(Deferential?) Judicial Review in EU Competition Law

KING'S College LONDON

Plan

- Problem
- Placing the problem in a comparative context
- EU case law prior to *KME* and *Menarini*
- Has the law changed after *KME* and *Menarini*?
- Does the Commission still enjoy any discretion?
- What future for the EU enforcement model?

The Problem

Relevant constitutional standards

- Art 47(2) EU Charter ➔ principle of effective judicial protection
- Art 6(1) ECHR ➔ right to a fair trial
- Art 53(3) EU Charter ➔meaning and scope of EU Charter rights *shall* be the same as meaning and scope of corresponding ECHR rights
- Art 6(2) TEU ➔ Union shall accede to the ECHR
- Right to a fair trial under Art 6(1) ECHR and principle of effective judicial protection as recognized by the constitutional traditions of the Member States are also fundamental principles of law under Art 6(3) TEU

Enforcement model under EU law

- Art 17 TEU ➔ Commission's main tasks
  - promotion of the general interest of the Union
  - the application of the Treaties and of measures adopted by the institutions pursuant to them
  - application of Union law, under the control of the Court of Justice of the European Union, are tasks entrusted to the Commission
- Art 105 TFEU ➔ the Commission shall ensure the application of the principles laid down in Articles 101 and 102
- Under Reg 1/2003, the Commission acts as 'prosecutor, judge and jury' – this system has been considered in compliance with fundmental rights: Case T-406/10 *Emesa-Trefilería SA v Commission*, paras 119 - 120
- Court of Justice of the European Union ➔ review of legality under Art 263 TFEU and unlimited jurisdiction as to fines under Art 261 TFEU and Art 31, Reg 1/2003

ECHR jurisprudence

- *Engel* (1976) ➔ autonomous concept of criminal charge for the purposes of Art 6 ECHR
- *Albert and Le Compte v Belgium* (1983), *Crompton v UK* (2009), *Janosevic v Sweden* (2002), *Grande Stevens v Italy* (2014) ➔ criminal charge may be determined by administrative body at first instance as long as there is then access to an impartial and independent tribunal with 'full jurisdiction'
- *Janosevic v Sweden* (2002), *Segame SA v France* (2012) ➔ 'full jurisdiction' means the power of the court to examine all aspects of the matters before the court and to quash the administrative decision if the court *disagrees* with the findings of the administrative authority
- Contrast *Bryan v UK* (1995) with *Tsfayo v UK* (2006)
- *Jussila v Finland* (GC, 2006) ➔ hardcore and non hardcore criminal law

Placing the problem in a comparative context

KING'S College LONDON

US and Canadian systems

- Allow for fines to be imposed on individuals and corporations by administrative authorities subject to judicial review
- Such fines are generally not considered criminal
- However, due process rights apply and this generally means that the same authority cannot be 'prosecutor, judge and jury'
  - in Canada, this defect is generally deemed not remediable by subsequent adjudication but if the decision-maker is impartial then review can be deferential
  - in the United States, subsequent adjudication by an impartial decision-maker 'cures' the defect but the second decision-maker does not need to be a judge insofar as procedural due process is upheld

EU case law prior to *KME* and *Menarini*

Fines and leniency

- Unlimited jurisdiction but
  - discretion as to the amount of the fine (e.g. Case T-461/07 *Visa Europe Ltd v Commission*, para 212)
  - discretion as to choice of factors (e.g. Case C-289/04 P *Showa Denko v Commission*, para 36)
  - manifest error standard: Case T-59/07 *Polimeri Europa v Commission*, para 251 (upheld on appeal in Case C-511/11 P, paras 104-106) on the deterrence multiplier
  - discretion as to parent company liability: Case C-444/11 P *Team Relocations NV v Commission*, para 161, upholding Case T-204 and 212/08, para 156
  - discretion as to leniency: Case C-511/06 P *Archer Daniels Midland Co v Commission*, paras 152 – 153

Whether undertaking is leader of a cartel: Case T-59/02 *Archer Daniels Midland Co v Commission*, para 226 (upheld on appeal in Case C-511/06 P, para 70)

Matters of complex economic assessment: Case T-201/04 *Microsoft v Commission*, para 87

Exchanges of price information: Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland AS v Commission*, para 279

Evidence

Menarini and *KME*

Italian competition law is criminal but not part of the hardcore criminal law under Art 6 ECHR

The Italian two-tier enforcement system does not infringe Art 6(1) because the Italian administrative courts had jurisdiction over all the issues of fact and law raised by the applicant, including in particular the review of the evidence relied on by the competition authority, the appropriate exercise of the discretionary powers of the authority, and the adequacy and proportionality of the fine

This was notwithstanding the fact that, under Italian law, the court's jurisdiction over certain aspects of the 'contextualization' and 'individualization' of indeterminate legal concepts was limited to the review of the reasonableness and technical coherence of the decision of the competition authority. The Court, however, does not specifically address this point and does not explain why limited review is compatible with Art 6

Menarini v Italy

The system of EU competition enforcement is compatible with the principle of effective judicial protection because the EU courts have the power to review 'both the law and the facts … to assess the evidence, to annul the contested decision and to alter the amount of a fine' (para 133)

However, *KME* set out all the standards of review applied by the EU courts, including the manifest error standard for matters of complex economic assessment, without explaining whether any of the pre-existing standards must be modified

Significant that Court holds at para 129: 'The Courts must carry out the review of legality incumbent upon them on the basis of the evidence adduced by the applicant in support of the pleas in law put forward. In carrying out such a review, the Courts cannot use the Commission's margin of discretion – either as regards the choice of factors taken into account in the application of the criteria mentioned in the Guidelines or as regards the assessment of those factors – as a basis for dispensing with the conduct of an in-depth review of the law and of the facts'

KME v Commission

Has the law changed after *KME* and *Menarini*?

Fines and leniency

- Case T-588/08 *Dole Food Company Inc v Commission*, para 662 (upheld on appeal in Case C-286/13 P): 'margin of discretion when fixing the amount of fines, in order that it may direct the conduct of undertakings towards compliance with the competition rules'
- Case T-566/08 *Total Raffinge Marketing v Commission*, para 543 (upheld on appeal in Case C-634/13 P): margin of appreciation under the 2006 Guidelines
- Case T-372/10 *Bolloré v Commission*, para 220 (upheld on appeal in Case C-414/12 P): *'…* the Commission has a discretion when determining the amount of each fine ...'
- Case T-154/09 *MRI v Commission*, para 234: 'As the Commission correctly recalls, in accordance with settled case-law, the gravity of an infringement is assessed in the light of numerous factors, such as the particular circumstances of the case, its context and the dissuasive effect of fines, in respect of which the Commission has a margin of discretion'

Fines and leniency

- Case C-501/11 P *Schindler Holding Ltd v European Commission*
- GC had held that the Commission has a considerable margin of discretion in the application of the Leniency Notice and only if the Commission manifestly exceeds the boundaries of its discretion, the GC will set aside the decision
- ECJ held at paras 155 and 156: ' … when the European Union judicature reviews the legality of a decision imposing fines for infringement of the competition rules, it cannot use the Commission's margin of discretion – either as regards the choice of factors taken into account in the application of the criteria mentioned in the [Fining Guidelines] or as regards the assessment of those factors – as a basis for dispensing with the conduct of an in-depth review of the law and of the facts … Such a rule also applies where the judicature determines whether the Commission applied the 2002 Leniency Notice correctly … the principles set out by the General Court in paragraphs 295 to 300 do not correspond to that case-law'
- But GC had in fact applied a correctness of review standard
- Principle confirmed by Case C-510/11 P *Kone Oyj v Commission*, para 42
- Full correctness now?

Evidence

Thorough review of the evidence in Case T-588/08 *Dole Food Company Inc v Commission* (upheld on appeal in Case C-286/13 P) and Case T-566/08 *Total Raffinage Marketing v Commission (Paraffin Wax)* (upheld on appeal in Case C-634/13 P), without reference to the manifest error standard

Case T-412/10 *Roca v Commission (Bathroom Fittings)* (upheld on appeal in Case C-638/13 P) ➔ although applicant pleaded manifest error of appreciation by the Commission, GC reviewed the evidence without reference to the manifest error standard

Even more interesting Case T-410/09 *Almamet GmbH Handel mit Spänen und Pulvern aus Metall v Commission (Calcium Carbide and Magnesium for the Steel and Gas Industries)*, paras 163 – 169 ➔ GC held that applicant's arguments challenging the existence of single overall infringement did not tend to establish a 'manifest error' but concerned the material accuracy of the facts and the correct application of the law

Matters of complex economic assessment: Art 101 and commitments

- Horizontal agreements
  - Case T-360/09 *E.ON Ruhrgas AG v Commission*, para 69: the standard, in relation to whether a restriction was ancillary, was 'manifest error'
  - Applied in para 106 of Case T-208/13 *Portugal Telecom SGPS, SA v Commission*
- Commitments
  - Case T-76/14 *Morningstar v Commission*, paras 41-42: reference to 'discretion' enjoyed by the Commission with respect to complex economic assessment in the review of a commitments decision (with emphasis on the forward-looking nature of the assessment) but note reference to para 46 of Case C-67/13 P *Groupement des cartes bancaires (CB) v Commission*, which is not a commitments decision!

Limited review is upheld by ECJ in both *KME* and Case C-510/11 P *Kone Oyj v Commission*. See, e.g., para 28 of *Kone*

Case C-295/12 P *Telefónica SA v Commission*, para 54

But see Case C-549/10 P *Tomra Systems ASA v Commission*, where the Court of Justice upheld the judgment of the General Court on the basis that the latter had carried out a detailed examination of the applicant's arguments (e.g. para 96 'the General Court examined in detail ..' and para 80 'the General Court correctly found that that analysis was adequate and sufficient to establish the existence of that abuse')

Matters of complex economic assessment: Art 102

Meanings of discretion

KING'S College LONDON

Need for a clear taxonomy of discretion

- Distinguish two types of discretion
  - general discretion, which the Commission continues to enjoy, in the choice and assessment of factors relevant to the setting of the fine as a matter of general policy (Joined cases C-189/02 P etc. *Dansk Rørindustri v Commission*, paras 241–243) – see Opinion of AG Wathelet in Case C-295/12 P *Telefónica SA v Commission*, para 124: 'An argument which is often raised against the approach advocated in this Opinion is that the General Court should not or cannot "interfere" in the setting of a fine, and hence in competition policy, which is the sole responsibility of the Commission. I do not share that reasoning since the General Court adjudicates only in individual cases. The Commission therefore retains all its powers to define and to apply its general policy in other cases'
  - an individualized discretion, which the Commission no longer enjoys or should no longer enjoy, which refers to the application of the general fining policy in individual cases. In this respect, it is unhelpful to continue to speak of a discretion, and even less of a margin of appreciation, of the Commission, given that judicial review is no longer/should no longer be deferential

Scope and intensity of review

Full jurisdiction is about *both* scope and intensity

- *Menarini*: the Italian two-tier competition enforcement system complied with Art 6(1) because the Italian administrative courts had jurisdiction over all the grievances raised by the applicant, including in particular the review of the evidence, the appropriate exercise of the discretionary powers of the authority and the adequacy and proportionality of the fine – clear confusion between scope and intensity of review
- Case T-422/10 *Trafilerie Meridionali SpA v Commission*, para 368 (upheld on appeal in Case C-519/15 P): full jurisdiction is 'power to vary in all respects, on questions of fact and law, the contested decision' – focuses only on scope of review and remedy but not intensity
- Full 'jurisdiction' is power 'to examine all questions of fact and law relevant to the dispute before it': ibid, para 368 – focuses only on scope of review
- So what about 'matters of complex economic assessment', which go to the intensity of review?

Types of decision

Mergers (Case C-12/03 P *Commission v Tetra Laval*, paras 38-39) and commitments (Case T-76/14 *Morningstar v Commission*, paras 40-42): discretion allowed and judicial review can be deferential in matters of complex economic assessment

Decisions as to an infringement of Arts 101 or 102: deferential review on matters of complex economic assessment, as on any other matters, is untenable, at least insofar as the Commission is 'prosecutor, judge and jury'

Administrative vs. criminal

Conclusions

Conclusions

Menarini, *KME*, *Kone* and *Schindler* clarify that in fining decisions the standard is correctness – still, Commission appears to enjoy a 'margin of appreciation' or 'discretion' in certain matters and questions of complex economic assessment are (perhaps) still subject to deferential review

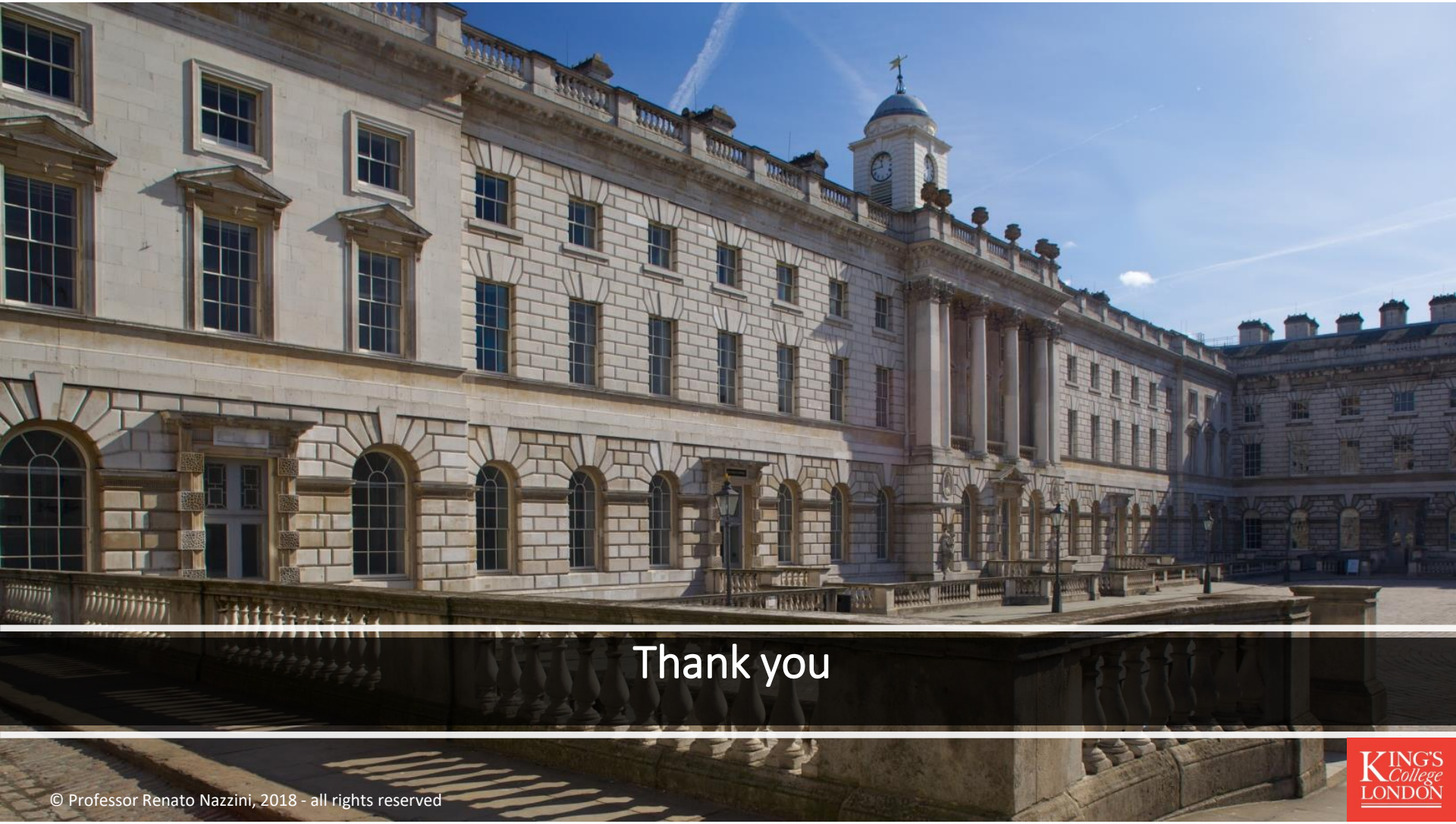
Way forward

- References to a Commission's discretion in judicial review should be discouraged. The Commission enjoys no discretion in individual cases. Its only discretion is in the shaping of the general enforcement policy

Review of matters of complex economic assessment can only be deferential in merger and commitments decisions – in all other cases, reference to 'manifest error' should be abandoned + courts should distinguish clearly 'criminal' matters from 'administrative' matters

EU enforcement regime is unnecessary burdensome ➔ more efficient solutions would be:

- functional separation and deferential judicial review, or
- prosecutorial model
- Member States could perhaps experiment more and certainly non-EU jurisdiction should think twice before adopting the 'EU model'



Thank you

KING'S College LONDON