

Judicial review of fines in Hungarian competition law: who controls the Leviathan?

“Judicial Deference in Competition Law”

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Agenda

- European fair trial **revolution**
- CJEU: **phraseological dipping**
- Hungarian Supreme Court: **brave new world!?**
 - Special structure, special procedure
 - Full *de novo* review
 - Increasingly interventionist courts

European fair trial revolution

Case 43509/08 *A. Menarini Diagnostics S.R.L. v. Italy*

Case 97/11 *Delta Pekarny A.S. v. Czech Republic.*

- Competition matters (fines) are **too serious** (quasi criminal) to treat them laxly in terms of judicial review.
- **Unlimited review**
 - full jurisdiction to carry out a comprehensive, full-fledged review
 - both factual and legal questions
 - power to carry out a *de novo* review and to second-guess the competition authority's factual assessment and legal interpretation
- The **character of the administrative procedure** matters and impacts on the standard of judicial review

CJEU: phraseological dipping

*Case C-272/09 KME Germany AG (industrial tubes)
ECLI:EU:C:2011:810.*

Case C-386/10 Chalkor ECLI:EU:C:2011:815.

*Case C-389/10 KME Germany AG (copper plumbing tubes)
ECLI:EU:C:2011:816.*

- Notwithstanding the margin of appreciation in **complex economic questions**, the review is unlimited.
- *As regards the review of legality, the Court of Justice has held that whilst, in areas giving rise to complex economic assessments, the Commission has a margin of discretion with regard to economic matters, that does not mean that the Courts of the European Union must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must those Courts establish, among other things, whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it.*
- Review of the **fine**: unlimited.

- **We have always done it this way...**
 - the review standard of EU courts is in line with the requirements of fair trial
- CJEU whitewashed the GC:
 - “although the General Court repeatedly referred to the ‘discretion’, the ‘substantial margin of discretion’ or the ‘wide discretion’ of the Commission (...), such references did not prevent the General Court from carrying out the full and unrestricted review, in law and in fact, required of it.”

- Case C-67/13 *Groupement des cartes bancaires*
 - quashing the GC's judgment for "dispensing with an in-depth review of the law and of the facts" and refraining "from reviewing the Commission's legal classification of information of an economic nature";
 - confirming that the Commission enjoys a margin of assessment "by virtue of the role assigned to it in relation to competition policy" and that "the General Court must not substitute its own economic assessment for that of the Commission, which is institutionally responsible for making those assessments";
 - the relevant question is whether the Commission ascertained the relevant factors, whether it collected the relevant data, and whether it drew reasonable conclusions.
- C-295/12 *Telefonica*: the above review standard satisfies "the requirements of an unrestricted review for the purpose of Article 47 of the Charter."

Judicial review

- Case Kfv.III.37.690/2013/29. *Railway Construction Companies*
 - The CC's decision must not have to be examined under the provision on discretionary acts, enabling a margin of appreciation (Section 339/B CCP) but during the judicial review the CC's decision has to be treated as if it were an 'indictment'. In the court procedure, the plaintiffs need not to demonstrate that the CC's decision assessed the evidence in a blatantly unreasonable manner or the legal assessment was obviously unreasonable; it suffices if they demonstrate that a more reasonable assessment of the evidence, and there is a more reasonable legal balancing exists.

Two-phases but one organization

- **Investigation** (case-handler)
 - case-handler's report
- **Decision-making** (Competition Council)
 - Preliminary position (~ statement of objections) – right of defense (Case *Kfv.II.37.268/2013/8.*, Supreme Court)
 - Final administrative decision
- **Judicial review**
 - The Hungarian administrative competition procedure is no quasi-judicial procedure [*Kfv.III.37.582/2016* (Supreme Court)].

Closing thoughts

The pendulum swayed: from a 90% rate of success to an 80% rate of failure?

- **Less deference** and trust
- **More stringent standards**
 - more demanding effects analysis centering around actual effects [Vj-96/2010/394 (Contact lenses), Kfv.11.37.110/2017/13 (Supreme Court); Vj-8/2012/1751 (Bank Data)].
 - impossible crime in case of anti-competitive object [Vj-23/2011 (Local newspapers)].
 - Vj-18/2008/341 (MIF), preliminary reference by the Supreme Court (Kfv.III.37.415/2017).
 - Vj-29/2011 (Concrete producers), Kfv.II.37.364/2017/26 (Supreme Court)
 - Vj-46/2012 (MasterCard, abuse of dominant position)
- **Reasons:** new review standard, diminishing reputation (of impartiality)?
- The **central question** of *de novo* review is not whether courts are allowed, but whether they are able.

Thank you very much for your attention!

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