

The Rule of Law and Competition Procedure

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1. it is well settled that the concept of the rule of law has both a procedural and a substantive content. At the root of it is the concept of a law-abiding society that respects and protects rights to a basic level both in terms of the substantive content of those rights and in terms of the mechanisms in place that secure observance of the law. The "basic" level referred to is not a primitive or undeveloped level but a level below which there would be no rule of law in the generally accepted sense.
2. My proposal is that the current structure of decision-making in relation to EU competition law does not respect the rule of law in the sense just described. I am not talking about policy-making or the devising of legislation intended to further the purposes of the EU. I am talking about the making of so-called infringement decisions, essentially decisions finding that there has been an infringement of what are now Articles 101 and 102 of the TFEU.
3. The position today is that, so far as is here relevant, infringement decisions may be made by the European Commission ("the Commission"), the competition authorities of the Member States, and by the courts of the Member States.
4. Infringement decisions made by the Commission are made by an entity that combines the functions of investigator, prosecutor and decision maker. The legality of its decisions can be challenged by an action for annulment brought before what is now the General Court. The General Court's jurisdiction extends to all matters of fact and law. In relation to certain types of factual question (typically those involving judgmental evaluations - see, for example, the discussion in *De 20 Ans a l'Horizon 2020*, Court of Justice, 2010, pp 163 and following), the General Court's jurisdiction is limited. In relation to the imposition of a fine, it is unlimited and, therefore, it may substitute its subjective evaluation of the fine for that of the Commission.
5. My proposal is that respect for the rule of law requires that structure to be modified so that the Commission is no longer the decision-maker but is converted into a

prosecutor. The decision-maker will be a specialist competition law court set up under Article 257 TFEU.

6. In the exercise of its jurisdiction, the Commission has occasion to investigate the facts of the case before it; but then the facts found by it are the subject of a second investigation by the General Court in the event of a challenge to the Commission decision.
7. Thus, the facts are investigated twice.
8. However, it should be observed that, at each stage, the fact-finding exercise is defective.
9. The Commission is neither trained nor has the inclination, as an administrative body which combines multifarious functions, to engage in serious fact-finding. It is a notorious fact that evidence is not tested adequately in the course of the Commission's factual investigations.
10. As to the General Court, fact finding is within its remit but dependent upon the constraints under which the General Court exercises its jurisdiction. As in the case of the Court of Justice, the ability of a court dealing with actions for the annulment of a decision made by the (supposedly) primary decision-maker is subject to other calls on judicial resources and to the way in which cases are presented to the General Court. A high volume of actions inevitably restricts the ability of the General Court to deal adequately with issues of fact (as was the case with the Court of Justice, which led to the creation of what is now the General Court).
11. The end result is inimical to the rule of law because neither at the first stage (that of the decision by the Commission) nor at the second (judicial control) is there effective testing of the evidential basis for infringement decisions. Undertakings are put to the expense of either one or (if they commence legal proceedings) two distinct stages of factual investigation, neither of which ensures respect for the rule of law.
12. Further, looking at the problem from the different perspective of the effect on the Commission, the problem resulting from the combination of the investigative,

prosecutorial and decision-making functions into one entity is the emasculation of the enforcement of competition law and the creation of areas of competition law in which lawlessness is encouraged to flourish because of inaction, or the inability to take action, of the decision-maker.

13. Why does that occur?

14. Where the functions of investigator, prosecutor and decision-maker are combined, the entity entrusted with those functions becomes sluggish. Its decisions are lengthy and result from the devotion of, in relative terms, vast resources to bringing a single case to a conclusion. It is necessary to prioritise decisions more than would otherwise be the case. Therefore, large areas of concern are left untouched. The entity pursues a selective policy of investigation and decision-making. Undertakings therefore know, or can work out, which areas are safe from interference and in which anti-competitive conduct can flourish. Difficult, resource-intensive cases are ignored.

15. In part, that results from the concern of the entity always to be right and never to be wrong. The risk that a court will overturn a decision therefore induces paralysis, caution and the over-commitment of resources to a case.

16. None of that is consistent with the concept of the rule of law.

17. The separation of the investigative and prosecutorial functions from the decision-making function would eliminate one, unnecessary, tier of decision-making and free the Commission from a constraint that reduces its effectiveness in ensuring that the law is observed.

18. A last word: a solution to the problem does not lie in the devolution of decision-making to national competition authorities or in the encouragement of civil actions brought before national courts. Some national systems use the EU model and therefore suffer from the same defects; the encouragement of private actions brought before national courts is capable of dealing only with certain types of case, usually the most obvious ones that require no intervention from any competition authority anywhere or else those that follow on from an infringement decision. In

any event, defects in the EU system that affect cases dealt with under that system cannot be excused by reference to other systems that deal with other cases.