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The need for better judicial review of European competition decision-making

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Outline

- The nature of Commission decisions in competition cases
- The grounds for judicial review of competition decisions
- The growth of "light judicial review" in competition cases: from *Remia* to *Microsoft.*
- The spread of deference into the setting of fines
- Honourable exceptions which prove what the rule should be:
  - Early competition cases: *Geitling* and *Woodpulp;*
  - Merger cases, where the economic analysis is no less complex, yet maybe the constitutional sensitivity is less;
- The Court has the tools to undertake a full review
- Full judicial review is an integral part of a fair process
- Constitutional considerations
- Conclusions
- References:
  - I Forrester: "A Bush in Need of Pruning: the Luxuriant Growth of 'Light Judicial Review'", European Competition Law Annual 2009: Evaluation of evidence and its judicial review in competition cases, Claus-Dieter Ehlermann and Mel Marquis (eds.), Hart Publishing, Oxford and Portland (forthcoming 2010), http://www.eui.eu/Documents/RSCAS/Research/Competition/2009/2009-COMPETITION-Forrester.pdf
  - I Forrester: "Due Process in EC competition cases: a distinguished institution with flawed procedures", (2009) 34 E.L. Rev. 817

The nature of Commission decisions in competition (non-merger) cases

A distinguished institution with flawed procedures

- No reproach as to the honour, talent, morality or probity of the Commission officials – to the contrary, the Commission is a distinguished institution weakened by poor procedures.

1. The Decision in a competition case is formally taken by 27 politicians,
   - none of whom attended the oral hearing and 26 of whom have not been involved,
   - without any apparent political control: the Advisory Committee of Member States have never in 25 years voted against a Commission's proposal.
2. No hearing before a decision maker.
3. No separation between investigating, prosecuting, deciding and penalising functions.

- Whether this amounts to *"an independent and impartial tribunal established by law"* within the meaning of Article 6 of the ECHR is a subject for another day.

⇨ However, the Commission's unique processes present more risk of errors than if more orthodox "*contradictoire*" procedures applied. This makes the standard of judicial review all the more important.

Are competition decisions administrative?

- The Commission is not simply an administrative body deciding on enforcement priorities, or applying a policy to a given case like a tax administration. In most antitrust cases it is the arbiter of conflicting assertions of legality or illegality, made by private parties.
- Leniency applications (accusations made in *ex parte* confessions).
- Complaints under Article 102 EU (accusations of abuse of a dominant position)
  - Risk of "capture" of the case team
  - Risk of prosecutorial bias "confirmation bias", "hindsight bias", etc.
- At least today, Commission decisions in cartel and dominance cases involve the resolution of bilateral or multilateral disputes.

The importance of facts

- Today's EC competition law inescapably requires an analysis of the real facts, the economic reality of the controversial conduct or proposed merger and its effects; not just the "textual facts".
- The determination of guilt or innocence generally turns on a handful of questions of fact, some of which may be hotly disputed. For example, whether a cartel conspiracy lasted, or even existed, over a period of time; whether access to an asset is essential or desirable.

⇨ These factual determinations by the Commission are so intrinsic to competition decisions that a review of the legality of those decisions must necessarily review those determinations of fact.

Grave implications: fines, criminal penalties, private damages

- Fines escalating exponentially
  - 8-fold increase between 2004 and 2008. Now over the € billion mark:
    - Article 102 (ex. Article 82): Intel € 1.06 billion (2009)
    - Article 101 (ex. Article 81): Saint Gobain € 896 million (2008)
    - Procedure: Microsoft € 899 million (2008)
- Further consequences of Commission Decisions in national courts
  - Article 16 of Regulation 1/2003: National Courts *"cannot take decisions running counter to the decision adopted by the Commission"* (cf. Case C-344/98 *Masterfoods Ltd v HB Ice Cream*, [2000] ECR I-11369)
  - Growth of private damages actions
  - Criminalisation of competition law, e.g. the cartel offence in the Enterprise Act 2002

⇨While the proper level of fines is not today's discussion, the quasi-criminal nature of the penalties involved make it all the more important that Commission decisions get appropriate judicial review before the European Union Courts.

The luxuriant growth of “light judicial review”

Legal bases for judicial review of Commission decisions

- Actions for annulment under Article 263 TFEU (ex. Article 230 EC, Article 173 EEC) can be brought:
  - "… on grounds of lack of competence,
  - infringement of an essential procedural requirement,
  - infringement of the Treaties or of any rule of law relating to their application,
  - or misuse of powers."
- Article 261 TFEU (ex. Article 229 EC, Article 172 EEC) states:
  - "Regulations made by the Council pursuant to the provisions of this Treaty may give the Court of Justice unlimited jurisdiction in regard to the penalties provided for in such regulations."
  - Also provided for in the area of competition law in Article 31 of Regulation 1/2003.
- This unlimited jurisdiction is not a free-standing remedy allowing the reduction of fines. It can only be exercised in the context of actions for annulment *(T-252/03 FNICGV v Commission).*
- Actions for annulment of EU acts by natural or legal persons are heard by the General Court (formerly the CFI), and can be appealed on points of law to the Court of Justice (formerly the ECJ).

The first seeds of "light judicial review" in competition cases

- The seed was planted in *Consten and Grundig*; an early, exceptional, deference to priority-setting (the Commission chose to pursue market integration as a goal):

"…judicial review of complex economic evaluations by the Commission concerning [Article 101(3)] exemptions must take account of their nature by confining itself to an examination of the relevance of the facts and legal circumstances which the Commission deduces therefrom. This review must in the first place be carried out in respect of the reasons given for the decisions which must set out the facts and considerations on which the said evaluations are based".

(Cases 56 and 58/64 *Consten and Grundig v. Commission* [1966] ECR 299, para. 3)

The first seeds of "light judicial review" in competition cases

- After lying dormant for 20 years, the seed germinated in *Remia*: how many years should a non-compete provision last?
- However this was intended to commend the Commission's pragmatic solution in balancing conflicting factors, not to shift the balance between the administration/ prosecution and the judiciary.

> "…although as a general rule the Court undertakes a comprehensive review of the question whether or not the conditions for the application of article [101] (1) are met, it is clear that in determining the permissible duration of a non-competition clause incorporated in an agreement for the transfer of an undertaking, the Commission has to appraise complex economic matters. […] The court must limit its review of such an appraisal to verifying whether the relevant procedural rules have been complied with, whether the statement of reasons for the decision is adequate, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of powers".
>
> (Case 42/84 *Remia and Others v Commission* [1985] ECR 2545, para. 34)

The luxuriant growth of "light judicial review"

- But the plant has grown rampant.
- The mantra has been repeated dozens of times, and frequently in matters not calling for deference.

> "The Community judicature undertakes generally a comprehensive review of the question whether or not the conditions for the application of Article 85(1) of the EC Treaty are met. It is only where it reviews ***complex economic appraisals*** made by the Commission that the Community judicature confines itself to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or a misuse of powers"
>
> (Case T-28/03, *Holcim (Deutschland) v Commission*, [2005] ECR II-1357, para. 95)

- This makes it appear as if the Court has elected not to roll up its sleeves and get into the heart of the controversy.

The luxuriant growth of "light judicial review"

- Worse, it mutated and was extended to complex technical appraisals.
- The example of *Microsoft:*
  - Involved numerous hotly-debated factual matters concerning the design of computer operating systems, how software functions, the role of directories in networks of servers, and other topics.
  - Although these matters were assuredly technical and complex, the issues were set forth with limpid clarity in the Report for the Hearing.
  - However, Court extended the formulation of light judicial review to technical matters, as well as complex economic assessments::

> *"as the Commission's decision is the result of complex technical appraisals, those appraisals are in principle subject to only limited review by the Court, which means that the Community Courts cannot substitute their own assessment of matters of fact for the Commission's"*
>
> (T-201/04, *Microsoft v Commission* [2007] ECR II-1491, para. 88)

The spread of deference into the setting of fines

- The Courts sometimes review in a "deferential" manner how the Commission exercised its fining discretion.

  "It is therefore for the Court to verify, when reviewing the legality of the fines imposed by the contested decision, whether the Commission exercised its discretion in accordance with the method set out in the Guidelines and, should it be found to have departed from that method, to verify whether that departure is justified and supported by sufficient legal reasoning. In that regard, it should be noted that the Court of Justice has confirmed the validity, first, of the very principle of the Guidelines, and, secondly, the method which is there indicated. … The self-limitation on the Commission's discretion arising from the adoption of the Guidelines is not incompatible with the Commission's maintaining a substantial margin of discretion. The Guidelines display flexibility in a number of ways, enabling the Commission to exercise its discretion in accordance with the provisions of Regulation No 17, as interpreted by the Court of Justice"

  (Case T-116/04, *Wieland-Werke v Commission*, Judgment of the Court of First Instance of 6 May 2009, not yet reported).

- This is striking: if any part of a Commission decision should be beyond deference-worthy discretion, it is the fine, which is explicitly subject to the unlimited jurisdiction.
- Is such an approach consistent with a proper exercise of the Court's unlimited jurisdiction?
- In the words of one former President of the CFI, in view of the ever increasing fines:

  "it is now much more necessary that the Community Courts fully exercise their unlimited jurisdiction and not just verify if the (Fining) Guidelines have been followed correctly by the Commission."

  (Bo Vesterdorf, "The Court of Justice and Unlimited Jurisdiction: What Does it Mean in Practice?, Global Competition Policy June 2009.)

Honourable exceptions: The Court has plunged into the factual details in some cases

- The Courts have in some cases questioned, and even overturned, what appear to be complex analyses undertaken by the Commission.
  - *Geitling:* A challenge to the High Authority's organization of the coal market in the Ruhr. The Court went into the figures, the background, the economy of coal-trading, put questions to the parties, and concluded that the High Authority had gone wrong in calculating the right coal tonnage.

    (Joined Cases 36, 37, 38 and 40/59, *Geitling RuhrkohlenVerkaufsgesellchaft mbH and others v High Authority* [1960] ECR 423)
  - *Woodpulp:* Rigorous cross-examination of a complex assessment; the Court commissioned two independent economic reports in order to assess whether the Commission's economic analysis of parallel behaviour was correct. The Court never classified the Commission's own economic analysis as "complex" and made no reference to the dicta on the limited scope of review to be accorded to complex economic assessments.

    (Joined case C-89/85, etc. *Ahlström Oy and Others v Commission* [1993] ECR I-1307)

The Court's practice in merger control: judicial reluctance to challenge a merger decision and an Article 82 decision may differ

- The Courts are prepared to conduct a full review of the economic analysis in merger cases:
- *Tetra Laval:* A complex analysis of conglomerate effects forecast to flow from the merger.
  - The Court worked through the Commission's economic analysis in great detail to conclude that neither horizontal, vertical, nor conglomerate effects flowing from the merger would lead to the acquisition of a dominant position.
  - On appeal, the ECJ upheld the CFI's judgment, holding that:

    "Whilst the Court recognises that the Commission has a margin of discretion with regard to economic matters, that does not mean that the Community Courts must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must the Community Courts, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it. Such a review is all the more necessary in the case of a prospective analysis required when examining a planned merger with conglomerate effect."

  (Cases T- 5/02, *Tetra Laval v Commission* [2002] ECR II- 4381 and C-12/03 *Commission v Tetra Laval* [2005] ECR I-987, para. 39)
- Other examples: *Schneider/ Legrand, Airtours, Sony/BMG.*
- The economic analysis is no less complex than in other competition cases.
- The Court should be even more ready to intervene when considering cases of guilt or innocence, *a fortiori* when penalties have been imposed.
- The quality of the Commission's decision-making has gone up since these cases.

The Court has the tools to undertake a full review

- The Court has sufficient powers to examine the factual findings of the Commission and to gather further evidence for itself :
  - It has access (if it wishes) to the Commission's case file;
  - Under their powers of measures of inquiry, it can require the personal appearance of the parties, request information and production of documents, request oral testimony, commission expert reports and inspect any place or thing that is in question;
  - At oral hearings in open court, the judges can and do put questions, through counsel, to the experts or employees of the parties.
- The availability of these well-recognised practices as to the powers of the Courts to look at evidence confirms the Courts' capacity to get to the heart of factual controversies.
- Some cases are purely legal; but most competition appeals will in large measure be fact-dominated. Judicial review thereof is the inescapable duty of the Community Courts.
- These powers exist to be used: they would not be provided if the Court was a purely cerebral court of heavenly principle.

Full judicial review is a prerequisite to a fair trial

- Article 6(1) of the ECHR

  "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

  - Under ECtHR case-law, in criminal cases "there must be at first instance a tribunal which fully meets the requirements of Article 6" (*Jussila v. Finland*, App. n° 73053/01, at para. 40)
  - Exceptionally, minor offences and disciplinary charges can be decided by administrative bodies, so long as there is a right of appeal before an independent and impartial tribunal which has powers of full jurisdictional review in relation to all aspects of the decision *(Albert and Le Compte v. Belgium, series A 58, at para. 29, and Öztürk v. Germany, Öztürk v. Germany, A 73, para. 56)*
  - There should in principle be no limit to the jurisdiction of the court which must scrutinise an administrative decision imposing a criminal sanction. (*Schmautzer v Austria,* Application No. 15523/89 [1996] 21 EHRR 51, para 36).
  - Few dispute the criminal nature of competition decisions which impose exorbitant fines (cf. *Dubus v France* (2009) on disciplinary proceedings by French Commission bancaire as 'criminal charge'),
  - even if some commentators hold that they are not "hard core" criminal (cf. W. Wils, World Competition, Volume 33, No. 1, March 2010).
  - Until the EU accedes, the ECHR is not binding on the EU, but constitutes a fundamental right which the Court upholds as a "general principle".

The impact of the Lisbon Treaty

- Came into force on 1 December 2009
- Amends the current TEU and TEC (renamed to TFEU)
- Changes include:
  - Appointment of judges: a special panel is intended to improve the quality of candidates.
  - Provision that the EU "shall" accede to the ECHR (Article 6(2) TEU). Subject to:
    - Consent of EP and approval by Member States (Article 218(6) and 218(8)TFEU);
    - Ratification of Protocol 14 of ECHR, allowing the EU to become a member;
    - Further provisions on how the EU would participate in the ECtHR: an EU judge?
  - The Charter of Fundamental Rights of the European Union becomes part of primary law, with the same status as the Treaties.
- Article 47(2) of the Charter: the right to an effective remedy and to a fair trial

  "Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law…"

  - Corresponds to Article 6(1) of the ECHR, but until now, no specific jurisprudence on this Article.
- Under Article 52(3) of the Charter, the ECHR should be a benchmark:

  "In so far as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

Constitutional considerations

- There is no constitutional reason why the European Union Courts should not conduct a full judicial review of acts of the European Union institutions.
- Indeed, as a matter of constitutional principle and commonsense, judges are meant to disagree with the public authority for the benefit of all.
  - "I view with apprehension the attitude of judges who on a mere question of construction, when face to face with claims involving the liberty of the subject, show themselves more executive-minded than the executive. […] In this country amidst the clash of arms the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law.

    Lord Atkin (dissenting) in *Liversidge v Anderson* [1942] AC 206.

Conclusions (1)

- The Courts could adopt a broad interpretation of their unlimited jurisdiction.
- Every day national judges decide difficult cases and are not inhibited in discharging their duty by any special deference in favour of the prosecutor or public authority.
- Similarly, European judges sitting in Luxembourg should not feel constrained, by the doctrine of light judicial review, from rigorously investigating whether errors were made.
- Deference has no place in determining specific facts.
- Deference has no place in determining fines.
- In many cases the doctrine of light judicial review has been used inappropriately. The extension of this doctrine to technical matters seems erroneous.

Conclusions (2)

- The fact that the task may be voluminous, time-consuming or difficult does not necessarily mean that discharging it involves supervising an administrative discretion.
- This debate reinforces an upstream problem, namely the inadequacies of due process within the Commission when it investigates and decides competition cases.
- Light judicial review should not excuse imperfect or abbreviated judicial review. It cannot be right for complex economic assessments to be immune from judicial scrutiny.

Conclusions (3)

- Too frequent invocation of the familiar phrase should be avoided, not because it is an inaccurate description of the legal scope of the Court's powers, but because at worst it could convey that the Court had ceded its responsibilities to control the public authority.

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