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Quis custodiet ipsos custodes?<sup>1</sup>

**Assessing the Judicial Role in a Lawful System  
of Competition Enforcement**

1. Competition law and the challenge for the judge

My topic is the judicial role in making European competition law both procedurally robust and substantively persuasive, at a time of unprecedented concern and uncertainty about the constitutional governance of the European Union.

Advocates who appear in large and small judicial controversies frequently say that they have lost cases which they expected to win, or which they felt they deserved to win, and have won cases they expected to lose. As a practitioner who has argued a number of cases, I may properly be suspected of bias, or at least lack of detachment, when voicing a feeling that judicial review in Luxembourg in competition matters is not always appropriately rigorous. However, I believe that my sentiment is not unique, and indeed there is an abundance of literature on the topic, so I venture to assert that a fair number of practitioners are not comfortable with the current regime. Instead of proclaiming, like the Monday morning football fan, that the referee was no good, perhaps it is useful to reflect on the challenges confronting the Luxembourg Courts in competition matters. It is pointless to blame judges for doing the jobs ascribed to them, or to wish that the Courts enjoyed powers other than those with which they are currently endowed. The Treaty of Rome gave the Court the task of deciding appeals on the basis of an administrative law standard; legality, not correctness. Can the criticism directed at EU competition procedures be cured, given the Treaty's constraints on judicial activity?

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<sup>1</sup> The quotation is usually translated as 'Who will guard the guardians?', but the entire text is more complicated: *audio quid ueteres olim moneatis amici, 'pone seram, cohibe.' sed quis custodiet ipsos custodes? cauta est et ab illis incipit uxor*: Juvenal, *Satire VI*, lines 347–348. Juvenal speculates that appointing watchers or guardians does not always solve a problem of spousal misbehaviour as the watching guardians may themselves fall into bad habits, so the reliability of the supervisors needs supervising.

I submit that standards of intensity of judicial review in competition matters vary to a considerable degree from jurisdiction to jurisdiction. The EU's is not, I respectfully suggest, the most rigorous or the most predictable. Whereas in France and the UK enforcers are likely to be a little uneasy when confronting the uncertainties of litigation before their respective tribunals, enforcers who contemplate judicial review by the European Courts can be a little more confident, even if their professionalism makes them well prepared and ready for robust debate. Separately, the advocate who has defended a client at a competition law hearing in Brussels will usually be less satisfied than if the argument had occurred in London. The client will probably have even stronger feelings. And the advocate who appeals a decision to the EU Courts in Luxembourg has a considerable challenge to overcome. The Commission has an exceptional record of success in Luxembourg. Its last appellate defeat in a question of abuse of dominant position was some 30 years ago.<sup>2</sup> In many cases, appellate scrutiny has consisted of 'light touch' judicial review.<sup>3</sup> In any system of prosecution, it is natural that the prosecutor will be found right most of the time, so it would be wrong to conclude that there was a problem merely because appellants are usually unsuccessful. However, it is useful to consider whether the EU system appears to present problems and how these might be addressed.

One elementary but fundamental challenge is the imprecision of the basic law. There is almost no proposition which is incapable of being advanced in a competition matter. Competition law lacks absolute unvarying principles. The basic prohibitions of EU competition law are contained in a few words in Articles 101 and 102 of the Treaty of Rome as amended. But, unlike other strict prohibitions in life (such as the Ten Commandments), competition law keeps changing. The rules are not absolute, rigid tax statutes; they are adaptable and plastic, reflecting evolution in policy.

Common sense can take judicial analysis a long way, as well as some notion that agreements between competitors are likely to be sensitive and that monopolies should sometimes be restrained. However, there will be situations where the applicable legal rule will not be obvious, or where the policy needs of the factual situation are unclear. Rigour is essential, scepticism is healthy and argument brings clarity. On the merits of robust, clear, precise analysis, I quote the following from a book<sup>4</sup> by Professor Gunther Bornkamm, the theologian father of Judge Joachim Bornkamm of the Bundesgerichtshof:

If the journey into this often misty country is to succeed, then the first requirement is the readiness for free and frank questioning, and the renunciation of an attitude

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<sup>2</sup> Case 322/81 *Nederlandsche Banden Industrie Michelin v Commission* [1983] ECR 3461.

<sup>3</sup> Ian Forrester, 'A Bush in Need of Pruning: the Luxuriant Growth of "Light Judicial Review"', in Claus-Dieter Ehlermann and Mel Marquis, eds, *European Competition Law Annual 2009: Evaluation of Evidence and its Judicial Review in Competition Cases*, Hart Publishing, 2011, 407 et seq.

<sup>4</sup> Gunther Bornkamm, *Jesus of Nazareth*, Hodder & Stoughton, 1960, 10.

which simply seeks the confirmation of its own judgments arising from a background of belief or unbelief.

Courts are intrinsically unpredictable; that is the nature of ritual combat. The European Commission concluded in a survey that judges examining parallel patent disputes in different Member States reached different conclusions in 11 per cent of the cases.<sup>5</sup> Thus, one in nine times, the German patent judge disagreed with the French judge on validity or infringement of the same patent and the same technology. In competition law, the role of the judge is particularly delicate since facts may be bitterly contested and can involve a direct conflict between individuals about technology, market size, nature and number of potential competitors, or the impact of new products, or between experts about how the market functions.

In addition, competition law theories evolve, sometimes to an important degree. When doctrines have evolved, should a court rely on the earlier judgments of a competent court applying that doctrine or espouse the modern doctrine which departs from that old authority? Should the public authority in court have the task to educate and encourage the adoption of evolving policy? Or is its task to defend the line taken in the prosecution? Would judges do better if the lawyers acting for the public authority had to counsel the court rather than seeking to prevail judicially? And what happens when a court overrules a public authority: does this ruin the credibility and confidence of the agency? What level of scepticism, benign neutrality, respect or deference is it appropriate for the judges to deploy? Is it possible to assess how rigorous the level of review in Luxembourg is, and is that adequate under the European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights? Is adequacy the relevant standard?

At a time of convergence, it is worth considering the process by which one regulator's opinion is favoured over another's. Convergence between enforcement authorities as to the goals and the priorities is obviously desirable, but we do not have it in the European Union, within the United States or around the world. The International Competition Network does heroic work to promote transparency and enhance consistency, but large differences exist. Because the European Commission is the prime competition enforcer in the EU, and arguably the world leader in competition law creativity, its views are afforded especial weight. The Commission's views are important because of its constitutional role in a devolved system and because it may be considered to have more expertise and experience. It will be worth studying carefully whether the Commission's decision-making gives better results.

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<sup>5</sup> See Commission, 'Pharmaceutical Sector Inquiry—Final Report' (8 July 2009), [http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/staff\\_working\\_paper\\_part1.pdf](http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/staff_working_paper_part1.pdf).

## 2. Theories and fashions change

The law (as applied in decisions by the College of Commissioners of the European Commission in 1962, 1991, 2004 or 2013) has evolved considerably. Europe is by no means the only continent where views or interpretations change or where enforcement choices are controversial. The arrangements of the United States for competition enforcement demonstrate that policy, trends and political tendencies have an effect on how antitrust decisions are taken. The Federal Trade Commission (FTC), created to remedy party political dissatisfaction over the vigour with which antitrust law was prosecuted, is an activist agency with a remit that is broader than pure antitrust. The FTC and the Department of Justice have had celebrated differences of opinion. They are not rivals, but they certainly are not identical twins. Yet the basic laws do not differ, whichever agency is interpreting them, though the two agencies may sometimes advocate different views of what antitrust law should provide. It is not the case that the American judiciary is confronted with a single fount of official antitrust wisdom. There is no doubt of the rigour with which US courts perform their task in antitrust matters.

In the earliest days, the Sherman Act<sup>6</sup> targeted large economic power, using populist rhetoric to justify action. The trusts were corporate equivalents of robber barons, so it is not surprising that their excesses were constrained by legislation. But there is little in common between those excesses and the infringing conduct which is today targeted by antitrust law.

Even in the modern era theories have changed significantly. For nearly 50 years, the US and Canada were the only countries to ban cartels. Elsewhere, serious legal and economic opinion asserted that cartels were wholesome, desirable or even necessary to ensure national economic development. The Dutch construction sector was exceptionally articulate and robust in defending horizontal cooperation between competitors. *Cementhandelaren*<sup>7</sup> is only one example of a case where horizontal cooperation is warmly endorsed by some parties. I am old enough to remember writing a memorandum for the revered Donald Holley summarising the different arguments in that case, and then listening to the debate between my betters about the merits of market allocations for consumers, employers and economic life generally. It is not the case that a rule of competition law will normally be perfectly clear and need only be applied to the established facts. Read Bill Kovacic, who bears the scars of many celebrated conflicts:

The Post-Chicago School literature generally defines a broader zone for antitrust intervention. One body of Post-Chicago commentary describes how, in some

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<sup>6</sup> Sherman Antitrust Act, 2 July 1890.

<sup>7</sup> Case 8/72 *Cementhandelaren v Commission* [1972] ECR 977.

circumstances, exclusive dealing, tying, and other vertical restraints can facilitate the acquisition or maintenance of market power on grounds other than efficiency. Other Post-Chicago commentators have suggested how firms can use a mix of price and non-price strategies to diminish economic performance by deterring entry and expansion by rivals. Some Post-Chicago commentators accept the primacy of an efficiency framework, while others say that antitrust policy should serve distributional and other objectives. Post-Chicago observers generally express greater faith than do their Chicago School counterparts in the capacity of government institutions to make wise choices about when and how to intervene.<sup>8</sup>

I have been involved in several cases where the rules were freshly minted (as well as others where the challenge was to fit within an established line of cases). If we compare *Volvo/Veng*,<sup>9</sup> *Magill*,<sup>10</sup> *IMS*<sup>11</sup> and *Microsoft*<sup>12</sup> regarding compulsory licensing, it is evident that we have moved from a world where compulsion is barely conceivable to one where compulsory licensing is not fanciful in any circumstances. The law on vertical distribution used to be exceedingly prescriptive and ferociously penalised. The presence of a forbidden clause (an export ban) in one unenforced distribution agreement which had by accident not been remedied when similar distribution agreements were being cleaned up was deemed a serious infringement, and was fined in the case of *Toshiba TEG*.<sup>13</sup> Another example of evolutionary policy can be seen in the first block exemption regulation for the distribution of motor cars, Regulation 123/85.<sup>14</sup> It spelled out in elaborate detail the rules on security of tenure for dealers, the range of products to be carried, the situations in which cross-border purchases could be insisted upon by unwelcome consumers, and many other precise details. By contrast, the latest version, Regulation 461/2010,<sup>15</sup> is much more tolerant and less prescriptive, leaving the parties to choose how to run their relationship. The block exemptions on distribution

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<sup>8</sup> See William Kovacic, 'The Intellectual DNA of Modern US Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix' [2007] *Columbia Business Law Review* 1.

<sup>9</sup> Case 238/87 *Volvo (UK) Ltd v Veng AB* [1988] ECR 6211.

<sup>10</sup> Commission Decision of 21 December 1988 in Case IV/31851—*Magill TV Guide/ITP, BBC and RTE* [1989] OJ L78/43, *upheld on appeal*: Case T-69/89 *Radio Telefis Eireann v Commission* [1991] ECR II-485, *upheld on further appeal*: Cases C-241/91 P and C-242/91 P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission* [1995] ECR I-743.

<sup>11</sup> Commission Decision of 3 July 2001 in Case COMP/38.044—*NDC Health/IMS Health: Interim Measures* [2002] OJ L59/18, *withdrawn by* Commission Decision of 13 August 2003 in Case COMP/38.044—*NDC Health/IMS Health: Interim Measures* [2003] OJ L268/69; Case C-418/01 *IMS Health GmbH & Co OHG v NDC Health GmbH & Co KG* [2004] ECR I-5039.

<sup>12</sup> Case T-201/04 *Microsoft Corp v Commission* [2007] ECR II-3601.

<sup>13</sup> Commission Decision of 5 June 1991 in Case IV/32.879—*Vihol/Toshiba* [1991] OJ L287/39.

<sup>14</sup> Commission Regulation (EEC) 123/85, [1985] OJ L15/24.

<sup>15</sup> Commission Regulation (EU) 461/2010, [2010] OJ L129/52.

relationships<sup>16</sup> and technology transfers<sup>17</sup> are likewise more relaxed than their predecessors, in the sense that, instead of threatening dire punishment for contracts the terms of which do not fit the prescribed ‘safe’ template, they leave the parties the freedom to negotiate acceptable terms and to justify them if controversy arises.

These evolutions in policy are further confirmations of my wider proposition—that competition law has few absolute rules. This fluidity makes judicial correction and supervision the more essential: they discipline an authority which could otherwise act in an arbitrary manner. It is, of course, relevant that the authority has a statutory mission and was in good faith, but those factors are not dispositive. The judicial task of performing quality control will also help to confer legitimacy on official action.

### 3. Differences between countries

There are significant philosophical differences between nations’ competition laws: the US does not favour ‘free riding’ via parallel trade (*GTE Sylvania*<sup>18</sup> is the classic case), whereas encouraging market integration via parallel trade used to be the most evident goal pursued by European competition law. A consideration of the number of early European cases which dealt with parallel trade would suggest that challenging private contractual obstacles to cross-border trade in consumer products was the prime enforcement objective of the Commission from 1970 to 1990. It was a feature distinguishing European law from other laws. Economic effects were not necessary, and the texts were enough to prove guilt. More fines were imposed for parallel trade infractions in that period than for any other category of conduct.

In the United States, technology licences used to be governed by highly interventionist rules—the so-called ‘nine no-nos’,<sup>19</sup> which have given way to

<sup>16</sup> Commission Regulation (EU) 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, [2010] OJ L102/1.

<sup>17</sup> Commission Regulation (EC) 772/2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements, [2004] OJ L123/11.

<sup>18</sup> *Continental TV, Inc v GTE Sylvania Inc*, 433 US 36 (1977).

<sup>19</sup> See Bruce Wilson, ‘Know-How License Agreements: Field of Use, Territorial, Price and Quantity Restrictions’, remarks before the Fourth New England Antitrust Conference, 6 November 1970. The ‘nine no-nos’ were:

- (1) tying the purchase of unpatented materials as a condition of the license;
- (2) requiring the licensee to assign back subsequent patents;
- (3) restricting the right of the purchaser of the product in the resale of the product;
- (4) restricting the licensee’s ability to deal in products outside the scope of the patent;
- (5) a licensor’s agreement not to grant further licenses;

a less prescriptive, more tolerant and more realistic legal regime in which the merits and demerits of a practice are balanced. In this respect, European law has evolved in parallel: it used to be that almost everything in theory was forbidden but could be permitted with a theoretically available exemption which in reality usually was unobtainable. National courts coped with the practical absurdities of this regime quite successfully. The notification regime came to an end with the adoption of Regulation 1/2003.<sup>20</sup>

#### 4. Differences in priorities

Antitrust law evolves not because the rule changes like tax law, which is purely statutory, but because enforcement approaches and priorities change.<sup>21</sup> I believe that, although regional cooperation in economic matters has taken firm root in Africa, South America and Asia, no other competition law regime has given priority to attacking contractual barriers to cross-border trade. But since, say, the year 2000, pursuing parallel trade cases seems to have been given a lower enforcement priority in Europe, although the topic has not entirely disappeared, as the various pharmaceutical cases about Greek and Spanish parallel trade problems demonstrate.<sup>22</sup>

Competition law has permeated deeply into the economic marrow of commercial life and business practice. Thus, more business leaders are conscious of the need to comply, and try to achieve compliance. But at the same time, what the law condemns has been evolving and changing. It is not like health

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(6) mandatory package licenses;

(7) royalty provisions not reasonably related to the licensee's sales;

(8) restrictions on a licensee's use of a product made by a patented process; and

(9) minimum resale price provisions for the licensed products.

<sup>20</sup> Council Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L1/1.

<sup>21</sup> See Damien Gérardin and Nicolas Petit, 'Judicial Review in European Union Competition Law: A Quantitative and Qualitative Assessment', in Massimo Merola and Jacques Derenne, eds, *The Role of the Court of Justice of the EU in Competition Law Cases*, Bruylant, 2012, 21 et seq, 32: 'While theoretical diversity may be a source of richness, and avoid the pitfalls of relying on one-sided theories, it may also be a source of confusion, and thus of errors, both in terms of competition policy-making, but also in terms of adjudication. Competition authorities will often be confronted with a patchwork of inconsistent theories concocted by clever complainants and defense counsel ... This may lead to confused, and thus generally misguided, enforcement.'

<sup>22</sup> See Case C-53/03 *Syfait and others v GlaxoSmithKline AVEE and GlaxoSmithKline plc* [2005] ECR I-4609; Joined Cases C-468 to 478/06 *Lelos kai Sia EE v GlaxoSmithKline* [2008] ECR I-7139; Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services and Others v Commission and Others* [2009] ECR I-9291; *Commission v GlaxoSmithKline Services Unlimited; European Association of Euro Pharmaceutical Companies (EAEPC) v Commission; Asociación de exportadores españoles de productos farmacéuticos (Aseprofar) v Commission* [2009] ECR I-9291.

and safety rules, where the progression is linear in the direction of becoming stricter; competition law enforcement fluctuates in priorities, becoming stricter in some areas but less strict in others. And, as noted above, much can depend on the creativity of complainants, of talented lawyers and intelligible economists, who will contend that a new approach is only a trifle novel.

In the previous sections I have pointed out that competition law is not a rigid and predictable set of rules but that, to the contrary, its enforcement varies according to times, fashions and geography. The law changes, getting more severe or less so. Enforcers make choices as to their targets and their accusations. They may choose no longer to challenge certain conduct, or to try alternative methods of addressing the supposed problem.

At the same time, the law imposes penalties, is criminal for the purposes of human rights standards, and major decisions are announced with condemnatory relish. The quality of the enforcement policy is (wrongly, in my view) often deemed to be linked to the height of the fines imposed. For a number of years, fines levied in Europe for breaches of the competition rules were higher than penalties imposed for any offence anywhere on earth, and may indeed still be the highest. I have suggested that such levels lie above that which is necessary to achieve appropriate punishment and deterrence. In a legal world where the criteria and theories shift, fines should not be imposed for novel offences. It manifestly ought not to be the law that whatever DG Competition condemns is liable to a fine for that reason. Fines should be no higher than is necessary to achieve the appropriate level of punishment and deterrence. In contrast to the substantive law, which fluctuates, fines seem to evolve in only one direction—up. These characteristics make the judicial function even more important. Criminal law demands a high standard of procedural due process. Deterrence is a rational rationale only if the conduct is known to be unlawful in advance. That I have to record such an obvious proposition is regrettable. I further propose that a law which evolves significantly needs judicial oversight to guard against the dangers of arbitrariness.

## 5. Does ‘old’ law help when considering ‘new’ cases?

The relevant authoritative texts will rarely offer a clear answer. Inevitably, the enforcement authority as well as the judge will need to consider whether a certain practice—viewed in its totality—is competitive or anticompetitive. National and European judges naturally give especial respect to the opinions of the prime European competition law legislator, drafter, enforcer and prosecutor.<sup>23</sup> A separate question is how should the Court respond if the

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<sup>23</sup> See Forrester, ‘A Bush in Need of Pruning’, above n 3.



Commission expresses itself inconsistently? Is the Court entitled to say to the prosecutor that certain conduct is no longer unacceptable in modern practice? Is the prosecutor entitled to rely on old judicial or administrative condemnations of a now-tolerated practice? Such challenges occur most often where the law has evolved from being prescriptive and even punitive, if certain elements were present, into a modern law which considers the pro-competitive and anticompetitive factors in a neutral way, giving particular weight to the actual effects rather than the wording of the contracts.

As one example, many practising lawyers and business people have difficulty in making sense of European law on discounts. The concern about discounts is that the dominant supplier may use them to exclude competitors; the merit of discounts is that they lower prices and intensify competition between suppliers. The European law on discounts is generally regarded as eccentric due to over-exuberant formulations of the principles in older cases.

Modern theories on discounts by a dominant player are notably different from the doctrines enunciated by the ECJ in the classic early case of *Hoffman-La Roche Vitamins*,<sup>24</sup> where a whistleblower, Stanley Adams, delivered to the Commission a mass of data showing that a Swiss company had established a system of rebates which depended on the customer's loyalty, whether the customer was tiny or huge. Thus the customer would get an especially attractive price if it bought nearly 100 per cent of its needs of vitamins from the dominant supplier. In a sense, the customer was being 'paid' not to buy from a rival supplier. Viewed otherwise, the customer was given a good price and had a reliable supplier. The case attracted huge attention because of the misfortunes of Mr Adams, whose identity became evident to his former employer due to the line of questioning used by the Commission. He was subsequently arrested in Switzerland on charges of economic espionage, and his then-wife took her own life during his imprisonment. EC/Swiss relations were scarred by these events, and the accused company's conduct was scrutinised with great scepticism. The prolonged, though ultimately successful, efforts of

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<sup>24</sup> Case 85/76 *Hoffmann-La Roche & Co AG v Commission* [1979] ECR 461, para 89:

An undertaking which is in a dominant position on a market and ties purchasers—even if it does so at their request—by an obligation or promise on their part to obtain all or most of their requirements exclusively from the said undertaking abuses its dominant position within the meaning of Article 86 of the Treaty, whether the obligation in question is stipulated without further qualification or whether it is undertaken in consideration of the grant of a rebate.

The same applies if the said undertaking, without tying the purchasers by a formal obligation, applies, either under the terms of agreements concluded with these purchasers or unilaterally ... discounts conditional on the customer's obtaining all or most of its requirements—whether the quantity of its purchases be large or small—from the undertaking in a dominant position.

Mr Adams<sup>25</sup> to get compensation kept the saga alive for years. His subsequent misfortunes have included a failed pig farm and a conviction for attempted murder. The outcome of the appeal was in the circumstances not surprising. Subsequent judicial analysis has focused not on whether there were actual economic effects of the pricing practices (even if not stipulated in writing) but on whether the practices might induce loyalty.

In a succession of cases about discounts, the question has arisen of how to treat discount policies which were—not surprisingly—intended to attract and retain customers. Did it make any difference that the policies were successful or unsuccessful? Suppose the customer used one supplier's discount to obtain a better price from the other supplier: was that a bad thing? Suppose customers regularly changed suppliers: was that irrelevant? Seeking to induce customer loyalty through discounts appears to be a kind of absolute offence. Competitors have successfully accused each other of abusive pricing (*British Airways*<sup>26</sup>—a very large enterprise; and *Tomra*<sup>27</sup>—a quite small enterprise). These were robustly defended on the grounds of commercial reasonableness. To what extent is it relevant that the discount or rebate did not hinder the success of the competitor? Is it relevant that there is no contractual duty on the customer which compels action to get the discount? Is offering a rebate for loyalty an offence in and of itself even if loyalty is not engendered? Does any reader think that a big supplier of goods or services should be punished for trying to keep customers loyal, indeed enthusiastic? What happens if the supposedly dominant player launches a programme of discounts which have no success in wooing customers but which can be said to have been liable, if they had encountered commercial success, to induce loyalty within the meaning of previous cases? *Tomra* (paragraph 70) provides an example:

In the event that an undertaking in a dominant position makes use of a system of rebates, the Court has ruled that that undertaking abuses that position where, without tying the purchasers by a formal obligation, it applies, either under the terms of agreements concluded with these purchasers or unilaterally, a system of loyalty rebates, that is to say, discounts conditional on the customer's obtaining—whether the quantity of its purchases is large or small—all or most of its requirements from the undertaking in a dominant position ...

Thus, the old law appears to condemn discount practices which contain no contractual duty to refrain from buying from other suppliers but which induce loyalty. To constrain competitors' attempts to undercut each other seems a rather improbable economic crime. The curiosities of European competition law on discounts are well recognised as distinctive and—I would

<sup>25</sup> Case 145/83 *Adams v Commission* [1985] ECR 3539.

<sup>26</sup> Case C-95/04 P *British Airways plc v Commission* [2007] ECR I-2331.

<sup>27</sup> Case T-155/06 *Tomra Systems ASA and Others v Commission* [2010] ECR II-4361; appeal dismissed: Case C-549/10 P, EU:C:2012:221.

argue—potentially irrational. National authorities have elected not to prosecute such discount policies: in the UK, the authorities have shown no appetite to develop a rule—even in accordance with modern doctrines—which may hinder competition on the merits and which is almost impossible to apply confidently. However, the European Courts have been broadly supportive of Commission challenges to discounts even where the two adversaries were evenly matched and competing ferociously. (Virgin and British Airways might both be thought well able to look after themselves.) Responsive to these criticisms, in its Guidance Paper on the Enforcement Priorities in Applying Article 82,<sup>28</sup> the Commission eschewed the absolute offence and relied on effects:

23 ... Vigorous price competition is generally beneficial to consumers. With a view to preventing anti-competitive foreclosure, the Commission will normally only intervene where the conduct concerned has already been or is capable of hampering competition from competitors which are considered to be as efficient as the dominant undertaking.

24 However, the Commission recognises that in certain circumstances a less efficient competitor may also exert a constraint which should be taken into account when considering whether particular price-based conduct leads to anti-competitive foreclosure. The Commission will take a dynamic view of that constraint ...

25 If the data clearly suggest that an equally efficient competitor can compete effectively with the pricing conduct of the dominant undertaking, the Commission will, in principle, infer that the dominant undertaking's pricing conduct is not likely to have an adverse impact on effective competition, and thus on consumers, and will therefore be unlikely to intervene. If, on the contrary, the data suggest that the price charged by the dominant undertaking has the potential to foreclose equally efficient competitors, then the Commission will integrate this in the general assessment of anti-competitive foreclosure ... taking into account other ... evidence.

On this basis, the topic is complex, but everything will be carefully studied. Reality is indeed important. However, once a matter is before the judges in Luxembourg, the Commission has been seen to rely on the old law when rejecting the argument that it had not demonstrated actual effects on competition:

there is in any event no requirement in the case-law to demonstrate actual foreclosure in order to prove an infringement of Article 102 of the Treaty ... the Community Courts have established that 'for the purposes of establishing an infringement of Article 82 EC, it is not necessary to demonstrate that the abuse in question had a concrete effect on the markets concerned. It is sufficient in that respect to demonstrate that the abusive conduct of the undertaking in a dominant position tends to

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<sup>28</sup> Communication from the Commission—Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, [2009] OJ C45/02.

restrict competition or, in other words, that the conduct in question is capable of having or likely to have such an effect ...'

with regard to conduct that constitutes granting fidelity discounts within the meaning of the *Hoffmann La Roche* case law, there is no requirement in the case-law even to demonstrate capability of foreclosure in order to prove an infringement of Article 102 of the Treaty ...

a violation of Article 102 TFEU may also result from the anticompetitive object of the practices pursued by a dominant undertaking. Indeed, the contested Decision found that establishing the potential foreclosure effects of ... exclusivity rebates ... was unnecessary for finding that these practices are in breach of Article 102 TFEU. The reason for this is because, as the Court explained, practices of this kind 'will also be liable to have such an effect'.<sup>29</sup>

A discount that is unsuccessful but is intended to induce loyalty is on this basis hazardous. If the dominant player wishes to stay out of trouble, it will eschew discounts since it appears to make no difference whether the discount has an effect on customers, or whether it truly excludes other competing offerors from a realistic chance of making business in the face of the controversial discount.

Thus, while the 'advisory and hortatory department' of the Commission acknowledges the merits of discounts (lower prices, intensity of competitive pressure, opportunities for the buyer to negotiate a better deal) and their dangers (foreclosure of meritorious potential competitors), the 'litigation department' may follow a different approach. Should the judge apply the modern doctrines? If there is a difference between the law as declared in the cases and the law as declared in the Guidance Paper, by what should the Court be guided? Is it possible that quasi-criminal law can be defined according to two inconsistent standards by the prosecutor, who can choose which version to advance? If such discrepancy exists, by which standard shall the Court be guided?

I note that a court which has the benefit of a neutral expert has a real advantage over one that does not. In several countries the highest court had the advantage of receiving advice, as opposed to advocacy, from a person entrusted with functions comparable to that of the Advocate General. The *amicus curiae* helps the appellate policy function. The Advocate General is a valuable member of the Court of Justice of the European Union. Of course, no lawyer will wish to mislead the Court, but there is a functional difference between the impact of the lawyer who says to the Court 'The contested action was valid and should be upheld' and 'The contested action presents the following points of principle'.

Similarly, passionate arguments will no doubt ensue as to the currently topical issue of the settlement of pharmaceutical patent litigations. Are these

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<sup>29</sup> I quote from a certain submission by the Commission to the Court.

to be regarded as ‘by-object’ offences, so inexcusably illegal that there is no need to enquire into their effects in the marketplace, like bribes to a competitor to leave the market, or are they susceptible to an analysis of the actual circumstances and whether they brought an end to litigation or legitimated the sale of a competing generic product? The FTC and the Commission have argued the former theory; the Supreme Court favoured a rule of reason enquiry (called by some the ‘sniff test’), not a blanket condemnation.<sup>30</sup> This is one more illustration of the proposition that interpretations of basic texts and basic concepts evolve and vary considerably within and between jurisdictions.

## 6. The Court is robust and radical in some fields

It is notable that, in the one area of Treaty competence where the Court of Justice has unlimited jurisdiction, namely competition cases involving penalties, there has been a tradition of deference, or what looked like deference.<sup>31</sup> By contrast, with far less Treaty authority, the ECJ and its successors have revolutionised the constitutional status of European law (*Van Gend en Loos*<sup>32</sup> through *Les Verts*)<sup>33</sup>, and damages for breach of the law (*Factortame*),<sup>34</sup> and have more or less created modern law on freedom of movement of persons, residence, migration, access to social benefits, education, deportation and gender discrimination. The evolution of the law in these highly sensitive areas has been jerky, sometimes even explosive. The Court has been called activist, and its supposedly interventionist approach has been criticised with varying degrees of sharpness (Rasmussen<sup>35</sup> was an early critic, and Bengoetxea<sup>36</sup> is a modern defender of the Court’s record).

I am not suggesting that we need to destabilise the pillars of the legal and administrative law temples. Constitutional doctrines occasionally move in jerks, but rarely come out of a totally cloudless sky. *Van Gend en Loos*<sup>37</sup> was

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<sup>30</sup> *FTC v Actavis, Inc*, 570 US 756 (2013).

<sup>31</sup> See Ian Forrester, ‘A Challenge for Europe’s Judges: The Review of Fines in Competition Cases’, 36 *European Law Review* 185 (2011).

<sup>32</sup> Case 26/62 *NV Algemene Transport- en Expeditie Onderneming Van Gend en Loos v Netherlands Inland Revenue Administration* [1963] ECR 3.

<sup>33</sup> Case 294/82 *Parti écologiste ‘Les Verts’ v European Parliament* [1986] ECR 1339.

<sup>34</sup> Joined Cases C-46 and 48/93 *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and the Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1996] ECR I-1029.

<sup>35</sup> Hjalte Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking*, Martinus Nijhoff Publishers, 1986.

<sup>36</sup> Joxerramón Bengoetxea, *The Legal Reasoning of the European Court of Justice*, Clarendon Press, 1993.

<sup>37</sup> *Van Gend en Loos*, above n 32.

an interesting development, but the problem and possible approaches to the problem (national law and European law being out of step) had been extensively discussed before the case arrived in Luxembourg.<sup>38</sup> It is not surprising that the Courts in Luxembourg regard the Commission's policy appraisals as especially useful, authoritative and likely to be sound. By contrast, the Court of Justice has granted little weight to Member States' policy appraisals in a succession of matters (deportation, food safety, environmental rules, technical regulations). Thus the Commission has enjoyed far more of a margin of discretion than the Member States. Putting it differently, the principle of proportionality has been invoked more frequently against Member States than against the Commission.

It is noteworthy that, by contrast, the ECJ has been criticised repeatedly for being 'activist', for being too creative in the making of new law, for being an independent actor in the building of the European house and for stepping in where the Member States were unable to agree. Thus, in the fields of free movement of goods, nationality and residence, and free movement of persons, European law is often the fruit of the Court's case law rather than legislation negotiated between the Member States.<sup>39</sup>

These phenomena prompt three remarks. First, the Court has shown itself able to disagree with public authorities in scores of cases. Second, it seems to leave more room to manoeuvre, more margin of discretion and perhaps a longer leash in the case of the Commission, a sister institution, than in the case of Member States. Third, European competition law has become more radical than American competition law as a result of the judicial successes of the Commission in major dominance cases.

## 7. The European Courts as locomotives of legal innovation and policy change

It is not difficult to explain the potency of European law in an introductory lecture to law students. Such cases as *Defrenne*,<sup>40</sup> *Cassis de Dijon*<sup>41</sup> or

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<sup>38</sup> Indeed, the London–Leiden meeting (June 2013) of the British Institute of International and Comparative Law and the University of Leiden's Europa Institute devoted an entire day to discussing those antecedents.

<sup>39</sup> I would note, however, that disregarding national justifications for legislative measures had the effect of achieving market integration but did not guarantee that the rules of the integrated market correspond to international standards (food, environment, telecommunications and other areas are possible examples of international disparities).

<sup>40</sup> Case 43/75 *Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena* [1976] ECR 455.

<sup>41</sup> Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

*Gravier v Liège*<sup>42</sup> each advanced the law constitutionally further than the drafters of the Treaty of Rome had contemplated or where the Member States desired to travel. The topics of equality of employment terms for women, free movement of goods regulated differently in different Member States and the right to study abroad were, and remain, fundamental to the confirmation of the freedoms which Union citizens today enjoy. Each case arose as a judicial response to questions framed by a national court hearing a legal controversy with a European flavour.<sup>43</sup> During the 1970s, a period of political stagnation, the Court (in the eyes of many) played a constitutional role as an independent actor in the construction of an integrated Europe.

The Court has often been regarded as an independent force in the creation of a united Europe, by reference to its judicial activism in several areas of national law, often where the Member States could not agree on legislation. Horsley's article on this topic<sup>44</sup> comprehensively reviews the literature regarding the Court's performance as a motor for integration and as an independent actor on the European stage.

Sometimes the Court has had to consider the creative invocation of European law in order to challenge national rules which were controversial domestically but which were not intrinsically 'European' in orientation or intention. In the *Sunday Trading*<sup>45</sup> cases the Court tried to produce a European rule but subsequently discontinued the effort and reversed itself. In *Stoeckel*<sup>46</sup> there was a challenge to rules against night work by women in France, and in *Johnston v Chief Constable*<sup>47</sup> there was a challenge based on European law to an essentially national rule, on the basis of principles of equality of opportunity for men and women. In cases like *Reyners*<sup>48</sup> and *Marks & Spencer*<sup>49</sup> (regarding, respectively, freedom of establishment of lawyers and the tax treatment of losses within corporate groups), the Court has found a way of short-circuiting stalled negotiations or a blocked legislative process. So there is no shortage of cases where the Court has been a lively, independent actor

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<sup>42</sup> Case 293/83 *Gravier v City of Liège* [1985] ECR 593.

<sup>43</sup> Ian Forrester, 'The Judicial Function in European Law and Pleading in the European Courts', 81 *Tulane Law Review* 647 (2007).

<sup>44</sup> Thomas Horsley, 'Reflections on the Role of the Court of Justice as the 'Motor' of European Integration: Legal Limits to Judicial Lawmaking', 50 *Common Market Law Review* 1 (2013).

<sup>45</sup> Case C-145/88 *Torfaen Borough Council v B&Q plc* [1989] ECR 3851.

<sup>46</sup> Case C-345/89 *Alfred Stoeckel* [1991] ECR I-4047.

<sup>47</sup> Case 222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651.

<sup>48</sup> Case C-2/74 *Jean Reyners v Belgium* [1974] ECR 631.

<sup>49</sup> Case C-62/00 *Marks & Spencer plc v Commissioners of Customs & Excise* [2002] ECR 6325.

on the European integration front. It is not my purpose to praise or to criticise these decisions, or to regret them, as the Court was faced with a genuine dispute which required a determination in light of the Treaty, the legislation and previous jurisprudence. My purpose is instead to suggest that the Court has plenty of experience of making itself unpopular with public authorities.

This brings us to the Court's role in the shaping of European competition law in reference cases. In *Grundig and Consten*<sup>50</sup> it acceded to the market integration goals proposed by the Commission. In *Oscar Bronner*<sup>51</sup> it commended free enterprise and individual effort. In the compulsory licensing cases it produced a set of rational (though expanding) parameters in *Volvo/Veng*<sup>52</sup> (reference), *Magill*<sup>53</sup> (appeal) and *IMS*<sup>54</sup> (reference after an appeal), but then seemed to abandon them in *Microsoft*<sup>55</sup> (appeal). One can note that when the Court responds to national requests for preliminary rulings, it is more ready to be expansive; in appeals it has on occasion been regrettably deferential. There have been appellate competition cases where the Luxembourg Courts were exceedingly interventionist. *Woodpulp*<sup>56</sup> was one; *Italian Flat Glass*<sup>57</sup> was another. *Tetra Laval*,<sup>58</sup> *Schneider Legrand*<sup>59</sup> and *Airtours*<sup>60</sup> were three others, each in the field of mergers, where the Court's overturning of three decisions within the space of about a year provoked a wholesome revolution in how merger cases were handled by the Commission. So it is not the case that the courts are unable to perform rigorous judicial review. They have sometimes done so, but not always. The impact of the European Courts' appellate jurisdiction on the evolution of the law has been less than that of the US court hierarchy.

I invited some friends to nominate their favourite ECJ competition case, and received a number of candidates: *Magill* (compulsory licensing of copyright); *Bodson v Pompes Funèbres*<sup>61</sup> (access to public cemeteries); *Italy v Commission*<sup>62</sup> (use of technology to divert traffic to cheaper service providers);

<sup>50</sup> Joined Cases 56 and 58/64 *Établissements Consten SARL and Grundig-Verkaufs-GmbH v Commission* [1966] ECR 299.

<sup>51</sup> Case C-7/97 *Oscar Bronner GmbH & Co KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG and Others* [1998] ECR I-7791.

<sup>52</sup> *Volvo v Veng*, above n 9.

<sup>53</sup> *Magill*, above n 10.

<sup>54</sup> *IMS Health*, above n 11.

<sup>55</sup> *Microsoft*, above n 12.

<sup>56</sup> Joined Cases C-89, 104, 114, 116, 117 and 125 to 129/85 *Ahlström Osakeyhtiö and others v Commission* [1993] ECR I-1307.

<sup>57</sup> Joined Cases T-68, 77 and 78/89 *Società Italiana Vetro SpA, Fabricca Pisana SpA and Vernante Pennitalia v Commission* [1992] ECR II-1403.

<sup>58</sup> Case T-5/02 *Tetra Laval v Commission* [2002] ECR II-4381.

<sup>59</sup> Case T-310/01 *Schneider Electric SA v Commission* [2002] ECR II-4071.

<sup>60</sup> Case T-342/99 *Airtours plc v Commission* [2002] ECR II-2585.

<sup>61</sup> Case 30/87 *Corinne Bodson v SA Pompes funèbres des régions libérées* [1988] ECR 2479.

<sup>62</sup> Case 41/83 *Italy v Commission* [1985] ECR 873.



*Tournier*<sup>63</sup> (royalties); *Night Services*<sup>64</sup> (economic reality); *Port of Genoa*<sup>65</sup> (regulation of docking services); and *Post Danmark*<sup>66</sup> (economic effects again). Giving a critique of these is beyond the scope of this article, but the range of the controversies addressed should suffice to demonstrate that the General Court and the Court of Justice of the European Union have demonstrated a capacity to produce judgments on competition law controversies which are robust and convincing. Disagreeing with the public authority is far from a disloyalty to a 'sister institution'. It is a vital form of quality control. I respectfully submit that a court which is not afraid to displease the Member States should not refrain from displeasing the Commission.

If it is true that, in appellate matters, the Court's performance has been more muted, this likely reflects in part the nature of judicial review prescribed in the Treaty of Rome as amended. Whereas in matters involving 'penalties provided for' in 'Regulations adopted by the European Parliament and the Council', the Court of Justice of the European Union has 'unlimited jurisdiction' in respect of other appellate matters, its jurisdiction is more modest according to paragraph 263 TFEU:

The Court of Justice of the European Union shall review the legality of ... acts of ... the Commission ...

It shall for this purpose have jurisdiction 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.

I note in the bygoing that the Court's judgments can at times be rather alarming. If one looks at Article 102, the merit of economic effects as a criterion can be recognised (as it was, for example, in *Post Danmark*),<sup>67</sup> but one can see under Article 101 a mushrooming of new by-object infringements.<sup>68</sup> Thus, *Allianz Hungary*,<sup>69</sup> *Expedia*<sup>70</sup> and the slightly different case of *Pierre Fabre*<sup>71</sup> seem to endorse extremely aggressive and prescriptive competition

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<sup>63</sup> Case 395/87 *Ministère Public v Jean-Louis Tournier* [1989] ECR 2521.

<sup>64</sup> Joined Cases T-374/94, T-375, T-384/94 and T-388/94 *European Night Services Ltd v Commission* [1998] ECR II-3141.

<sup>65</sup> Case C-179/90 *Merci Convenzionali Porto di Genova SpA v Siderurgica Gabrielli SpA* [1991] ECR I-5889.

<sup>66</sup> Case C-209/10 *Post Danmark AIS v Konkurrencerådet*, EU:C:2012:172.

<sup>67</sup> *Ibid.*

<sup>68</sup> In the time since this chapter was completed, the Court of Justice appears to have circumscribed this expansive trend to a certain extent. See Case C-67/13 P *Groupement des cartes bancaires (CB) v Commission*, EU:C:2014:2204.

<sup>69</sup> Case C-32/11 *Allianz Hungária Biztosító Zrt and Others*, EU:C:2013:160.

<sup>70</sup> Case C-226/11 *Expedia Inc v Autorité de la concurrence and Others*, EU:C:2012:795.

<sup>71</sup> Case C-439/09 *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence* [2011] ECR I-9419.

law principles under Article 101. In *Allianz*, the question was whether it was anticompetitive for a car repair shop to be accorded a higher hourly rate for carrying out repairs covered by insurance if the repair shop had sold insurance policies issued by the same insurer. The merits in competition law were evidently unsure: the Hungarian court was sufficiently unsure that it made a reference. The Advocate General found there to be no breach of the competition rules; the European Commission felt the contrary. The *Allianz* judgment confidently condemned the arrangements as a ‘by-object’ infringement, on the basis that, among other things, it was a means for the insurers to increase market share. In *Pierre Fabre*, a not-very-large skin-care company was told that it could not forbid its resellers to make internet sales. In both cases, it is not evident why such severe, indeed absolute, new infringements are being created.

One can argue that, as a matter of consumer welfare, a car repairer should be paid the same price for replacing a dented bumper, whether or not the repairer sells insurance policies for the insurer who is going to pay the bill. One can argue that internet selling is the modern way, and that it is old-fashioned to prohibit resellers from using that method. But I would challenge the proposition that in either case there is a gross infringement of the competition rules, so profound that it is not necessary to check whether there is any effect in the marketplace. I question whether the Court was wise to follow the Commission’s encouragement to be so bold, whether the explanation is deference or exuberance. Now, carefully criticising these is for another publication (can it be that there is no need to show the effect of a contractual provision which seems to fit the *de minimis* exception?), but for present purposes I will say only that these judgments show that the Court of Justice is not afraid to take strong positions on matters of competition, and that encouragement by the European Commission plays a role therein. In the next section, I will review the numerous occasions where both Courts have taken weak appellate positions on matters of competition, and I will highlight the relevance of this state of affairs from the perspective of the ECHR.

## 8. Where do we stand as to the ECHR?

What should and what will be the impact of the ECHR and the Charter of Fundamental Rights on how competition cases are handled by the European Union? Although the Courts in Luxembourg have always enjoyed unlimited jurisdiction in fining matters, in past years they have frequently declined to do more than make a bare review of legality, and have often refused on constitutional grounds to consider whether a fine was proportionate. In recent years, the General Court has often not engaged in significant proportionality

review of the fines.<sup>72</sup> The ECJ, in turn, has generally declined to review the proportionality of fines with a view to overruling positions taken by the General Court:

while ... the Court cannot substitute, on grounds of fairness, its assessment for that of the Court of First Instance giving judgment in the exercise of its unlimited jurisdiction as to the amount of the fines imposed on undertakings by reason of their infringement of Community law ...<sup>73</sup>

In *Vitamins*, the then-Court of First Instance (CFI) went so far as to suggest that its unlimited jurisdiction is only activated when there is illegality:

It is possible for the Court to exercise its unlimited jurisdiction under Article 229 EC and Article 17 of Regulation No 17 only where it has made a finding of illegality affecting the decision, of which the undertaking concerned has complained in its action, and in order to remedy the consequences which that illegality has for determination of the amount of the fine imposed, by annulling or adjusting that fine if necessary.<sup>74</sup>

This went beyond deference into error, I suggest. Similar language was found in other cases: ‘the Commission nevertheless has a wide discretion in assessing the quality and usefulness of the cooperation provided by the various members of a cartel, and only a manifest abuse of that discretion can be censured’.<sup>75</sup>

The suggestion here that only a ‘manifest *abuse*’ of the Commission’s discretion is capable of being censured by the Courts seems very doubtful. The proper exercise of the Court’s unlimited jurisdiction requires the Court to correct *any* abuse or error that it detects in the Commission’s reasoning, manifest or otherwise. While it is true that in the *Vitamins* case the debate related to the value of a confession to the Commission, while the prosecution is best placed to assess the value of a guilty party’s confession and while it may be difficult for a court to reach a conclusion about the relative values of

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<sup>72</sup> See, eg Joined Cases T-71, 74, 87 and 91/03 *Tokai Carbon and Others v Commission* [2005] ECR II-10; Case T-38/02 *Groupe Danone v Commission* [2005] ECR II-4407; Joined Cases T-217 and 245/03 *FNCBV and Others v Commission* [2006] ECR II-4987; Case T-15/02 *BASF AG v Commission* [2006] ECR II-497; Case T-279/02 *Degussa v Commission* [2006] ECR II-897, where proportionality pleas were dismissed.

<sup>73</sup> Case C-125/07 P *Erste Group Bank AG v Commission* [2009] ECR I-8681, para 187. See also Case C-320/95 P *Società Finanziaria Siderurgica Finsider v Commission* [1994] ECR I-5697, paras 45–46; Case C-310/93 P *BPB Industries and British Gypsum v Commission* [1995] ECR I-865, para 34; Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others v Commission* [2002] ECR I-8375, para 617.

<sup>74</sup> *BASF*, above n 72, para 582. This *BASF* judgment is probably wrong, as it contradicts the notion of unlimited jurisdiction.

<sup>75</sup> Joined Cases T-236, 239, 244 to 246, 251 and 252/01 *Tokai Carbon and Others v Commission* [2004] ECR II-1181, para 371; *upheld on appeal*: Case C-328/05 P *SGL Carbon v Commission* [2007] ECR I-3921, para 88.

contrasting pieces of testimony, it might be argued that the information thus tendered and the value thereof ought to be capable of objective assessment by a court. One aspect of the Commission's decision seems no less susceptible in principle to an intense standard of review than any other. It seems legally wrong or, at least, institutionally inappropriate to have eschewed 'unlimited jurisdiction'.

In *Wieland-Werke* the Court stated:

in areas such as determination of the amount of a fine imposed pursuant to Article 15(2) of Regulation No 17, where the Commission has a discretion, for example, as regards the amount of increase for the purposes of deterrence, review of the legality of those assessments is limited to determining the absence of manifest error of assessment.<sup>76</sup>

So the Luxembourg Courts have occasionally been reproached for applying inconsistently intense levels of judicial review in competition cases.<sup>77</sup> The judgment of the Court of Justice in *Chalkor*<sup>78</sup> may have changed matters. In *Chalkor* and *KME*,<sup>79</sup> the appellants complained that the CFI had used its familiar deferential language from *Wieland-Werke* to limit the scope of its review as to fines, whereas with respect to fines there was no scope for deference in light of the Court's unlimited jurisdiction as well as the requirements of the Convention. The ECJ said that, although the CFI had (inappropriately) used the language of deference, it had in fact exercised non-deferential review of the arguments raised. So the appeals were unsuccessful. However, the standard of judicial review in matters where the Court has unlimited jurisdiction was redefined for the future. Such review should henceforth include a verification of whether the factual assessments were free of manifest error. In future, the appellate judge should examine thoroughly the facts while at the same time being cautious about second-guessing Commission assessments in complex technical or economic matters. This might be called 'legality plus' or 'merits minus'. Does the *Chalkor* judgment remedy the problem? I think not.

<sup>76</sup> Case T-116/04 *Wieland-Werke v Commission* [2009] ECR II-1087, paras 32–33. See also Case T-241/01 *Scandinavian Airlines System v Commission* [2005] ECR II-2917, para 79, cited in *Wieland-Werke* ('It next has to be examined whether the Commission's assessment of the seriousness of the infringements, having regard to the three factors of their nature, the extent of the geographic market concerned and their actual impact on the market, is vitiated by obvious error').

<sup>77</sup> There is considerable literature on this topic. See, eg Merola and Derenne, eds, *The Role of the Court of Justice*, above n 21; Forrester, 'A Bush in Need of Pruning', above n 3; Forrester, 'A Challenge for Europe's Judges', above n 31; Wouter Wils, 'The Combination of the Investigative and Prosecutorial Function and the Adjudicative function', 27 *World Competition* 202, 216 (2004); Fernando Castillo de la Torre, 'The 2006 Guidelines on Fines: Reflections on the Commission's Practice', 33 *World Competition* 359 (2010).

<sup>78</sup> Case C-386/10 P *Chalkor AE Epexergasias Metallon v Commission* [2011] ECR I-13085.

<sup>79</sup> Case C-272/09 P *KME Germany AG v Commission* [2011] ECR I-12789.

## 9. The ECHR and competition decision-making

If we (the community of teachers, enforcers, judges and practitioners) were asked to describe a perfect basis for enforcing the European competition rules in a satisfactory, efficient, robust manner, we would assuredly not opt for what exists today. There are several overlapping problems with the current system of enforcement which can for present purposes be summarised as administrative procedures and which seem not to offer an accused company the chance of an independent determination of its guilt or innocence after a fair examination of evidence. There is no hearing by a decision-maker and no confrontation of the accused with witnesses against him. The decision-making and the investigating function are not separated in the case team handling the reaching of a decision. There are truly rigorous internal checks and balances, but these are not visible to the outsider; indeed, Commission enforcers would justifiably complain that the procedural constraints on officials are much too burdensome, that the process is too slow and that concluding cartel cases clogs up the institution and prevents more interesting cases being advanced. The structural problems of Commission procedures are then exacerbated by the fact that judicial review appears to be unpredictable, and also uses the language of deference, notably with respect to 'complex' 'economic' or 'technical' 'assessments'.<sup>80</sup>

The question for present purposes is not whether a better system could be devised, but whether the present system is satisfactory when viewed under the Charter and the Convention. It is to the Convention, and specifically its Articles 6(1) and 6(2), that we now turn.

In order to assess the acceptability of current arrangements, we need to step back in the process of examining whether competition law procedures match modern standards of fairness in light of the ECHR. There have been many Strasbourg challenges to the imposition by the public authority on a citizen of some disadvantage: the loss of sheltered housing, a traffic ticket, the imposition of fiscal penalties and the loss of other advantages. The ECHR routinely treats as 'criminal' matters which are not so labelled as a matter of domestic law. We can easily agree that the citizen in dispute with the public authority has more procedural rights if the matter is 'criminal' than if it is not. The *Engel*<sup>81</sup> criteria mean that if a matter is labelled 'criminal' in domestic parlance, that will guarantee the applicability of Article 6 ECHR; but the domestic categorisation of the infringement is no more than a starting point, implying that the authority cannot be sure of avoiding the inconvenience of Article 6 by calling the offence 'administrative'. Putting it differently,

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<sup>80</sup> *Microsoft*, above n 12.

<sup>81</sup> Case No 5100/71, *Engel v Netherlands*, 8 June 1976.

almost no deference or credit is given to how the state defines the offence. After *Engel*, the scope of what was eligible for the protections of Article 6 ECHR was expanded steadily to cover a range of controversies with the state. It is, I believe, beyond argument that competition cases would be deemed 'criminal'. But that is not at all the end of the debate. The difficult question is whether the availability of judicial review of fines in Luxembourg remedies the lack in Brussels of a public hearing by an impartial tribunal, where witnesses can confront the accused.

In appropriate cases, the absence of a tribunal at first instance can be cured by the availability of an impartial tribunal on appeal. Assuming (which is not a trivial assumption) that competition cases fall into this category, the question arises of whether the constrained nature of the appeal presents a problem for purposes of the ECHR. Does a review of legality and not of correctness fall short of what the ECHR demands? Opinion is not unanimous.

## 10. The problem of penalties under the ECHR

The rule of the ECHR should be that fines and other penalties are subject to appropriately intense appellate review. The application of the case law of the European Court of Human Rights (ECtHR) to 'administrative' penalties is difficult and confusing. In *Jussila*,<sup>82</sup> the Court considered the imposition of a €300 fiscal surcharge by an administrative authority. It made a distinction between what the literature calls hard-core criminal offences and others:

it is self-evident that there are criminal cases which do not carry any significant degree of stigma. There are clearly 'criminal charges' of differing weight. Tax surcharges differ from the hard core of criminal law; consequently, the criminal-head guarantees will not necessarily apply with their full stringency ...<sup>83</sup>

*Jussila* was a decision of a Grand Chamber and was therefore highly authoritative, but dissents by Judges Zupančič and Spielmann (now President) made it less so. The Court also said 'there must be at first instance a tribunal which fully meets the requirements of Article 6'. I note in the bygoing that I am assuming it is no longer plausibly contestable that the Union and the Commission are bound by the Convention in general, and its Article 6 in particular, in respect of the enforcement of competition law. Following *Jussila*, it seemed to me that the Court had declared unacceptable regimes under which an administrative agency imposed penalties in matters which did involve a 'significant degree of stigma'.<sup>84</sup>

<sup>82</sup> Case No 73053/01, *Jussila v Finland*, 23 November 2006.

<sup>83</sup> *Ibid*, para 43.

<sup>84</sup> See Forrester, 'A Challenge for Europe's Judges', above n 31.

Now, the public stigma of being condemned for competition infringement is much greater than losing an argument with the tax authorities. Citizens who have to pay tax penalties, or civil penalties for putting out rubbish on the wrong day or for customs irregularities, are not exposed to public disgrace. In tax cases, the facts in dispute are usually narrowly limited and the dispute turns on how to characterise them. The frequency and circumstances under which tax investigations are conducted differ substantially from the way the Commission conducts its competition investigations. Nor does the tax authority encourage private lawsuits against the taxpayer who paid too little. Thus the condemnation of a company found guilty of a competition law offence is a major disaster for the enterprise. Through their conduct employees are at risk of criminal charges, fines may be huge and years of civil claims in several countries may ensue.

However, the ECtHR seems to have partially reversed *Jussila* by its judgment in *Menarini*.<sup>85</sup> Perhaps 'reversed' is too strong. Maybe 'departed from' or 'elected not to follow' would be more accurate. In *Menarini*, the Court found that the imposition of a fine by the administrative agency in a competition case was acceptable in that the appellate courts had jurisdiction over questions of fact and law on appeal, could review the evidence and could review how the authority had exercised its discretion in imposing the fine. If *Menarini* (not a Grand Chamber decision, and weakened by the dissent of Judge Pinto de Albuquerque) is reliable, then punishment by an administrative agency may be made acceptable by the intensity of the available judicial review.<sup>86</sup> This would mean that the Court must carefully enquire into the factual circumstances on which guilt is said to repose.

Numerous questions are presented by the Commission's ferocious fines in competition cases. The principle of proportionality has rarely been used to reduce fines by the Luxembourg Courts, even though they had unlimited jurisdiction. It seems curious that gigantic fines should be imposed for breaches of a law which is so prone to new interpretations. To the extent that arbitrariness is a risk, the institutional set-up in Brussels is not reassuring: the same officials study the complaint, decide whether to investigate, decide whether to accuse, decide if the accusation is well founded and decide on the penalty. By the end of the case, when the hearing occurs and levels of fine are discussed, the case team members must look like prosecutors even if they see

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<sup>85</sup> *Menarini Diagnostics SRL v Italy*, No 43509/08, 27 September 2011. For discussion, see Marco Bronkers and Anne Vallery, 'Fair and Effective Competition Policy in the EU: Which Role for Authorities and Which Role for the Courts after Menarini?', 8 *European Competition Journal* 283 (2012).

<sup>86</sup> See further Renato Nazzini, 'Administrative Enforcement, Judicial Review and Fundamental Rights in EU Competition Law: A Comparative Contextual-Functionalist Perspective', 49 *Common Market Law Review* 971 (2012).

themselves as neutral investigators; if the presumption of innocence is meant to be present, the light it shines is quite feeble.

I note the very keen approach taken by the French Conseil Constitutionnel in examining the law according to which the French telecoms regulator could impose sanctions on undertakings for breaches of telecom regulations.<sup>87</sup> The Conseil ruled that the lack of separation of powers in investigating ('les fonctions de poursuite et d'instruction') and punishing ('les fonctions de jugement') exercised by the regulator would breach the principle of impartiality guaranteed by Article 16 of the Déclaration des Droits de l'Homme et du Citoyen de 1789. Thus, it is by no means obvious that as a matter of due process the mechanisms by which fines are imposed are satisfactory. Indeed, I respectfully submit that they are plainly unsatisfactory.

It is also interesting to note that in the case of *Ziegler*,<sup>88</sup> the Court of Justice had to consider a claim that it was improper for the Commission both to impose a penalty on a cartel and at the same time to claim damages for having had to pay too much to members of the cartel. Paragraphs 159–61 are particularly confident that there is no problem whatever:

the court has already held that Commission decisions may be subject to review by the European Union judiciary and that European Union law lays down a system enabling the courts to review Commission decisions, including decisions relating to procedures under Article [101] EC, which provides the guarantees required by Article 47 of the Charter ... The Commission cannot, therefore, in any event be regarded as both the victim of an infringement and the judge responsible for imposing penalties for the infringement. In light of the foregoing, the General Court was justified in taking the view that the Commission had not failed in its duty of impartiality. It did not, therefore, err in law in rejecting Ziegler's plea alleging infringement of the right to fair legal process and the general principle of good administration. Moreover ... it is for the General Court alone to assess the value which should be attached to the evidence produced to it, save where the clear sense of the evidence has been distorted.

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<sup>87</sup> Conseil Constitutionnel—Décision No 2013-331 QPC du 05 juillet 2013, Société Numéricable SAS et autre, para 12:

Considérant que, selon le premier alinéa de l'article L. 132 du code des postes et des communications électroniques, les services de l'Autorité de régulation des communications électroniques et des postes sont placés sous l'autorité du président de l'Autorité; que, selon l'article D. 292 du même code, le directeur général est nommé par le président de l'Autorité, est placé sous son autorité et assiste aux délibérations de l'Autorité; que, par suite et alors même que la décision de mise en demeure relève du directeur général, les dispositions des douze premiers alinéas de l'article L. 36-11 du code des postes et des communications électroniques, qui n'assurent pas la séparation au sein de l'Autorité entre, d'une part, les fonctions de poursuite et d'instruction des éventuels manquements et, d'autre part, les fonctions de jugement des mêmes manquements, méconnaissent le principe d'impartialité; que celles de ces dispositions qui sont de nature législative doivent être déclarées contraires à la Constitution.

<sup>88</sup> Case C-439/11 P *Ziegler SA v Commission*, EU:C:2013:513.



Arguably, the very last words, totally confident and allowing of no doubt or hesitation, seem to confirm the limited nature of the factual reappraisal which is often conducted by the EU Courts. This seems to take us back to manifest error again, and might seem to indicate that they endorse a limited factual check. The question is whether they have found a formula to satisfy the Charter and the ECHR by the judgment in *Chalkor*: I have doubts, though I concede that *Menarini* is read by some as endorsing the validity of how competition cases are decided by the EU.<sup>89</sup>

## 11. The approach of the European Free Trade Association (EFTA) Court to the problem

One way of approaching the matter is to conclude that there is no single test by which the requirements of Article 6 can be assessed. On this reasoning, the totality of what happens at first instance may be relevant to the adequacy of the treatment accorded to the citizen. This involves discarding *Jussila*'s convincing distinction between categories of controversy, with a special status for the 'hard core' of offences. Something like this line was taken, not without some head-scratching, in *Norge Post*,<sup>90</sup> where the EFTA Court stated:

The criminal head guarantees of Article 6 are applied in a differentiated manner, depending on the nature of the issue and the degree of stigma carried by certain criminal cases on the one hand and, on the necessity of the guarantee in question for the requirements of a fair trial on the other. Thus, to what degree these guarantees apply in a given case must be determined with regard to the weight of the criminal charge at issue ...

the present case cannot be considered to concern a criminal charge of minor weight. The amount of the charge in this case is substantial and, moreover, the stigma attached to being held accountable for an abuse of a dominant position is not negligible ...<sup>91</sup>

keeping in mind the guarantees provided by Article 6(2) ECHR, it follows from the principle of the presumption of innocence that the undertaking ... must be given the benefit of the doubt ...<sup>92</sup>

This confirmed the notion that the presumption of innocence is relevant; it is a welcome concession, and not one that fits well in a regime where the

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<sup>89</sup> See also *Segame SA v France*, Application No 4837/06, 7 June 2012; *Silvester's Horeca's Service v Belgium*, Application No 47650/99, 4 March 2004.

<sup>90</sup> Case E-15 *Posten Norge AS v EFTA Surveillance Authority*, judgment of 15 April 2012.

<sup>91</sup> *Ibid.*, paras 89–90.

<sup>92</sup> *Ibid.*, paras 93–94.

authority investigates, decides and punishes.<sup>93</sup> However, the next problem was the extent of judicial review when the Treaty requires a review of legality yet common sense requires that a criminal charge be substantiated convincingly:

as far as past events involving complex economic features are concerned, a situation may arise in which the Court, while still considering ESA's reasoning to be capable of substantiating the conclusions drawn from the economic evidence, may come to a different assessment of a complex economic situation. However, the fact that the Court is restricted to a review of legality precludes it from annulling the contested decision if there can be no legal objection to the assessment of ESA, even if it is not the one which the Court would consider to be preferable ...

This does not, however, mean that the Court must refrain from reviewing ESA's interpretation of information of an economic nature. Not only must the Court establish, among other things, 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 ...<sup>94</sup>

This language presents well the dilemma for a court when it thinks the agency came to a wrong conclusion but did not go wildly off the rails. The EFTA Court concludes that it should not interfere in such a case. As to fines, it is properly confident and on solid ground:

when imposing fines for infringement of the competition rules, ESA cannot be regarded to have any margin of discretion in the assessment of complex economic matters which goes beyond the leeway that necessarily flows from the limitations inherent in the system of legality review.<sup>95</sup>

This formulation represents an attempt to square the circle of performing a legality review which also involves more than a quick look at the facts.<sup>96</sup> It is a worthy effort, but it does not remove valid concerns.

I therefore submit that the case law of the ECtHR in Strasbourg is not dispositive as yet, and that the case law of the European Courts in Luxembourg is inadequate to satisfy the requirements of Article 6 of the Convention in all cases; in consequence, the EU regime for taking competition decisions and judicially reviewing them is imperfect. The Luxembourg Courts, following *Chalkor* and *Menarini*, have tried to crack the problem of rendering acceptable a competition regime which imposes criminal sanctions without a hearing by an independent and impartial tribunal (and without according much of a presumption of innocence) by stating that the General Court will perform

<sup>93</sup> See the discussions in Bronkers and Vallery, 'Which Role For the Courts After *Menarini*?', above n 85.

<sup>94</sup> *Posten Norge*, above n 90, para 98.

<sup>95</sup> *Ibid*, para 100.

<sup>96</sup> Forrester, 'A Bush in Need of Pruning', above n 3.

careful examination of whether the Commission's factual assessment was vitiated by manifest error. This is no more than a step in the right direction.

I thus respectfully conclude that *Menarini* and *Chalkor* have not resolved the controversy over the adequacy of the regime by which the European competition rules are enforced.<sup>97</sup> I cannot refrain from voicing regret that, although it has been known for years that the Union would be adhering to the Convention, we are still a long way from completing the process. Such delay conveys, even if there are institutional excuses, a sense of low priority which is dismaying.

## 12. Purely factual assessments can determine guilt or innocence; the problem of brevity

In this section I will consider two practical difficulties which undermine the supposed effectiveness of the available judicial review. First, a conscientious authority will very frequently have some basis for believing that a given factual circumstance is present. Was the medicine prescribed because it was one of a class of competing medicines, or did it enjoy a unique status? Would a computer operating system with an upgraded directory program which operated in certain respects identically to another manufacturer's directory program be a new product? These determinations are crucial to the existence of dominance or abuse. Was Mr Dupont absent from the cartel meeting on January 13 (as he contended) or was he present (as contended by Mr Smith, the employee of the leniency-seeking competitor)? There will often be more than one way of viewing a set of market share figures. Do they show that one product was largely immune to competitive pressure, and was therefore in a dominant position, or was it one of several competing products? There will usually be some basis for each point of view advanced by the authority. It will commonly be the case that officials have a profound certainty that their analysis is correct. It is never easy to show that an authority committed a denaturing of the facts or a manifest error of assessment. So a key legal question may often turn on a question of factual assessment. If that assessment is not satisfactorily tested (satisfaction being in the eye of the alleged infringer), then judicial review that assumes that the assessment is likely to be right is fragile.

To this I add a common lament from coffee shops where lawyers congregate: how is it possible to appeal a huge, tentacular decision of 500 pages or 700 paragraphs in a 50-page succinct application to the General Court

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<sup>97</sup> See Christopher Bellamy, 'ECHR and Competition Law Post *Menarini*: An Overview of EU and National Case Law', *e-Competitions* No 47946, 5 July 2012.

in Luxembourg identifying the legal errors? Good decisions are necessarily voluminous. They cannot easily be summarised. The advocate does not know whether to pare the challenge to three big problems in 50 pages and risk failing to give sufficient detail or to write a longer pleading which helpfully describes the crucial legal pleas but risks being rejected as too prolix. Oral advocacy will not fill the gaps. Shortness in the initial oral presentations (20–30 minutes) is inescapable (the free-flowing question tradition of the General Court is quite generous, however). Thus, the Courts do not want lengthy submissions, but lengthy submissions are the only way of explaining the voluminous context of three or four legal problems.

The two problems mentioned in this section are real, small manifestations of a bigger difficulty: adequacy of review. One standard asks if the Commission acted illegally by making a manifest error of appreciation of the facts. The other asks if the Commission acted correctly in assessing the facts. I submit that the former standard is no longer adequate to satisfy the standards established by the Convention.

There is a big difference between saying that the authority correctly determined the controversial point and saying that the authority did not commit a manifest error of appreciation in its determination of the point. The judges' duty is not to consider if the agency acted correctly, but whether it acted lawfully. Since an agency will act lawlessly in only very rare cases, the factual obstacle for the appellants to overcome is very high. The Commission is not a reckless or imprudent entity, and will not often commit truly gross errors of factual assessment; and its decisions are—very properly—written to resist judicial interference. Putting it differently, if the *Chalkor* standard is carefully applied, few appeals to the EU Courts are likely to succeed on factual grounds alone.

These questions are forcefully reviewed in a magisterial opinion by Advocate General Wathelet in the case of *Telefónica SA*,<sup>98</sup> in which there was a question of whether the level of the fine imposed on Telefónica was consistent with fines imposed on others. The Advocate General reviews the not-easy-to-reconcile past decisions of the Commission and judgments of the Courts. Some cases suggest that the Commission was not obliged to be strictly consistent and could impose heavier fines if it felt enforcement so required. Other cases stated that while the Commission could usefully indicate how the fine was calculated, it need not feel constrained to follow strict arithmetical formulae. The Advocate General wonders whether the Commission could be

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<sup>98</sup> Opinion of Advocate General Wathelet in Case C-295/12 P *Telefónica SA, Telefónica de España SAU v Commission*, EU:C:2013:619. Following the completion of this chapter, the ECJ declined to follow the suggestions of the Advocate General. See Case C-295/12 P, EU:C:2014:2062.

silent both on how the fine is calculated and as to why the fine seemed higher than previous fines in comparable cases.

He then considers how these cases and the decision-making practices of the Commission fit within the full jurisdiction of the Courts when reviewing penalties. Embarrassingly, the Advocate General observes that despite the judgment of the ECJ in *Chalkor* (regarding the necessity of full judicial review, not a mere check on legality), and despite the Opinions in the ECtHR case of *Menarini*, there had been cases in which the General Court had persisted in checking whether the Commission had had the power to impose the fine, not whether it had reached a correct conclusion. He concludes that the duty of the General Court is to exercise thoroughly and independently its power to review fines; and then in two trenchant pages concludes that the General Court failed to do its duty.

Whether or not the Court of Justice finally agrees with the Advocate General, the Opinion suggests that there are grounds for concern as to the adequacy, consistency and persuasiveness of judicial review in competition matters. These concerns are amplified by the high levels of fines, the absence of a hearing by a person empowered to decide contested facts and the inconsistent functions attributed to those in charge of the administrative enquiry.

### 13. Competence and legitimacy

I end with a few thoughts about the role and duty of the institutions in competition matters. There is a political debate about the legitimacy of the actions of the Union in a number of important areas. The triumphs of helping to end armed conflict and of achieving the reunification of East and West were massive, but they lie in the past. In matters of the European currency, early success has given way to apparently interminable crisis which looks likely to be ended only by a degree of political, fiscal and economic integration beyond the current appetite of many citizens. Separately, it is not certain that the Union's 30-odd specialist regulatory agencies enjoy legitimacy because they perform well or because their output shows their skills, nor is their democratic mandate to regulate evident.<sup>99</sup> By contrast, the drafters of the Treaty of Rome attributed to the Commission, as one of its core competences, the application of the competition rules, including the power to grant exemptions. In 2004,

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<sup>99</sup> The erratic and inconsistent performance of the Commission's efforts to achieve good governance and to learn from successes or failures are elegantly documented by Sandra Keegan, 'Legitimacy in the EU Single Market: The Role of Normative Regulatory Governance', University of Edinburgh (2013), <https://www.era.lib.ed.ac.uk/bitstream/handle/1842/7808/Keegan2013.pdf?sequence=2&isAllowed=y>.

this power was shared in part with the Member States.<sup>100</sup> We should reflect on whether the Commission deserves to be respected because of its constitutional role or because of the excellence of its output.<sup>101</sup> One can argue over the rightness of individual competition decisions, but there is no doubt that the Commission is the prime advocate for, and enforcer of, competition law as set forth in the Treaty. That said, a necessary element of the legitimacy of the constitutional competence of the Commission depends upon the Courts in Luxembourg.

It is correct that powers were granted by the Treaty to apply the competition rules, a very authoritative conferring of legitimacy. But legitimacy is a continuing obligation. The availability of rigorous, consistent and effective judicial review is not something 'desirable' and 'worthy', but an indispensable element in the ongoing acceptability of the whole system. We can observe that fines have risen from tens of thousands to hundreds of millions over 40 years, an evolution which has been largely endorsed without much judicial interference. The proportionality margin of discretion of the Commission has been checked only as to details, never as to the fundamental question of whether huge fines go beyond the level necessary to achieve compliance and deterrence, and on many occasions the judicial check was a quick look at the existence of powers, not how well they were exercised. That was a serious failing.

I respectfully submit that a standard of review of 'manifest error' and 'legality' would undermine the legitimacy of the enforcement of the competition rules by the Commission. In light of the evolution of Union law and in light of the public law evolutions applicable to the Union after the Lisbon Treaty, it is fair to ask that the Luxembourg Courts' standards of review satisfy a 'correctness' or 'merits' standard, and that the processes of reaching a decision in Brussels be adapted to remedy some of the weaknesses.

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<sup>100</sup> See Ian Forrester, 'Modernisation: An Extension of the Powers of the Commission?', in Damien Geradin, ed, *Modernisation and Enlargement: Two Major Challenges for EC Competition Law*, Intersentia, 2004, chapter 3.

<sup>101</sup> Another useful form of quality control is for the authority to examine the beneficial, wasteful, unexpected or wholesome consequences of its actions *ex post facto*. What can we learn about the desirability of 'technological tying' (the inclusion of new features as standard in a technical product like a software program, as in *Microsoft*), or the practice whereby fielding a minimum number of home-grown players could be demanded of teams in the first division of professional sport leagues (as in *Bosman*)? In cases where mergers were permitted or where the merger was prohibited, have subsequent experiences revealed the wisdom or unwisdom of the official action taken? These questions deserve to be asked by a well-run and well-supervised public authority, yet at the moment they seem not to be examined consistently, rigorously and officially. The world's pre-eminent enforcer of competition law is under a duty to be no less rigorous in looking at its past conduct than in examining the past conduct of enterprises under investigation.