The Court of Justice and Judicial Deference (abstract)

Professor Rob Widdershoven (University Utrecht), 11 October 2018, Warsaw

1. In my contribution I will discuss the approach of the European Court of Justice (ECJ) to the topic of the conference, judicial deference. In this respect attention is paid to the two different roles the ECJ may exercise, namely the role of administrative court assessing acts of EU institutions (Art. 263 TFEU), and the role of constitutional court prescribing the level of judicial scrutiny the national courts should exercise when assessing national acts in the scope of Union law, in response to a preliminary question (Art. 267 TFEU). After all, in both roles issues of judicial deference and the intensity of judicial review may be at stake. Therefore this contribution is not only relevant for European lawyers, but for national lawyers who are involved in some way in national cases in the scope of Union law as well.

2. In recent case law the ECJ's approach to judicial scrutiny in its role as administrative court and as constitutional court alike is converging. Formerly the ECJ approached the question of the intensity of judicial review the national courts were required to exercise in EU cases, in the framework of national procedural autonomy. Therefore, as long as Union law had not laid down binding rules as regards the issue in sectoral EU legislation, the MS were allowed to apply their domestic standards of judicial review, provided that the minimum *Rewe* principles of equivalence and effectiveness were met. The ECJ's test on effectiveness was quite deferential and allowed the Member States' courts much leeway to apply their own, sometimes very different standards of review. Within the limits of effectiveness the marginal test on *Wednesbury* unreasonableness applied by the UK courts (Case C-120/97 *Upjohn*) and the strict legality control of margins of interpretation exercised by the German courts were both allowed (Case C-55/06 *Arcor*).

In recent case the ECJ is clearly strengthening its grip on the level of national judicial review of national decisions within the scope of Union law and, as a result, the autonomy approach is gradually but surely vanishing. Instead the ECJ increasingly transports its standards of review of EU acts (as administrative court) to the review to be conducted by the national courts of similar acts and decisions. In the remainder of this contribution this statement will be further substantiated.

3. Before arriving at the issue of judicial deference, I say a few words about situations that judicial deference is not allowed because the administrative authorities do not enjoy any (or only reduced) discretion. In this respect two ECJ's standards of judicial review are relevant, unlimited jurisdiction and strict legality review:

The standard of unlimited jurisdiction is applied by ECJ when assessing competition law sanctions. It implies that the Court is empowered to 'substitute its own appraisal for the Commission's and, consequently, to cancel, reduce or increase the fine or penalty payment imposed' (*KME*, case C-389/10P). However, the unlimited review standard does not apply to the question whether a company has indeed violated the competition rules of Article 101 and 102 TFEU. The assessment of this question is subjected to a review on legality only and is discussed below, in point 6. The standard of unlimited jurisdiction of competition sanctions is connected to Article 47 CFR (and is prescribed by Article 6 ECHR as well). Therefore, it probably applies to the imposition by national authorities of competition law sanctions and of similar national administrative sanctions of a criminal nature in the scope of Union law as well. However, as yet there is no clear case law of the ECJ conforming this statement. This issue is discussed further in the first afternoon session.

The standard of strict legality review is applied by the ECJ when assessing EU acts seriously interfering with fundamental rights, more in particular with the right to respect for private life (Article 7 CFR) and the connected protection of personal data (Article 8 CFR) (*Digital Rights Ireland,* case C-293/12). In this regard the EU institution's discretion is limited or reduced.. From subsequent ECJ's case law it can be derived that the judicial assessment by the national court of similar national interferences should be as strict as the judicial review of such interferences by the ECJ (Case C-203/15 *Tele2 Sverige*). So, this assessment standard is indeed transported to the national courts. The principle of procedural autonomy does not apply.

4. Judicial deference may occur whenever the EU or national authorities enjoy a margin of appreciation or discretion when taking a decision. Conceptually margins of appreciation and discretion can be distinguished. Discretion refers to the situation that the authority balances different political considerations against each other. In case of margins of appreciation the authorities' leeway emanates from the technical, scientific, economic or otherwise factual complexity of the matter under review. However, generally the ECJ does not make a strict distinction between both terms and uses them interchangeably. Hereafter, I will use the term 'discretion' for both forms of administrative leeway.

As regards judicial scrutiny of discretion the ECJ makes a clear distinction between the substance of the decision (and the appraisal of the facts leading to the substance) and the process in which the decision has been established. Judicial review of the substance should be very deferential. According to long-standing case law, the Court is not allowed to substitute their own appraisal of the facts for that of the institution and should limit its review to whether the decision at issue is 'not vitiated by a manifest error of a misuse of power, or that the institution did clearly exceed the bounds of its discretion' (Case 55/75 *Balkan-Import Export*; Case C-225/91 *Matra v. Commission*, Case C-157/96 *National Framers' Union*; Case C-12/03 P *Tetra Laval*). This judicial deference as regards substance is to some extent compensated by a strict process review of the fact-finding activities conducted by the EU-institution, and of the adequateness of the statement reasons. Hereafter I discuss three relevant cases.

5. The first one is the case of *Technische Universität München* (C-269/90*)*, which fairly recently has been reconfirmed in the case of *Fahimian* (see point 7). The case was concerned with the validity of a custom decision of the Commission, based on a technical evaluation, which was binding for the German authorities when deciding on a customs exemption. In his preliminary question the referring German court questioned the lawfulness of the very marginal judicial test of technical decisions by the Court, mentioned above, on manifest error or misuse of power only. The ECJ states:

> *13. It must be stated first of all that, since an administrative procedure entailing complex technical evaluations is involved, the Commission must have a power of appraisal in order to be able to fulfil its tasks.*
> *14. However, where the Community institutions have such a power of appraisal, respect for the rights guaranteed by the Community legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case, the right of the person concerned to make his views known and to have an adequately reasoned decision. Only in this way can the Court verify whether the factual and legal elements upon which the exercise of the power of appraisal depends were present.*

In the remainder of the judgment the Court examines whether the Commission has complied with the principles mentioned, and concludes that they have been violated. It was advised by a group of experts which did not possess the technical knowledge required, it did not provide any opportunity to the person concerned to make his view known on the relevant circumstances and documents and, as a result, the decision did not contain a sufficient statement of reasons. Therefore the Commission's decision was declared invalid. So, in this case a strict review of the fact-funding process compensates judicial deference as regards the substance of the decisions indeed.

6. The approach of *Technische Universität Münche*n has been refined in *Tetra Laval* (Case C-12/03 P). As probably well-known, *Tetra Laval* dealt with the intensity of judicial review of complex economic assessments in a merger case, but the standard developed in it is in a comparable way applied by the Union courts when reviewing scientific or technical complex decisions in other areas of EU law, such as the areas of public health and environmental law. In the case the ECJ distinguishes between review of the establishment of the facts on one hand and review of the appraisal of the facts in the light of the relevant legal framework, on the other. As regards the establishment of the facts the intensity of judicial review is strict. In this respect the Union Courts have to:

> *'establish, amongst other things, whether the evidence relied on is factually accurate, reliable and consistent and also whether it contains all the information which must be taken into account in order to assess a complex situation […]'.*

As regards the appraisal of the facts (and, thus, the substance of the decision) the authorities enjoy a wide margin of appreciation. Therefore the Union Courts are, as stated above, only allowed to assess whether the substance of the decision at issue is 'not vitiated by a manifest error of a misuse of power, or that the institution did clearly exceed the bounds of its discretion'. However, according to *Tetra Laval* this judicial deference in relation to the substance of the decision, is compensated to some extent by a strict review of the reasons of the decision. More in particular, the courts should review whether the information produced is 'capable of substantiating the conclusions drawing from it'.

7. The third relevant case is the recent case of *Fahimian* (C-544/15), in which the ECJ prescribes its approach in *Technische Universität München* to the national courts. In this preliminary reference procedure the ECJ was asked whether under Directive 2004/14 national authorities enjoy a wide discretion which is subject to only limited judicial review in determining whether a third country national applying for a visa for the purpose of study, represents a threat to public security. According to the ECJ the assessment of the applicant's individual situation involves 'complex evaluations' based on multiple relevant factors. In this regard, the competent national authorities enjoy 'a wide discretion'. Therefore, substantive judicial review of the appraisal of the facts should be limited 'to the absence of manifest errors'. However, this judicial deference as regards substance is (at least to some extent) counterbalanced by a strict judicial review of the fact finding process and of the statement of reasons. Referring to *Technische Universität München*, the Court states that in this regard the national court should,

> *'ascertain in particular whether the contested decision is based on a sufficiently solid factual basis'. [..] In addition, 'judicial review must also relate to compliance with procedural guarantees, which is of fundamental importance', and which include 'the obligation for those authorities to examine carefully and impartially all the relevant elements of the situation in question […], and also the obligation to give a statement of reasons for their decision that is sufficient to enable the national court to ascertain […] whether the factual and legal elements on which the exercise of the power of assessment depends were present.'*

From this consideration it is apparent that also the national courts are obliged to combine a very limited substantive review with a strict process oriented review. This review relates to both, the obligation of the authorities to examine carefully and impartially all relevant elements of the situation in question, and the statement of reasons. The judgment contains no reference to the principle of procedural autonomy. Moreover, the judgment does not leave any room for the national court to apply a (possible) more strict national standard of judicial review.

8. What can be concluded from these cases? First, that as regards the intensity of judicial review to be conducted by the national courts in EU cases, procedural autonomy is indeed vanishing. This tendency is also visible in other recent cases, such as *Samba Diouf* (Case 69/10) and *Berlioz* (Case C-682/15). Instead the ECJ increasingly transports its standards of review of EU acts to the review to be conducted by the national courts of similar acts and decisions.

Second, in respect of the large group of decisions which leave the authorities a margin of discretion or appreciation the Court applies and prescribes a combination of a limited review on, in short, the absence of a manifest error of the substance of the decision and the appraisal of the relevant facts, with a strict review of the fact finding process and of the statement of reasons. The process review is concerned with the authorities' examination of the establishment of the facts. This examination must be careful and impartial (*Fahimian, Technische Universität München*) and the evidence relied on must be accurate, reliable, consistent and complete (*Tetra Laval*). Moreover, the fact-finding process must comply with the applicable procedural safeguards, more in particular with the rights of defence (*Technische Universität München*, *Fahimian*). This seems self-evident as these safeguards are the tool *par excellence* for the parties alike to ensure that no relevant facts have been left out in the decision-making process. If the procedural rights are not observed properly, it cannot be ruled out that important facts or circumstances have not been taken into account. In addition, the Court conducts - and requires the national courts to conduct - a test of the authorities' statement of reasons for their decision and the appraisal of the facts on which it is based. This statement should enable the courts to ascertain that the factual and legal elements on which the decisions has been based were indeed present (*Fahimian*, *Tetra Laval*).

9. To conclude, the ECJ's approach towards judicial deference in relation to expert knowledge is mixed. As regards substance, the approach is clearly deferential and the Court does not replace the assessment of the expert administrative authority. In order to, nevertheless, ensure an adequate form of judicial review, the Court applies and prescribes a strict review of the fact finding process and the statement of reasons. So, in so far the Court's approach is not deferential at all. As such this mixed approach seems balanced. What is not very clear to me is how intense the test of the fact-finding process on accuracy, reliability et cetera exactly should be. In this regard the ECJ's guidance seems as yet not very precise. This aspect will probably dealt with in more detail in the workshops to come in the conference. I am looking forward to the workshops and will surely learn a lot.

Thank you for your attention.

Current Debates in Deference to U.S. Administrative Agencies
(for Judicial Deference in Competition Law, Theoretical and Axiological Views)

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My remarks will focus on current debates concerning deference to U.S. administrative agencies. Although the deference doctrines have existed for decades (and some for more than a century), they are, to varying degrees and intensity, always under attack. These attacks—whether deference to legal, factual, or discretionary matters—are grounded on separation-of-powers, statutory vagueness, and utility. I shall address deference to facts and discretion briefly first; they are less controversial than deference to legal interpretations. I shall then turn to challenges to deference for agencies' statutory interpretation.

Deference to Facts. The Administrative Procedure Act (APA)—a statute that provides default rules for federal agency proceedings—requires federal courts in nearly all instances to review agency factual findings under one of two standards: either under an arbitrary-and-capricious standard for less formal proceedings or under a substantial-evidence standard for more formal proceedings. (Some courts treat the latter standard as more searching than the former, but others see the latter standard as only an application of the former.) Deference to factual findings furthers various values. It recognizes that agencies likely have more expertise, and it promotes efficiency because agency proceedings are almost always less formal than judicial ones. Finally, it can promote uniformity as to certain factual matters that are common to numerous cases because, instead of having judges from around the country deciding facts separately, the agency can decide facts in aggregated cases. But, more cynically, it allows courts to have less involvement in cases that they may not find interesting.

The challenges to deferring to agency fact-finding are relatively muted, but they are mostly grounded in U.S. constitutional notions of separation of powers. One argument is that for at least those matters that European courts would likely refer to as "criminal administrative matters"—those concerning fines or penalties—Article III courts (those with judges who essentially have life tenure) must provide de novo review before entering an order that deprives a party of traditional notions of property or liberty. Similarly, others contend that courts have been too quick to excuse agency fact-finding from the U.S. constitutional right to a civil jury trial. For these challengers, the independence of an Article III judge or a jury prevails over expertise and, especially, efficiency. But the case law contrary to these challenges is significant and has an established provenance, indicating that these challenges are unlikely to succeed.

Deference to Discretionary Decisions. The nature of judicial review for "discretionary" decisions, despite being ill defined in the APA, it is likely the most common. The APA does not specifically create a category for discretionary decisions, but courts have created the category over time and applied the arbitrary-and-capricious standard, which has become the default standard under the APA. This standard applies to most regulations and less formal agency decision-making. Deference promotes administrative expertise and uniformity, much as deference to agency fact-finding does. But it also promotes political accountability and respect for legislative delegation to expert agencies to consider problems that require dynamic responses.

The key disputes surrounding the review of agency discretion are the types of disputes that qualify as "discretionary" and the intensity of judicial review. First, distinguishing discretionary decisions from legal interpretations has proven difficult, but that difficulty is not insurmountable. In large part, the difference depends upon the specificity or broadness of the statutory term or phrase that the agency invokes when acting. The narrower the phrase (e.g., "stationary source" in the context of a factory's pollution-emitting sources), the more likely that courts will deem the interpretation legal in nature. The broader the phrase (e.g., "reasonable regulation"), the more likely that courts will deem the agency's interpretation discretionary. Second, courts have long struggled with how intense their review should be under the arbitrary-and-capricious standard. The APA's enacting legislature appeared

to seek—and courts for the decade or so after the APA's enactment provided—minimal review. From the late 1960s, however, courts have created two forms of review. For issues with more economic or political importance, courts will likely use what is referred to as "hard look" review by giving the agency's action an intensive review to ensure that the agency considered appropriate factors, did not consider inappropriate ones, and fully addressed the record before it. For lesser issues, courts are more likely to use "soft glance" review by providing more cursory review and more deference to agency reason giving. The difficulty is determining when an issue is weighty enough to require hard-look review and having courts apply consistent forms of review.

Deference to Statutory Interpretation. The most significant issues for deference concern judicial review of agency legal interpretation. There are two key forms of deference—each named after a case that helped establish them. First, under *Skidmore* deference, the court retains interpretive primacy, but it may defer after considering certain factors, including the thoroughness, consistency, and validity of the agency's reasoning. (Indeed, because courts can choose their best reading of the statute, many have questioned whether *Skidmore* is appropriately deemed a deference doctrine.) Second, under *Chevron* deference, the *agency* has interpretive primacy to provide reasonable interpretation of ambiguous provisions in statutes that the agency is charged with administering. *Chevron* has a well-known two-step process. The first step asks whether the statutory provision is ambiguous. If it is not, the court simply enforces its clear meaning. If the statute is ambiguous, then the court under the second step assesses whether the agency's interpretation is reasonable. In contrast to *Skidmore* deference, the court may not choose its preferred or best reading of the statute if the agency's interpretation is reasonable.

A growing view during the past decade had been that deference doctrines, in fact, do not really matter. A prominent U.S. scholar (Professor Richard Pierce) has compared various empirical studies and concluded that debates over deference doctrines of all stripes are unnecessary because agencies prevailed 2/3 of the time no matter how the courts reviewed the agency action. Recently, a co-author (Professor Christopher Walker) and I completed the most comprehensive review of judicial review of agency statutory interpretations in the intermediate federal courts of appeals. We found that deference doctrines as to statutory interpretation do appear to matter because agency-win rates significantly differ under the various deference regimes. Because the doctrines affect judicial decisionmaking, considering their theoretical grounding and effects is worth the effort.

As for challenges to deference for legal interpretations, I shall concentrate on challenges that concern *Chevron* deference (as opposed to de novo review with or without *Skidmore* review). The challenges, in my view, arise largely from *Chevron*'s questionable primary justification (legislative delegation to agencies) and its failure to account for how secondary justifications fit with the doctrine (expertise, uniformity, and political accountability). In my presentation, I shall discuss the need for these justifications and their tension with one another. I shall conclude by considering how a more orderly, searching inquiry into whether statutory ambiguity or vagueness exists may leave a smaller, yet more legitimate space, for agency institutional advantage in statutory interpretation.

Judicial deference from a broader perspective on controls in the system of the rule of law

By Miroslava Scholten

Short abstract

Judicial deference is a part of the judicial review and more in general judicial control over the use of public authority. The debate in many jurisdictions has been about how intense the judicial deference *should* be. I propose to address this question by taking a 'higher' (bird) view at the system of the rule of law, its many components and the function of judicial deference in there. My key message is the following. Different jurisdictions use different logics and arrive at different tests developed by the courts to set the 'rule of the game' for judicial deference but none withstanding these differences, the function of the mechanism is the same. It is to prevent abuse/misuse of public power by public authorities, while preserving effective operation of the executive machinery. To determine/assess to what extent judicial deference ensures this function in a particular jurisdiction one needs to look at the broader system of control. This broader picture requires mapping out the availability and (depending on the methods used) effective operation of other relevant types of controls, such as administrative review and political accountability, as well as

the balance between ex ante and ex post procedural safeguards. The availability and operation of these other mechanisms will impact the need for and scope of judicial deference to create an effective system of controls and the rule of law without undesirable gaps in control and excesses which could jeopardize the effectiveness of the decision-making.

My presentation

To present my message, I will focus on the three points. I will first give a snapshot of the key elements in the debates of the EU and US judicial deference tests presented by the leading experts in this field just before me. Second, I will try to map out the whole system of the rule of law, i.e., different types of controls for different types of actions. Third, I will make my first observations on how the intensity of judicial deference can and perhaps should be determined in light of the bigger picture.

1. *Judicial deference: a snapshot on the US and EU key elements*

Elements in the debate	***EU***	***US***
Intensity variables	Facts (process), Substance (discretion to determine somethings (like sanctions), balance political considerations)	Facts, Discretion (ambiguity of the statutory language), Legal interpretation of statutes
Who checks the public authority action?	EU vs. national courts (+national procedural autonomy?) Agency (for substance if discretion) vs. judicial check (fact-finding/process review) Exceptions: 'strict legality review' (Fundamental rights at stake)	Agency (for facts due to expertise, for discretion due to the pol. Accountability and if specific statute) vs. courts (for broad discretion; statutory interpretation: Skidmore and Chevron) Exceptions: 'Article III courts' when the questions involve 'higher values ('property, liberty')

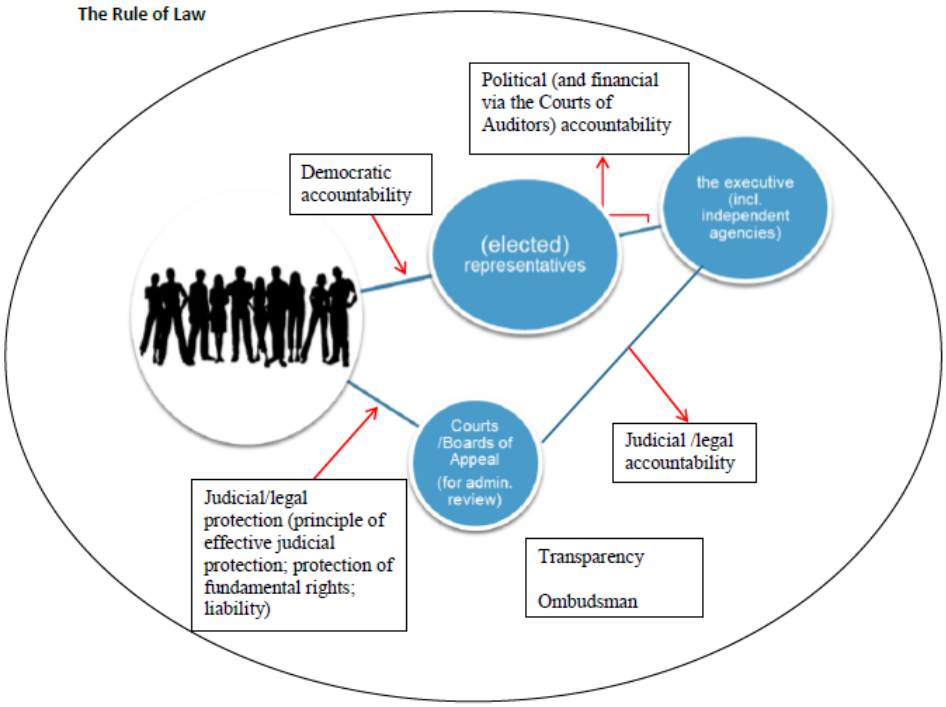
2. *Ensuring the rule of law (control over the public power)*

If you try to collect different types of control over public power (and the concepts used so far in different disciplines and literature list), you come up with a picture like this (see below, a first draft).

An executive branch institution is under control of many accountability forums, like parliaments, courts, ombudsman, auditors, etc. They focus on different parts of performance, activities and actions. Judicial deference is a part of judicial/legal accountability and implies the scope of it. The function of judicial deference is to ensure a judicial check while keeping the system of public administration operating effectively (without unnecessary delays in the decision-making process, promoting legal certainty, uniformity in application of law and not jeopardizing the reputation of the decision-makers (such as competition authorities, which could be done by constant overruling decisions by the courts). The trick in the question on 'intensity' is to make this scope striking the right balance between ensuring the control of an agency's action, on the one hand, and the effective operation of the executive, on the other hand. In a way, we could think about a formula:

judicial deference (scope/intensity) = ***agency expert decisions*** *(i.e., substance and process)* ***– relevant controls*** *(i.e., ex ante decision-making procedural safeguards (like the US 'notice and comment', etc.) + possible (specialized) administrative review + political accountability (more?))* ***+ 'FR guarantees'***.

So, the degree of intensity would be right if controls, including special guarantees (FR), and effective operation were ensured. I do not necessarily argue that this is the final version of the formula. It is my first thought experiment, but I think having such a formula (perhaps a fine-tuned version of it in the future) could help us to ease a comparison between different jurisdictions and their tests, to understand/explain why these tests the way they are and the q of what the intensity *should* be (and a more theory-like development of the concept).



3. *Looking through this formula at the mentioned examples*

I think that this logic of determining the scope/intensity of judicial deference in light of a boarder picture seems to have been there already, but perhaps not explicitly.

Prof. Widdershoven talked about the balance in the EU doctrine between checking the process to compensate for less of a check on the substance to allow for agency's expertise not to be replaced by that of a court. The logic of this is in fact balancing between the effective administration and the rule of law.

Prof. Barnett talked about an 'easy check' on facts and deference to discretionary decisions (esp. when the statutory language is very specific), which is also based on the same idea – balance between the effectiveness and the rule of law. If we have political accountability over agencies' top officials, policies of adoption certain rules, ex ante procedural guarantees like the notice and comment, reg neg, right to be heard before the decision is taken, etc., then the judicial check could be lessened. If my ideas, formulas, etc, make sense, I think that further discussion and research should go towards the direction of testing/refining the formula in terms of specific components on the relevant types of controls and if applying it, we need to check what issues of agencies' performance escape the checks, where, so that judicial deference could provide this check and vice versa. Clearly, other types of controls will be of different nature and scope, in this sense, we need to look for

To conclude, today's conference focuses on an important notion of judicial deference, its many faces in different jurisdictions and challenges that it may face or cause. With my presentation, which is based on my first thought experiment, I hope that I have provided you with a broader picture on this notion, putting it 'in a perspective', of the system of the rule of law. This could be helpful to understand why certain tests have been developing as they are, to compare different jurisdictions and further research, assess and design the judicial deference doctrines. In a larger picture, my ideas of today are based on a project that I have started with prof. Alex Brenninkmeijer (member of the ECA and a former Dutch Ombudsman and judge) on all kinds of concepts of control ensuring altogether the rule of law. We want to explore there how all these concepts like judicial deference, political accountability, liability, etc. could be aligned together to close possible gaps and avoid undesirable excess in controlling the public power to preserve its effectiveness.

The Review of the European Commission's Economic Assessments by the General Court

Andriani Kalintiri

Economic assessments are an intrinsic element of competition enforcement. This is hardly surprising, given the ecosystem with which competition law is concerned – that is, the market, and its function – that is, discouraging anticompetitive forms of firm conduct without chilling procompetitive behaviour. Being the body in charge of securing compliance with the competition rules, the European Commission regularly performs evaluations of an economic nature, which may be subsequently challenged before the General Court in the context of an action for annulment. The question thus arises how the latter reviews the authority's economic appraisals. Generally, there are two standards of judicial scrutiny: full review and marginal review. Full review is the applicable threshold of control with respect to questions of law and of fact. By contrast, where the Commission's decision entails complex economic evaluations, judicial intervention is confined to instances where the authority has committed a 'manifest error of assessment'. As further clarified in *Tetra Laval*, however, this does not mean that the EU Courts will refrain from reviewing the Commission's interpretation of information of an economic nature. Rather, they must establish whether the evidence relied on is factually accurate, reliable and consistent, whether it contains all the information that must be taken into account in order to assess a complex situation, and whether it is capable of substantiating the conclusions drawn from it.

This clarification is certainly welcome. Nevertheless, the judicial review of the economic assessments performed by the Commission remains somewhat elusive. For one, the language employed by the EU Courts creates the impression that all complex economic appraisals are subject to marginal review. If the latter is the exception, rather than the norm, though, one should be able: (a) to define 'complex economic evaluations' – insofar as it is their presence which activates the operation of a less strict form of judicial scrutiny; and (b) to explain in what respects manifest errors of assessment are different from errors of law and errors of fact. To this end, several endeavours have been made to understand, on the one hand, what a 'complex economic appraisal' is, and, on the other hand, what makes an error of assessment 'manifest'. Indeed, recognizing that competition analysis encompasses by default economic evaluations, commentators have attempted to define the criterion of 'complexity' as a more promising way of demarcating the circumstances where marginal review will be engaged. Likewise, an error of assessment is said to be 'manifest', where it is 'obvious' and it could have had a 'decisive effect on the outcome' of the analysis. While, however, these efforts have shed some light on the judicial review of the Commission's economic appraisals, they have not succeeded in removing the feeling of elusiveness surrounding the matter.

Against this backdrop, it is submitted that, in order to understand how the General Court reviews the Commission's economic assessments in competition cases, one must let go of two assumptions. First, that all 'complex economic appraisals' are part of the same homogeneous category and subject to marginal review. Second, that 'manifest errors of assessment' comprise errors of a single kind and quality, which are fundamentally distinct from errors of law and of fact. Indeed, the authority may carry out evaluations of an economic nature in two different contexts: on the one hand, when it interprets the law; and, on the other hand, when it applies its interpretation of the law to the facts of the case in question. For instance, determining whether pay-for-delay agreements or the grant of exclusivity rebates by a dominant firm should be subject to a rule of *prima facie* illegality requires carrying out economic assessments. The authority must consider the nature of the practice at hand, its impact on competition and the implications of a *prima facie* prohibition or of case-by-case intervention for future firm conduct, the cost of enforcement and the cost of business compliance.

Economic assessments underpinning the construction of the law, however, are subject to *full* – not marginal – review. The interpretation of EU law is in accordance with Article 19(1) TEU the sole prerogative of the EU Courts, which have consistently confirmed that they 'cannot use the Commission's margin of discretion (…) as a basis for dispensing with the conduct of an in-depth review of the law'. While the administrative model of enforcement in place means that the competition rules are constructed at first instance by the Commission, the EU Courts have the final – and exclusive – say on the matter and, in principle, the authority enjoys no latitude in this regard. This remark is important from an evidence perspective. Both the authority and the undertakings concerned may produce evidence in support of their preferred construction of the competition rules, but – formally speaking – the latter is not subject to the standard of proof. Admittedly, however, where the competition provisions are interpreted in the context of judicial review proceedings, the line between law interpretation and legal qualification may not be easy to distinguish. In practice, the record of the General Court in reviewing the Commission's interpretations of the law and

the underlying economic evaluations has been mixed. Some cases, such as *Airtours*, have signaled that the General Court will thoroughly review the authority's construction of the competition rules in line with economics. Other cases, however, such as recently *Cartes Bancaires*, *Intel* and *Lundbeck*, may cast some doubt on this and the General Court's judgments have been appealed before the CJEU.

Turning now to the second context in which the Commission may perform economic evaluations, that is, when it applies the law to the facts of a specific case, the authority seems to enjoy some margin of appreciation: it is free to decide which theory or theories of harm to pursue, how to investigate the case and what tools to use. In this respect, the General Court may not substitute its own economic assessments for that of the Commission. Nevertheless, marginal review is far less marginal than what one might initially think. A look at the case law suggests that 'manifest errors of assessment' may take four different forms: a failure correctly to assess the material facts underpinning the Commission's evaluations; a failure to take into account a relevant factor; taking into account an irrelevant factor which distorted the outcome of the analysis; and a failure to satisfy the standard of proof. Accordingly, thinking of 'manifest errors of assessment' as a single object category is inaccurate. This marginalization of marginal review can be largely attributed to the *Tetra Laval* formula, which has armed the EU Courts with the perfect Trojan horse. On the one hand, the evidence-qualification of the 'manifest error of assessment' test confirms that the Commission's *exercise* of its margin of appreciation is subject to an important caveat: the authority is legally required to demonstrate that its chosen approach is justified and thus among the 'correct' ones. On the other hand, *Tetra Laval* makes it clear that the EU Courts remain the ultimate arbiters of the factors that must be taken into account in order to assess a complex situation. In view of its margin of appreciation, one would be excused to think that the Commission would have a strong say in what is relevant and what is not. Interestingly, however, the EU Courts have employed evidence-related wording to retain this role for themselves.

Having said this, it is worth making two further comments. First, one should not confuse economics-grounded competition analysis with complex economic evidence. As the EU Courts have correctly explained, it is not necessary to produce economic evidence to substantiate an economic assessment and there is no reason to prioritize such 'technical' evidence over other forms of relevant information – for instance, documents. Moreover, because economic evidence is exactly that, i.e. *evidence*, its probative value should be determined by the General Court independently in accordance with the principle of unfettered evaluation, irrespective of whether it has been produced by the Commission or the undertakings. In other words, the authority's margin of appreciation is confined to the *production* of economic evidence; it does not extend to the weighing of its probative value. Second, economics may also play an indirect role in the judicial review of the Commission's economic assessments: it may serve as a backdrop for making sense of the evidence or as a benchmark against which to evaluate the available information. The economic premise, for instance, that conglomerate mergers are generally neutral or beneficial for competition sets the tone for the way in which a Commission decision prohibiting such a concentration – and the underlying economic assessments and evidence – will be reviewed.

Judicial Review of National Competition Authorities' Economic Assessment: Underlying Conditions and Consequences

Annalies Outhuijse

The practice of challenging EU cartel fines and the success of such challenges is described in several studies for different periods, sometimes even reaching back to the 1950s. These studies, particularly when read together, provide exhaustive information on the number of appeals and their successfulness, and sometimes offer indications on the incentives for challenging fines, on factors which distinguish undertakings which go to court from those which do not, and on cases which are successful or not.

Empirical assessment of challenges to national cartel fines and their successfulness is in contrast very limited to non-existent. Previous research into Dutch enforcement – which is characterised by high rates of challenged and annulled cartel fines – has shown that this provides interesting insights. My research explaining the high percentage of successful litigation in the Netherlands entailed an analysis of the rates of challenged and annulled cartel fines in nine other European Member States: Belgium, Bulgaria, Croatia, Finland, France, Germany, Italy, Sweden and the

United Kingdom. The analysis of the appeal rates in those countries showed that the Netherlands is not unique. Although the type and number of annulments differ, other national courts also conclude that fines should be annulled, for example because of insufficient evidence, or because the amount of the fine should be reduced.

The comparison among Member States indicates that jurisdictional characteristics, such as the court which reviews the case and the powers of review of this court, have an important influence on this phenomenon, in addition to the nature of the case. The characteristics of judicial review vary extensively among the Member States as a result of the constitutional arrangements and competences conferred to the judicial branch. Even though these standards of review must comply with EU law and the law of the ECHR, the scope and intensity of the judicial review can vary and lead to different outcomes. The European legislature and European Courts have so far avoided setting guidelines for judicial review specific to competition law, in contrast to for example telecommunications law. Therefore, similar topics will continue to be reviewed differently in the Member States as a consequence of the procedural autonomy that the Member States enjoy, as long as the basic requirements of equivalence, effectiveness and effective judicial protection are guaranteed.

The presentation covers the research that shows that the Member States apply different systems of judicial review of national competition authorities' economic assessment with a particular focus on cartel fines: the national courts, both first and second instance courts, vary in the sense whether economic assessment is reviewed and with which intensity it is reviewed. There are also clear differences in whether the agencies, according to the courts, are supposed to pursue detailed market analyses to assess whether specific conduct is anti-competitive or whether the use of legal presumptions of anti-competitiveness of certain behaviour is sufficient. In addition to the description of the differences as prescribed by the respective national laws, the presentation will focus on underlying factors which lead to differences of judicial review in practice, such as degree of specialisation of the courts, and the consequences of the judicial review for the cartel fine.

In case of cartel fines, the prescribed standard of review in most countries differs depending on which elements are under review. Many national courts fully review the establishment of the facts, the interpretation of the law and the compliance with the relevant procedures. They may evaluate whether the findings of the authority are correct with regard to these matters. However, as will be set out in the presentation, the review differs among the Member States if the authority disposes of any margin of appreciation or discretion for certain elements of the decision, which is in particular the case where it concerns economic analysis.

As will be illustrated by several examples, in some Member States, the courts only require limited economic evidence from the NCA based on presumptions and will for example not require an analysis of the relevant market and if presented merely reviews this element of the fining decision marginally. In other Member States, though, the courts require, if disputed by the companies fined, an detailed analysis and will review whether this analysis and the conclusions drawn from it are correct and not merely review whether it is patently unreasonable or as the European Court describes it, involved a manifest error of assessment. Moreover, it is an emerging tendency of some national courts to apply full, at least more intensive, review of discretion in specific circumstances, and broaden the scope of what is reviewed. Several courts showed, after an initial reluctance, an increasing willingness to review the core of administrative decisions on economic issues.

In several Member States, such as the Netherlands, there is ongoing discussion what can be and should be requested from the competition authority with regard to economic analysis and the intensity of the review by the courts of these elements for fine imposition but also determination of the fine. Finally, the presentation will also show that, as also observed earlier in the literature, that the application of a certain scope and intensity of review may not only differ depending on the circumstances of the case and what is prescribed by law, but also depend on other features such as the judges' expertise and their strength. For some Member States, it also prescribed that the intensity of review in case of margin of appreciation will depend on the expertise of the court, while in others the intensity of the review will depend on the expertise of the authority.

Krystyna Kowalik-Bańczyk

Outline of the presentation:

Intensity of Judicial Review of Fines in EU Competition Law

Jurisdiction of the General Court of the European Union covers different domains and has a variable character. Considering the statistics, the General Court is first and foremost an administrative court of the European Union, controlling, under article 263 of the Treaty on the Functioning of the European Union (TFEU), the legality of acts issued by the institutions, organs and other bodies of the European Union. I don't mention here other fields of jurisdiction of General Court. The usual scope of control consists in a legality control, where the General Court analyses the pleas raised by the parties as to the illegality of the measure (usually decision) in question. There are however, in this administrative jurisdiction, two cases of extended scope of control. Those two specific cases cover: first, the control of decisions issued by the Board of Appeal of the Office of the Intellectual Property of the European Union (EUIPO), where the Court exercises a kind of "broader" control (or "full review"), and, second, **the control of penalties imposed by the institutions of the European Union, where the General Court has the so-called unlimited jurisdiction**. The most prominent case of this unlimited jurisdiction is provided in the antitrust law. There the judicial review comprises two very distinct aspects: review of legality and review of the amount of the fines imposed by the Commission. The implications for the General Court are very different, in terms mainly of its possible activism. Is the General Court to be very active to use its unlimited jurisdiction? Is it to use it towards the sanction only or towards the whole mental process leading to the imposition of a sanction – in the second scenario would it not be held to be "over-active"? Unlimited jurisdiction implies a transfer of powers because the General Court replaces the Commission in its reasoning. The General Court can rely on new evidence and rely on facts post-dating the decision. However in two recent cases (C-389/10 P KME Germany v Commission and C-603/13 P Galp Energia España) the Court of Justice made it clear that unlimited jurisdiction only covers the setting of the fine and not the whole assessment of circumstances leading to the decision in question.

Despite this precision as to the scope of activism of General Court while exercising its unlimited jurisdiction, there are at least three main questions that need to be addressed and will be answered by the presentation:

1) what is the exact scope of unlimited jurisdiction?
2) what is the intensity of control in case of unlimited jurisdiction?
3) what is the quality or method of control in case of unlimited jurisdiction? (how to readapt or recalculate the amount of fine and is the court prone to do this, replacing the reasoning of the European Commission ?)

Dawid Miąsik

Intensity of judicial review of fines in Poland - abstract

General thesis

Intensity of judicial review of fines in Poland depends on: **(I)** the quality (persuasiveness) of the justification set out in the decision of the Office of Competition and Consumer Protection (hereinafter the NCA), especially those regarding: 1) public interest in fining (functions of fines); 2) individual circumstances of each case and each defendant (in restrictive agreements cases); 3) internal (resulting from the NCA practice) and external (statutory or judicial) limitations of the NCA's discretionary powers.

General background of the restrictive approach of the judiciary to judicial review of the NCA's fining policy

- Real introduction of the antitrust law when the country was undergoing economic transition – state created monopolies transform into state controlled or private monopolies
- State involvement in the economy – several "clients" of the NCA have been either state or public entities or undertakings controlled by the state
- Use of antitrust rules as the only ready-to-use tool of the public administration to correct the state failure to properly set out the rules organizing the operation of different markets
- Socio-legal background of the early cases

Statutory background

- Permanent difficulties resulting from imperfect statutory and theoretical foundations of the procedural rules applied in antitrust cases resulting from the application of the administrative procedure code at the NCA's level and the application of the civil procedure rules before the courts
- Full review of the NCA decision – no statutory limitations with the exception of the scope of review demanded by the applicant (with regard to fines the result is that no higher fine may be imposed by the court than the fine imposed by the NCA – encouragement to litigation), the intervention of the NCA is made "in the public interest", a fine "may be imposed", open-ended list of factors to be used when determining the amount of the fine.
- judicial limitations established concerning the subject-matter of the decision and the fine: decision may be corrected / amended / repealed partially or totally or upheld but the court must not exceed the initial scope of the decision.
- Low judicial costs (excluding the costs of legal representation)

Intensity of judicial review of fines and the Supreme Court (SC)

- Judicial deference and the SC – the concept directly accepted, however courts not bound by the practice or policy of the NCA
- Fines seen as one of many remedies at the disposal of the NCA
- Importance of the aims of fines and the quality of reasoning of the NCA (lower court) - substantially high fines accepted if the reasoning of the NCA / court is proper
- No review of fines at the level of the SC unless the fine manifestly disproportionate
- Assessment of the conduct of each individual undertaking
- Fines amounting to 10 x estimated profits resulting from illegal conduct deemed to be proportionate (cost savings, profit margins, etc.)
- Attempts to link the amount of a fine to the turnover derived from the relevant market(s) – dropped?
- Irregularities in the market concerned (in general) support higher fines
- Tolerance of fines for "new" practices, however higher fines should be applied in cases concerning "established" restrictive practices
- Principle of equality – "prior / present" (at the date of decision) fining practice of the NCA may influence the court's assessment, however "later" policy change is irrelevant
- Principle of legitimate expectation – prior non-fining actions of the NCA concerning the same undertaking or its predecessor (regarding the same behavior), sudden change of the NCA interpretation of law – limit the ability of the NCA to impose fines

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Consumers' access and participation in the public enforcement of EU competition law and its Implication for Judicial Review

Kati Cseres, University of Amsterdam

This presentation will assess the intensity of judicial review exercised by the EU Courts concerning decisions of the European Commission and more specifically their judicial deference to the Commission's discretion from the slightly unusual perspective of consumers' access and participation in the public enforcement of EU competition law.

The participation of consumers in the public enforcement of competition law by the EU Commission is grounded on the instrumental function of their intervention. Consumers are important "watchdogs" who may assist competition authorities in monitoring and understanding markets. Consumers' knowledge of the day-to-day functioning of markets, in particular those in mass-market consumer goods, make consumers and consumer organisations important information providers for competition authorities by way of bringing complaints and/or initiating damages actions before national courts. Especially outside the area of hard-core (secret) cartels the information advantage may lie with private actors such as consumers - rather than public authorities. With regard to vertical agreements and abuse of dominance, suppliers or buyers are often aware of restrictions in contractual agreements.[1] In these cases, consumers may have the necessary information through their contractual relationship with the wrongdoers.

In this sense, consumers provide information that might be relevant to achieve an accurate representation of the factual situation that will enable the competition authority to issue a materially correct decision in correspondence with the truth of the facts.

Consequently, consumers' participation and the information they provide in the course of the procedure can enable the competition authority to substantiate the ways in which it has collected the information that bases its complex economic assessments and thus comply with the standard of review defined in *Tetra Laval* that requires evidence to be "factually accurate, reliable and consistent", complete and "capable of substantiating the conclusions drawn from it".[2]

However, consumers' access and participation in the procedure still largely depend on the Commission's and the national competition authorities' discretion and assessment concerning the extent to which their interests are affected by the alleged competition law violations.

Therefore, and as a matter of principle, judicial review of the Commission's administrative discretion is limited.

Accordingly, where the Commission and NCAs are given a "wide margin of discretion" judicial review should be limited to verifying "whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated, and, whether there has been any manifest error of assessment or misuse of powers."[3]

However, this principle according to which judicial review of discretionary powers should be limited has not prevented the General Court and the Court of Justice from reviewing rather rigorously the factual basis and the qualification of complex economic and technical assessments.

As already cited above, in Tetra Laval, the Court of Justice acknowledged that "Not only must the Community Courts, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it."[4]

[1] Competition authorities may have neither the resources nor incentives to identify cases of vertical restraints or abuses of dominant position.
[2] Case C-12/03P, *Commission*v. *TetraLaval*, EU:C:2005:87, para39
[3] Case 42/84, Remia and Others v. Commission, EU:C:1985:327, para 34
[4] CaseC-12/03,*Commission*v.*TetraLaval*,EU:C:2005:87,para38.

It has been argued that the line of case law initiated with *Tetra Laval (*as well as the duty of care), enable the reviewing court to scrutinize the information on the basis of which the act was adopted, the way the decision-maker has collected and treated that information and to assess the plausibility of the conclusions it took therefrom.[5]

I will argue that despite the fact that consumers' participation could in fact strengthen the ways in which competition authorities collect the information that is needed to establish the relevant factual and legal aspects of a given case and could thus justify courts' deference to the competition authorities' discretion, it is this very discretion and its marginal review that stands in the way of such "improvement" of the administrative decision-making.

The predominantly instrumental rationale of the intervention of consumers as third parties in the European competition law procedures is well established in relation to complainants.[6] Complaints are an essential source of information for detecting infringements of competition rules. In its Notice on handling of complaints the Commission underlines that it "wishes to encourage citizens and undertakings to address themselves to the public enforcers to inform them about suspected infringements of the competition rules."

As EU competition law now stands, consumers can have direct access to the administrative procedure conducted by the Commission.[7] However, having access does not mean that the conditions upon which access is granted enable them to protect their economic interests.

The conditions under which final consumers may access the EU competition law procedures and the question of which procedural rights they are entitled to in this procedure have been extensively analysed elsewhere.[8]

In short, whether consumers are accepted to the EU competition law procedure depends on a discretionary assessment of the Commission or of the Hearing Officer on how the alleged illegal conduct affects their legally protected interests. There are *Outer limits* to consumer participation – i.e. those that condition *a priori* consumers' access to the public enforcement procedure[9] – result from the Commission's discretion in setting priorities and deciding whether to pursue certain complaints. [10]

I will discuss these outer limits and the way the General Court has been assessing the question whether the Commission can reject a complaint[11] in light of recent judgments of the General Court in Si.mobil[12], EasyJet[13] and

[5] Joana Mendes, 'Discretion, care and public interests in the EU administration: Probing the limits of law' 53 *Common Market Law Review*, Issue 2, pp. 419–451.

[6] recital 5 of the Regulation 773/2004,. Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, para. 3.

[7] Art. 27(1) and (3) of Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, O.J. L 1/1 and Art. 6 and Art. 13 of Regulation 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, O.J. 2004 L 123/1.

[8] Cseres, K.J. and Mendes, J. (2014), 'Consumers' access to EU competition law procedures: outer and inner limits' C*ommon Market Law Review* 51(2) pp.4 483–522

[9] Priority setting is a basic tool of public administrative authorities to rationalize resource allocation and to optimally deal with financial and human resource constraints. Choosing and pursuing articulated priorities with a reasonable and well-explained rationale can enhance the effectiveness as well as the credibility of administrative action.[9] Administrative entities generally use priority criteria as filters to help them determine which actions are likely to lead to the desired results.

The main principles governing the Commission's obligations and margin of discretion when it receives complaints have been laid down in *Automec II*, a case that concerned the extent of the Commission's obligation to examine complaints. Case T-24/90, *Automec Srl*, [1992] ECR II-2223.

The *Automec II* principles are the most important pillars of complainants' participation in competition law procedures. These principles, currently enshrined in the 2004 Notice on the handling of complaints (Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, O.J. 2004, C 101), still guide the Commission's priority setting when enforcing Articles 101 and 102 TFEU.

[10] Article 105 TFEU has conferred wide powers on the Commission to fulfil its law enforcement tasks. Case T-24/90, *Automec Srl*, para. 73.

[11] The Court of Justice has also pointed out that Article 13 of and recital 18 in the preamble to Regulation No 1/2003 reflect the broad discretion which the national authorities joined together in the network of competition authorities have in order to ensure an optimal attribution of cases within the latter (judgment of 14 February 2012 in *Toshiba Corporation and Others*, C-17/10, ECR, EU:C:2012:72, paragraph 90). Given the role assigned to the Commission by the TFEU in defining and implementing competition policy, the Commission, *a fortiori*, also has a broad discretion when applying Article 13 of Regulation No 1/2003.

[12] T-201/11 Si.Mobil ECLI:EU:T:2014:1096

[13] T-355/13 EasyJet ECLI:EU:T:2015:36

Agria Polska[14], concerning the interpretation of Article 13[15] of Regulation 1/2003. The General Court (and on appeal in Agria Polska the Court of Justice) argued that the Commission may reject a complaint in accordance with Article 13 of Regulation 1/2003, on the grounds that a Member State competition authority is dealing or has dealt with the case. These cases demonstrate that even though the General Court acknowledges the fact the Commission's discretion "as how it deals with complaints is not unlimited" and thus it "must take into consideration all the relevant matters of law and of fact in order to decide on what action to take in response to a complaint. More particularly, it must consider attentively all the matters of fact and of law which the complainant brings to its attention"[16] and "where the institutions have a broad discretion, respect for the rights guaranteed by the legal order of the European Union in administrative procedures is of even more fundamental importance; those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case",[17] the "review by the Courts of the European Union of the Commission's exercise of the discretion conferred on it in this regard must not lead them to substitute their assessment of the European Union interest for that of the Commission, but must focus on whether the contested decision is based on materially incorrect facts, or is vitiated by an error of law, manifest error of appraisal or misuse of powers."[18]

I will critically assess the GC's reasoning in these judgments in light of the decentralized enforcement system and more specifically in light of a tentative assessment of Member States' administrative procedures that often fail to provide effective access to consumers (and other third parties) to the public enforcement procedures of competition law.

There are also *inner limits* that result from the way administrative enforcement procedures are structured, once consumers are admitted to the procedure. The present model of infringement procedures for the enforcement of EU competition law have been conceived along a strictly bilateral scheme. The procedure gravitates around the relationship that opposes the Commission and the undertaking targeted by its investigations. All other natural or legal persons concerned by the procedure are considered third parties, and intervene in different procedural qualities.[19] This bilateral structure has been enshrined in the EU regulations that have ruled this matter since the outset of European integration.[20] It mirrors the adversarial nature of the procedure. This way of conceiving the procedure seems to be fully justified by its object and by its possible outcome: the procedure assesses the conduct of undertakings investigated for an alleged infringement to competition law rules and may lead to a decision that impacts negatively on their legal sphere. Access to the procedure of persons other than the targeted undertakings is filtered by a discretionary assessment of their interest to participate.[2122] The participation of complainants in infringement procedures depends both on the Commission's assessment of their "legitimate interest",[23] and on the Commission's finding that there is a Union interest in pursuing the complaint (Art. 5 to 9 of Regulation 773/2004).

[14] T-480/15 Agria Polska ECLI:EU:T:2017:339, C-373/17P Agria Polska, ECLI:EU:C:2018:756

[15] On the question whether the Commission can reject complaints where "*one authority is dealing with the case*" (13(1)) or where a complaint "*has already been dealt with by another competition authority*" (13(2)).

[16] Para 18 T-355/13 EasyJet

[17] Para 19 T-355/13 EasyJet

[18] Para 19 T-355/13 EasyJet

[19] The term "persons" refers here both to natural and legal persons. It is acknowledged that in the specific context of competition law procedures, only legal persons (i.e. the undertakings concerned) are addressed by infringement decisions.

[20] Regulation 17/62 (First Regulation implementing Articles 85 and 86 of the Treaty, O.J. 1962 L 13/203), Regulation 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17 (O.J. 1963 L 127/2268) later replaced by Regulation 2842/98 (O.J. 1998 L 354/18).

[21] Art. 19 (2) of Regulation 17/62 and Art. 27 (3) of Regulation 1/2003.

[22] Holders of a "sufficient interest" apply to be heard and their participation depends on the assessment of the Hearing Officer. Art. 13 (1) and (2) of Regulation 773/2004 (previously, Article 7 (1) of Regulation 99/63 and Article 9 (1) and (2) of Regulation 2842/98). Article 5(2) and (3) of Decision of the President of the European Commission of 13 October 2011, on the function and terms of reference of the hearing officer in certain competition procedures (O.J. 2011, L 275/29) – henceforth, "the hearing officer terms of reference". See also Point 105 of the Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, O.J. 2011, C 308/06.

[23] Art. 3 (2) of Regulation 17/62, and Art. 7 (2) of Regulation 1/2003. In assessing a complaint, the Commission will verify whether the complainant has a legitimate interest (cf. Commission Notice on handling of complaints, points 33 to 40). The following analysis will not deal with the procedure for the rejection of complaints. The focus is on procedures that have been initiated in order to determine the existence of an infringement.

Hence, the establishment of "legitimate interest" results from a decision of the Commission, following the procedure to deal with complaints.[24]

The way the procedure is structured does not seem to be problematic in the light of the public interests that the Commission needs to pursue in enforcing competition law. Consumers' economic interests are a core consideration in the protection of the process of competition[25] and the case law has shown that consumers – both individual consumers and consumer associations – can be granted access to the public enforcement procedure. Nevertheless, whether they are accepted to the procedure depends on a discretionary assessment of the Commission or of the Hearing Officers on how the alleged illegal conduct affects their legally protected interests. The protection of consumers' economic interests and the place it effectively has in the assessment of the Commission is fully dependent on the Commission's view and interpretation of the circumstances of the cases it needs to decide upon. In sum, though the way the procedure is designed does not ignore the position of consumers and, potentially, gives them a role in the public enforcement of competition, the procedure is not constructed to give them voice with a view to protecting their economic interests.

Procedures matter for the pursuance of public interests: they affect the range of decisions available and, thereby, influence substantive outcomes. Therefore, the design of procedures, and, in particular, the determination of who has access and under which conditions, is a crucial condition in making the administrative decision-maker comply with the public interests and the legally protected interests of affected persons it is legally bound to respect.

Mendes has argued that the processes and structures that ensure the accuracy, completeness and sufficiently thorough analysis of the facts condition, by their very configuration, the public interest appraisals that are eventually made. They determine the type of public interest considerations that weigh on the final assessments. [26]

In this sense, the way in which competition law procedures are designed is important. The bilateral structure of competition law procedures – in essence opposing the Commission and the undertakings investigated – places the economic interests of consumers, arguably one of the public interests that competition law protects, in a secondary place in the public enforcement of competition law. [27]

Accordingly, in the course of judicial review the courts may consider the accuracy, completeness and reliability of the information gathered by the competition authority and the thoroughness of its assessments objective and legal, this may be deceptive. While the decision may be technically sound and legally accurate, it can actually fail to ensure "an inclusive and fair treatment of the competing public interests involved, the balance and pursuit of which law would require." [28]

[24] Besides holders of "sufficient interest" and of a "legitimate interest", other persons may be invited by the Commission to participate in the procedure (Article 13 (3) of Regulation 773/2004). Their participation depends, by its very nature, on an assessment made by the Commission.

[25] Administrative procedures on possible infringements of competition law need to be guided by the public interests that EU competition law pursues. That the European Commission's decisions ought to uphold the public interests protected by EU law is a general requirement of the rule of law, which underpins the EU legal system (Art. 2 TEU). However, which public interest guides the enforcement of EU competition law is subject to debate. The Court of Justice has clearly stated that this public interest is "competition as such", stressing that EU competition rules aim to protect "*not only* the interests of competitors or of consumers, but also the structure of the market" Case C-8/08, *T-Mobile Netherlands and others*, [2009] ECR I-4529, paras. 38–39; Still, the economic interests of consumers remain a key part of the equation when assessing possible competition law infringements. Cseres, K.J. and Mendes, J. (2014), 'Consumers' access to EU competition law procedures: outer and inner limits' C*ommon Market Law Review* 51(2) p.489-491.

[26] Joana Mendes, 'Discretion, care and public interests in the EU administration: Probing the limits of law' 53 *Common Market Law Review*, Issue 2, pp. 419–451

[27] Joana Mendes, 'Discretion, care and public interests in the EU administration: Probing the limits of law' 53 *Common Market Law Review*, Issue 2, pp. 440.

[28] Joana Mendes, 'Discretion, care and public interests in the EU administration: Probing the limits of law' 53 *Common Market Law Review*, Issue 2, pp. 441.

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The Intensity of Judicial Review and the Competition Authority Institutional Structure. Findings from Central Europe[29]

Courts play a crucial role in controlling the enforcement of competition law by competition authorities. They correct wrong administrative decisions and work against the abuses of administration. However, ineffective and incompetent judicial review may have adverse effect on enforcement of competition law. Such features have been identified in the literature but the academic focus has been often limited to the EU courts. National courts have attracted more limited attention. My research - the results of which are presented at the conference - tried to fill in this gap by studying judicial review of NCAs decisions in Central and Eastern Europe (Poland, Hungary, Czech Republic and Slovakia). I analysed effectiveness and intensity of judicial review in these countries. At the same time, I tried to identify common features of judicial review in these countries and challenges faced by courts. When discussing the intensity of judicial review and permissibility of judicial deference to NCAs expert findings I built upon my previous study that shows the correlation between the depth of judicial review and the organization of the administrative proceedings, namely the level of expertise of competition authority, the level of impartiality of decision-makers (division of investigatory and decision-making functions) and the level of protection of due process rights during administrative proceedings.[30]

In my presentation I will compare models of judicial review of NCAs decisions: cassatory in Czech Republic and Slovakia (legality review) and reformatory in Poland and Hungary (*de novo* review). After distinguishing the competences of courts, I will discuss whether the review (whatever the model) is in practice effective. I will take into account the factors that may adversely affect the effectiveness of judicial review. Next, I will analyse if national courts tend to defer to the expert findings of the NCAs and whether such approach (if existent) is based on courts' acknowledgement of the competition authority superior expertise. Finally, I will discuss whether proceedings before the NCAs ensure sufficient due process guarantees, the impartiality of decision-makers, and the overall expert character of decision-making process. On this basis, I will examine whether there are grounds for the reviewing courts to defer to NCAs expert findings.

I will conclude that currently the review undertaken by national courts is often superficial and formal and thus ineffective (case of Slovakian courts and Polish first instance competition court). At the same time, the review by higher courts is rarely deferential towards the NCAs findings (a case of Poland Supreme Court, Czech Administrative Court in Brno and Hungarian Supreme Court). These courts – often because of expertise of judges in antitrust field – tend to substitute the NCAs expert determinations with their own. However, I will show that currently in the majority of the analysed countries there are no grounds to argue for greater judicial deference. Proceedings held before the NCAs still do not provide for sufficient division between investigatory and decision-making functions (case of Poland, Slovakia and Czech Republic); also due process guarantees should be broadened. In addition, NCAs expertise may be insufficient for both institutional and practical reasons; in particular, it is put at risk due to political model of appointment of NCAs presidents.

[29] The research funded by Poland's National Science Centre (decision 2014/15/D/HS5/01562). The information about Czech Republic, Slovakia and Hungary collected by co-investigators: Ondrej Blazo (SK, CZ), Borbala Domotorfy, Stella Simon (HU).
[30] M. Bernatt, *Transatlantic Perspective on Judicial Deference in Administrative Law,* 22(2) Columbia Journal of European Law 275, 324-325 (2016), available at: http://ssrn.com/abstract=2648232

The intensity of judicial scrutiny by the CAT and the institutional model of UK competition law

David George, Assistant Legal Director, Competition and Markets Authority

Institutional model

The Competition and Markets Authority ('CMA') is an independent non-ministerial department of government. It was established on 1 October 2013 pursuant to section 25 of the Enterprise and Regulatory Reform Act 2003 and became operational on 1 April 2014, replacing two predecessor bodies – the Office of Fair Trading ('OFT') and the Competition Commission ('CC'). The CMA has numerous competencies: traditional 'antitrust' enforcement (a power it shares with other UK sectoral regulators), merger control, and the power to conduct far-reaching market investigations. In addition, the CMA has competencies relating to the enforcement of competition law against individuals (both criminal and civil) and functions relating to regulatory appeals and consumer protection laws.

The Competition Appeal Tribunal ('CAT') is a non-departmental public body. It is a statutory tribunal, established by section 12 of the Enterprise Act 2002. It began functioning in April 2003. Unlike the High Court, which has an inherent jurisdiction, the CAT's functions are defined exclusively by primary and secondary legislation. The CAT is effectively a specialist first instance court. It hears a wide range of cases, including challenges to decisions adopted by the CMA and other regulators and certain private actions. Cases are heard by a three member panel, with a legally qualified chair and two 'ordinary members' who may have special expertise in economics, accounting or business.

The CAT is separate and entirely independent of the CMA. Persons dissatisfied with an infringement decision adopted by the CMA can challenge such a decision by way of an appeal 'on the merits' under section 46 of the Competition Act 1998. Persons dissatisfied with merger decisions or market investigation decisions can challenge such decisions by way of a 'judicial review' under sections 120 and 179 of the Enterprise Act 2002. As explained below, the term 'judicial review' has a specific technical meaning in the UK and is a different form of challenge to a merits appeal.

Importantly, the remedies available under a judicial review and under a merits appeal are potentially very different. Under a judicial review the only available remedy is to quash the decision and remit it to the authority for reconsideration. In other words, the authority must take a fresh decision in compliance with the CAT's ruling. In a merits appeal, remittal is one option, but it is also possible for the CAT to step into the authority's shoes and take its own decision if it considers that it has adequate evidence before it to do so. Similarly, the CAT can also impose, revoke or vary the amount of any penalty. This is a key difference in the two sets of procedures: whereas in a judicial review the CMA is always the decision-maker, in an appeal the CAT can substitute its own decision for that of the authority in appropriate cases.

Intensity of judicial scrutiny of CMA decisions by the CAT

Judicial review

In a 'judicial review' the CAT examines the legality, fairness and reasonableness of the decision (as opposed to the substance of the decision). Essentially, the CAT must ask itself whether the decision reached was one which was open to the authority on the evidence before it. There are three possible grounds of challenge:

- **Illegality**: did the authority act *ultra vires*?
- **Irrationality**: did the authority, in coming to its decision, either: (i) fail to consider relevant considerations; (ii) rely upon irrelevant considerations; or (iii) make a decision which no reasonable authority could have reached.
- **Procedural impropriety**: is the decision undermined owing to procedural unfairness in some way? For example, is there a suggestion of bias on the part of the authority? Alternatively, was the authority's decision-making process unfair? For example, was the person challenging the decision deprived of the opportunity to comment upon, correct or seek to contradict the evidence upon which the authority relied in coming to its decision?

Because the CAT is not taking its own decision, in a judicial review the evidence which can be relied upon is generally limited to that which was before the authority at the time it took its decision. New evidence is generally limited to that which is required to show what material was before the authority, or to demonstrate a jurisdictional or procedural error or misconduct by the authority.

Appeal 'on the merits'

By contrast to a judicial review, a merits appeal enables the CAT to consider not only how the authority came to its decision, but also whether, in the CAT's opinion, the authority's decision was correct in substance. In contrast to a judicial review, in a merits appeal the CAT will hear sworn evidence from live witnesses. The parties may cross-examine (i.e. ask questions of) the opponent's witnesses, including expert witnesses. This process enables the correctness and credibility of evidence to be tested rigorously. New evidence, which was not before the authority during the administrative stage, is also more readily admissible in an merits appeal compared with a judicial review.

These differences in approach can make a real difference to the outcome of the relevant challenge. For example, a decision which would not be susceptible to a challenge under judicial review, could be overturned 'on the merits' if the CAT considered it substantively wrong, or if new admissible evidence sufficiently undermined the original decision. Similarly, it is possible for decisions which would be liable to be quashed under a judicial review proceeding to be confirmed in a merits appeal. For example, in *TalkTalk v Ofcom* [2012] CAT 1, the CAT found that a procedural flaw in the authority's decision-making process had been cured through the merits appeal.

In a merits appeal, if the CAT sets the decision aside the matter will often be remitted to the authority for reconsideration. However, in appropriate cases, the CAT will substitute its own decision for that of the authority. In one instance, the CAT set aside a non-infringement decision and substituted its own finding of infringement (see *Albion Water v WSRA* [2008] CAT 31).

Conclusion

The UK's institutional model and procedures provide for particularly rigorous scrutiny of infringement decisions through the system of appeals 'on the merits'. This reflects the fact that these proceedings are *quasi*-criminal in nature and the guarantee under Article 6 of the European Convention of Human Rights to a fair trial. The system of judicial review applicable to merger decisions and market investigations provides for less intrusive scrutiny of authority decisions, but nevertheless requires rigorous, well-evidenced and well-reasoned decision-making on the part of the CMA.
