

Checks and balances: EU competition law and the rule of law

Dr Philip Marsden

British Institute of International and Comparative Law

p.marsden@biicl.org

The rule of law is an eminently European concept. It may well have been exported around the world, achieving constitutional status in some jurisdictions, but it was first discussed by Aristotle and Plato, formed the basis of the Magna Carta, has been enunciated by Blackstone and Dicey, and motivates the thinking of senior Law Lords to this day.

Quis custodiet ipsos custodes?

The fundamental issue that the rule of law seeks to address is: 'Who guards the guardians?' Who ensures that they use the powers we have granted them to protect us, in an appropriate, just and fair manner, and that we never need to be protected from them? In the context of competition law, much centres on the use of both the power and the discretion that we have given the authorities. Where are the guarantees that they will be accountable, independent and fair? At the same time, how do we ensure that the courts accord competition authorities the appropriate degree of deference due an expert body, while still holding the authorities to both the *acquis communautaire* and the rule of law?

Do we tell a 'noble lie' – as Plato argued – and trust those in power to guard themselves against themselves? Competition officials are after all, experts, and often part of agencies that are independent from ministries. They are public servants, and will keep this responsibility well in mind. Wisely, we do not have that kind of faith. For example, for various reasons over the years, safeguards have had to be introduced into the decision-making process at the European Commission's DG-Competition. As there is no requirement that the European Union's Competition Commissioner be an expert in competition law or economics, we rely on the expertise and analysis of case teams. These are made up of more lawyers and economists than ever before. Their investigations are in turn reviewed internally by a 'fresh pair of eyes': colleagues who act as devil's advocate panels to ensure that the evidence supports the particular theory of harm. This peer review is also supplemented by the rigour

and scepticism of the Office of the Chief Economist, which hopefully tempers the fire that we want the case team to have, with added intellectual rigour and objective analysis. There is also obviously the to - and fro between the case teams and the parties; added to which independent Hearing Officers monitor oral proceedings to try to ensure both due process and that the rights of defence are adequately protected. They are also increasingly getting involved in more substantive areas. The Legal Service reviews draft decisions, with an eye on EU law, and the very real pressure that they may have to defend the decision in court some day. Then there is the fact that major decisions go to the College of Commissioners, which, while bowing to the Competition Commissioner's point of view, also provides another layer of review. Then we have possible appeals to the courts, and the court of public opinion as well: the reporters, and the academic community.

After this exhaustive review, are there not more than enough 'checks and balances' in the system? Let us see. Dicey's three principles of the rule of law require:

- the absolute supremacy of the law over arbitrary power / *discretion*;
- *equality* before the law; and that
- the law be defined and enforced by the *courts*.

How does EU competition law match up to these standards? The EU *acquis* is a unique and impressive achievement: uniting civil and common law regimes through public international law, and applied through a unique form of administrative law. It tries to bring together different cultures with different backgrounds, legal traditions, stages of economic development and concentration, and resulting different views on competition, wrongdoing and enforcement.

So we must ask, in such a system, with such obvious opportunities for divergent decisions, is EU law indeed supreme? What is the extent of discretion that we want competition authorities to exercise and to what extent is it controllable? Is there sufficient official guidance for undertakings to understand what conduct is permissible? Are case-selection, re-allocation and decision-making consistent and accountable? Is the law

really being interpreted and enforced by the courts? Or is it the authorities that are making the greatest strides in this area? Does this raise any problems, and if so, how are these controlled?

I will address these areas by looking first at the European Commission, particularly DG-Competition; the European Competition Network; and finally the EU Courts.

The European Commission – lingering procedural concerns

DG-Competition investigates, prosecutes and decides on competition law matters, subject to appeal to the courts. The various checks and balances outlined above constrain the discretion of the enforcers, as do detailed regulations.

Since these many safeguards have been introduced, however, the OECD has undertaken a peer review of DG-Competition, and found that its multiple roles raise ‘serious doubts’ about the absence of checks and balances.¹ This is curious; one can understand why, at the level of rhetoric, it might be difficult to accept an authority acting as prosecutor, judge, jury and executioner. But most authorities have multiple roles. Only a very few have to convince a judge of their case – as the United States Department of Justice does – before enforcement action can be taken. The way to ensure that what might otherwise appear to be intolerable accords with fundamental justice is precisely through the kinds of safeguards that the Commission has introduced, and greater transparency in the system. But that can only be the start.

The OECD report focused on a few particulars which make clear that there is still rather a lot of room for improvement. Generally speaking, these all fall within a category of a greater ‘judicialising’ of the system. The OECD noted that there was no right of undertakings to cross-examine witnesses or leniency applicants. Also, they found the Commission to be the only competition authority where the ultimate decision-maker – the College – is not required to attend the oral hearing, nor is the Competition Commissioner, nor even the Director-General. Despite all the checks in the system, questions have been raised about the extent to which this procedure complies with the right to a fair hearing. Article 6 of the European Convention on Human Rights holds that rights, obligations, and penalties, particularly those not of a minor nature, should be determined at first instance by an ‘independent and impartial tribunal’ and a right to a subsequent review by an appellate body is not enough. While the OECD recognised that this issue had arisen before, in the 1980s, it clearly thought

it worth reconsideration. The severity of recent fines, and the fact that they are obviously punitive, may have played a part. Perhaps the system is beginning to require a degree of separation of powers, and greater judicial involvement. At the very least, some functions within DG-Competition might be separated, formalising the division between the case teams and the devil’s advocate panels. Certainly senior staff – at the Director-General or Deputy level – should be more evident at hearings, if such proceedings are to remain an important and credible part of the system. Finally, could DG-Competition investigate and prosecute and then bring their findings to the CFI for review? Of course, the EU Courts are over-burdened as it is, but perhaps given the punitive and quasi-criminal nature of the penalties involved, and the fact that almost every fine gets appealed to the court anyway, it is time for a separate chamber to consider such cases, or a separate European Cartel Court.

Revisit guidance?

The high fines for violations make it all the more important that undertakings know where they stand *ex ante*. The removal of the notification system was not supposed to leave them entirely in the dark, and it does not. Informal guidance from the Commission is still available. To date, however, there have only been a few requests for such guidance and no formal findings that Article 81 EC does not apply. Perhaps undertakings are happy with their legal advice and just self-assessing. The experience of in-house counsel, however, appears to be that the Commission is reluctant to provide informal guidance. There appears to be a widely held impression that guidance will be difficult to obtain, and perhaps this is why it is so rarely sought. Given the possibility that a non-compliant agreement might be nullified, companies might avoid concluding borderline agreements, even if their potential benefits outweigh their anti-competitive effect. Chilling pro-competitive arrangements is in no one’s interest; so it would be good for the Commission to make its thinking clear in this regard to dispel the growing impression – whether ill founded or not – that it is not really minded to provide such guidance.

European Competition Network – time for more disclosure

The European Competition Network (ECN) was created by the Modernisation Regulation² to improve European competition law enforcement by making it quicker, more targeted and closer to the ground, so to speak. The ECN itself is a mechanism for authorities

to exchange information and re-allocate cases. DG-Competition benefits because it can apply its limited resources to a smaller caseload, ideally involving a truly European interest. A more effective and efficient enforcement regime is thus created, and one which accords more closely with the principle of subsidiarity. As ever with all things 'EU' it is a unique experiment, and one that seems to be working well.

'Seems' is the operative word, because that is all outsiders really have to go on. The network is only for the authorities, and thus is viewed by practitioners as a 'black box'. The unknown naturally attracts suspicion. This is unfortunate because the principles that guide the ECN are sensible and clearly stated in Regulation 1/2003. Generally, the Commission deals with cases affecting more than three EU Member States; the rest go to one or more Member States, based on which is most affected; with the Commission reserving the right to take back some multi-State cases of particular importance, as has happened in the energy and telecoms sectors.

Headline results are reported. The authorities have noted that more than 800 cases have been notified within the ECN, and more than 300 reported to the Commission. A great deal of knowledge and – perhaps more importantly – appreciation for each others' competences has developed.

As the central node, the Commission is responsible for maintaining a degree of consistency. So far it has taken a soft approach, ringing authorities, writing letters, or submitting amicus briefs to try to ensure that decisions are broadly consistent with EU standards.³ This is good and respectful, but it is not going to catch everything. The process depends primarily on the interests and resources of the ECN unit at DG-Competition, which has to monitor more cases in more languages than ever before. Furthermore, it is not always clear that sufficient reporting from national courts is reaching the Commission. Inevitably, there has been divergence, which is to an extent permitted for some aspects of competition law, particularly abuse of dominance.

Inconsistency at the ECN – at the margins

Resale price maintenance arrangements have been approved in Spain, but banned in Italy and Holland.⁴ The infamous *Michelin II* rebates scheme – that attracted such opprobrium and penalties at the European level – has been approved in France. Similarly, British Airways' commissions to travel agents were banned and fined at the EU level, while cases involving similar arrangements of BA were closed by the UK Office of Fair Trading.

The sky is clearly not falling, but cases like these

do show the limits of the system and the inevitable uncertainty this provides businesses with pan-European product offerings. The same is true of the analysis the authorities use more generally. Of course each authority has different enforcement priorities, resources, and functions within a different legal 'operating system', whether it is common law, civil law or something else. They also function in different markets, with different degrees of privatisation, economic development and concentration, to name but a few variables. This can lead to different approaches in the ways authorities define markets, identify anti-competitive problems, prioritise cases, and intervene.

All of this is not surprising in such different economies. When Articles 81 and 82 EC are enforced, though, consistency is not necessarily the hobgoblin of mediocre minds. At the very least a greater effort at transparency would be welcome so we can understand *why* divergences are happening. Where it is possible, historical data from the ECN intranet of cases should be made public. Equally, authorities should be encouraged to publish non-confidential versions of non-infringement decisions and any informal guidance that they issue.

Greater publication of this sort would also save public resources, and be of indirect benefit to business, if it can help authorities with their analysis, and ensure that they do not re-invent the wheel, or reach conflicting conclusions about similar arrangements. Public statements of reasoning behind all decisions – including case-closures – will be more effective in 'spreading the gospel' than relying on the network operating solely through internal checks.

The EU Courts

Recalling Dicey's third principle, there is no doubt that the EU Courts are the ultimate interpreters of the law. But that does not mean there are not problems en route to justice. The main one is how long that journey is. Back in 1996, the European Court of Justice (ECJ) was found to be largely a victim of its own success, due to its wide jurisdiction, the large volume of case law upon which it was the sole interpreter and the relatively effective enforcement of its judgments.⁵ Delay is still the primary problem.⁶ Cases can take an average of two and a half to five years, and sometimes eight to nine years from initial decision to final appeal. This is too long, and various initiatives have been suggested to speed things up.

Translation issues are still a major factor in the delay, and it really must be asked whether the court's system of holding internal deliberations in French, with the necessary translation, makes sense, where the majority

of judges now will have English as their second language and French as a distant third, if that.

Should there be a separate EU court purely for competition issues? A House of Lords subcommittee said it was not yet the right time for such a body.⁷ But something should be done to give appropriate consideration to what is really such an important pillar of EU law, and in which quite important economic interests are at stake. Roving circuit judges or national panels of the EU Courts have also been suggested, particularly if populated by retired members of the ECJ or the EU's Court of First Instance (CFI). This is certainly a most pragmatic suggestion, and while it may take a while to set up, and might mean that some circuits are busier than others, is worth consideration.

The most pressing area is always mergers of course, as this is the most time-sensitive of any aspect of competition law. If a merger tribunal is not yet timely at the EU level, then we should explore more ways to free up the CFI in other areas, so that it can apply its expertise to more quickly rule on mergers. Here again, consideration might be given to a separate panel or court dealing solely with relatively straightforward, though no less important, cartel cases.

Dissents please

A word of concern about the role of the courts, though. Of course they should continue to rule on the most complex and controversial cases. But how best should they do that? CFI Judge John Cooke, the Judge Rapporteur in the *Microsoft* case, recently revealed, 'I tell my clerks that these (Article 81 and 82) cases are 20 percent fact, 20 percent law and 60 percent policy'.⁸ We will never know how much of the case was decided on policy grounds, rather than on the facts or the law itself. It might be viewed simply as following EU case law quite closely, but expanding its scope in some areas to accommodate the Commission's view of the facts. Or it may be yet-another judgment⁹ representing an out-dated ordoliberal view of competition, that is also starkly at odds with the Commission's stated aim of only intervening when there is clearly identified and likely consumer harm.¹⁰ Can we be sure that the judges understand the economic points being made before them, and can take an appropriate view; or is it sometimes all too difficult, and so their default is more often than not to defer to the Commission? Is that appropriate?

There is no doubt that overturning a Commission decision – or finding it manifestly unsupported – can deal a severe blow to the agency. We do not know how much this is in the minds of the judges, or how much it is discussed in their deliberations. Hopefully

though – and Judge Cook's comments aside – policy considerations are not determinative, as judgments must rest on sound and *current* law first and foremost. Where different motivations are behind some rulings, however, then this should be made clear.

Isn't it time to finally allow dissents at the European Courts? The Commission seems confident in leading the world intellectually and through cases. The Courts should be too. It is highly unlikely at this stage that dissents would destabilise the *acquis*. Judges who speak their minds should not fear national retribution when they retire. Dissents would help make rulings more transparent, reasoning more clear, and help allow new ideas to be discussed and considered.

The standard of review

The CFI reviews Commission decisions against a 'manifest error of assessment' standard which supposedly entails ascertaining whether the facts on which the Commission's assessment was based were correct, whether the conclusions drawn from those facts were not clearly mistaken or inconsistent and whether all the relevant factors had been taken into account. The limited standard of review is of course a deferential bow to the relevant agency's expertise, the technical and economic issues at hand, and its discretion. But it is not a full appeal; nor even judicial review.

Is this the appropriate balance, of the Commission's expertise and discretion, and the CFI's duty of review? The CFI has not at all been shy of rebuking DG-Competition when it has not argued its cases carefully enough. The three judgments in *Airtours*, *Tetra Laval*, and *Schneider* and 'were scathing in their criticism of the Commission's appreciation of the facts and treatment of evidence' and eventually forced the Commission to introduce the very safeguards discussed earlier.¹¹

Nevertheless it can be argued that in very complex economic cases, the CFI's limited standard of review leads it to rely too heavily on the findings of the Commission. There is also the problem that in the legal tradition of Continental Europe – which predominates at the EU Courts – 'opinions' and agency findings can often end up being treated as if they are 'facts'. Thus, the Commission's decision might not be as thoroughly tested as it would be, for example, in a British court.

Given this, do Europeans and others really understand the limited nature of the CFI's review of the Commission's decisions? The CFI is only looking at the adequacy of the decision. Judgments are reported as if they were full appeals; as if a hearing was held of all the issues, witnesses examined, arguments heard in full, in a public forum. The reality of course is quite different. There may be judges' questions – which are

starting to grow in significance – but there is no in-depth questioning of officials, witnesses, complainants, and the majority of the work has been done in unavailable written pleadings which are protected from public scrutiny. More could be opened up, and thereby provide greater oversight.¹² How much more credibility would the process have if reporters could genuinely write ‘today the Court upheld the Commission’s decision’, rather than what should be: ‘today the Court found that the Commission was not manifestly wrong’?

Conclusion – ‘a more economic approach’ may lead the way

This article has argued for more openness and more legal and procedural guarantees. But perhaps the solution will come from another quarter entirely: the rule of reason. As the Commission pursues its ‘more economic approach’, it will inevitably have to explain its decisions more thoroughly – whether in providing informal guidance, non-infringement decisions, or actual prohibitions. This too will help authorities around Europe better understand, share and benefit from this self-discipline. It also means that cases will be more thoroughly reasoned, and hard-fought, and thus better tested as they pass through the various existing checks and balances. The recommendation I have made is that greater disclosure of agencies’ reasoning, access to ECN data, some separation of the investigative and adjudicative functions, allowing full hearings and dissents, and above all greater transparency, would all help the continued development of EU competition law. Ironically though, the reliance on more economics, and balancing tests like the rule of reason may be what allow EU competition law to better accord with the rule of law. This can only happen though if judges are themselves able and willing to undertake more rigorous evaluation, rather than rely on precedents that were never informed by economic analysis.

Notes

- 1 OECD, European Commission – Peer Review of Competition Law and Policy (OECD: Paris, 2005)
- 2 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty, [2003] OJ L1/1.
- 3 K Wright, ‘European Commission Opinions to National Courts in Antitrust Cases: Consistent Application and the Judicial-Administrative Relationship’, CCP Working Paper 08-24, ESRC Centre for Competition Policy, University of East Anglia.
- 4 Comments of the Global Competition Law Center on the Functioning of Regulation 1/2003 (2008).
- 5 British Institute of International and Comparative Law, ‘The Role and Future of the European Court of Justice’, A report by members of the EC Section of the British Institute’s Advisory Board chaired by the Rt Hon the Lord Slynn of Hadley (1996).

- 6 T Cowen, ‘Justice Delayed is Justice Denied’: The Rule of Law, Economic Development and the Future of the European Community Courts’, 4.1 European Competition Journal 1 (2008).
- 7 House of Lords, European Union Committee, 15th Report of Session 2006–2007, An EU Competition Court – Report with Evidence (London, The Stationery Office, 2007), HL Paper 75.
- 8 See P Marsden and S Bishop, ‘Intellectual Leaders Still Need Ground to Stand on’ Editorial, (2007) 3.2 European Competition Journal 315.
- 9 See Case C-95/04 P *British Airways v Commission* [2007] ECR I-2331.
- 10 P Marsden, ‘Microsoft v Commission – With Great Power Comes Great Responsibility’, Competition Law Insight (October 2007).
- 11 Case T-342/99 *Airtours v Commission* [2002] E.R. II-2585; Case T-310/01 *Schneider Electric v Commission* [2002] ECR II-4071; and Case T-5/02 *Tetra Laval v. Commission* [2002] ECR II-4381. See N Levy, ‘EU Merger Control: From Birth to Adolescence’, World Competition 195, 211 (2003).
- 12 D Lawsky, ‘Information Please: Opening Antitrust to the Public - Why More European Union Court and Commission Documents and Hearings Should No Longer Be Secret’, in P Marsden (ed), Handbook of Research in Trans-Atlantic Antitrust (Cheltenham: Edward Elgar, 2006).