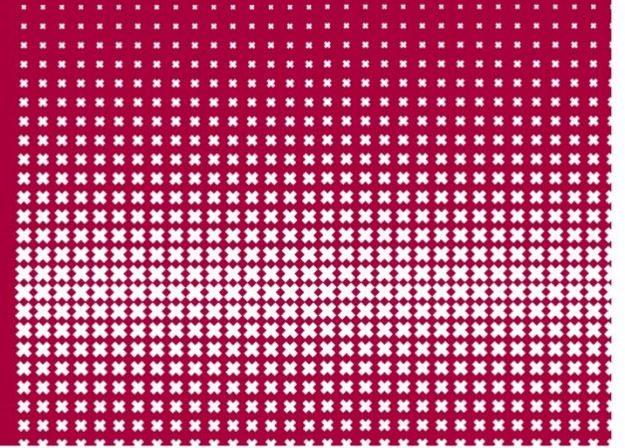




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# **Judicial deference in light of consumers' participation in the public enforcement of competition law**

Judicial Deference in Competition Law, 11 October 2018, CARS, University of Warsaw

# Consumers' participation in public competition law proceedings

- Participation rights: complement to judicial review – extends the reach of judicial review
- Instrumental function in competition law proceedings
- Consumers are important “watchdogs”
- Essential source of information → can identify matters of fact and law  
→ help assess significance of alleged infringement T-201/11  
*Si.mobil* para 83
- Consumers provide information that might be relevant to establish an accurate representation of the factual situation that will enable the competition authority to issue a materially correct decision

# Consumers' participation and judicial review

- Can enable the competition authority to substantiate the ways in which it has collected and identified matters of fact and law
- Can help to comply with the standard of judicial review
- *Tetra Laval* standard: evidence that *is* “factually accurate, reliable and consistent”, complete and “capable of substantiating the conclusions drawn from it”
  
- → 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

## **BUT CP depends on Commission's and NCAs' discretion**

- Whether and how the formal role consumers are assigned during this procedure and the way access is defined enables them to protect their economic interests
- Classify complaints according to different degrees of priority based on Union (national?) interest
- Consumers can have direct access to the procedure  $\neq$  conditions enable them to protect their economic interests
- It is this very discretion and the Courts' marginal review that stands in the way of such "improvement" of the administrative decision-making

## 'Consumers' access to EU competition law procedures

- **Outer limits:** *the Commission's discretion in setting priorities of enforcement*
- **Inner limits:** *the way the procedure is conceived*
  
- Joint work with Joana Mendes, 'Consumers' access to EU competition law procedures: outer and inner limits' *Common Market Law Review* 51(2) pp.483-522.

# Outer limits (before and after decentralization)

- Main principles in T-24/90, *Automec Srl*,
- Regulation 1/2003 and Regulation 773/2004 (Arts.5,6,7)
- Regulation 1/2003 and Notice on handling of complaints :  
reduce number of complaints to Commission
  - where possible NCAs should deal with them (NCAs' criteria are converging around the Commissions' policy)
  - normally there is not a sufficient Union interest in examining a case when the plaintiff is able to secure adequate protection of his rights before the national courts
  - seriousness of infringement, likelihood establishing it

# Rejecting a complaint: recent cases

- T-201/11 Si.mobil; other NCA is dealing with case - Article 13 (1) Regulation 1/2003
- T-355/13 EasyJet: other NCA has rejected complaint on the basis of priority setting
- T-480/15 Agria Polska: NCA rejected complaint due to a procedural rule; time limitation
- General Court: Commission has discretion “as how it deals with complaints” but it “is not unlimited” “it must consider attentively all the matters of fact and of law which the complainant brings to its attention”

# Judicial deference justified?

- GC in Easyjet: “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;” “in particular, the duty of the competent institution to examine **carefully** and **impartially** all the relevant aspects of the individual case”
- GC defer to Commission’s discretion
- Si.mobil: UVK has launched investigation actively deal with case
- Easyjet: NMa (ACM) priority setting = “*dealing with*” case?
- Agria Polska: effectiveness of EU competition law enforcement is not endangered, turn to national court



# Judicial deference justified?

- What are the criteria of an NCA dealing with a case in the meaning of Article 13 Regulation 1/2003?
- Si.mobil para 48: taking steps on its own initiative is no evidence of NCA using its powers neither of assessment of relevant facts and points of law in the case
- No obligation on the Commission to verify, in implementing that particular provision, whether the competition authority concerned has the *institutional, financial and technical means* available to it to enable it to accomplish the task entrusted to it by that regulation.
- EasyJet: rejection based on priority setting grounds

# Minimum conditions

- Criteria for rejecting a complaint on the basis of priority setting
- Minimum conditions investigation *Automec II*. para 81
- Dutch Administrative Court for Trade and Industry in *Vereniging van Reizigers/NMa*,
- Requires substantive assessment and some investigation
- Motivation of the decision and the in-depth investigation before such decision
- Should also include?
- Assessment of national procedural rules on access 3<sup>rd</sup> parties
- Effective judicial protection Art.47 CFR → *Agria Polska* applicant

## In light of ECN+

- Si.mobil para 57: No obligation on the Commission to verify, in implementing that particular provision, whether the competition authority concerned has the institutional, financial and technical means available to it to enable it to accomplish the task entrusted to it by that regulation.
- ECN+: number of authorities struggle with insufficient human and financial resources
- “Many NCAs do not have all the tools they need to effectively detect and tackle competition law infringements.”
- “Measures taken to undermine the independence of the NCAs or to limit their resources necessarily emanate from the Member States themselves. For example, restrictions on independence can be motivated by the desire to exercise greater control over decision-making by the authority”

## Inner limits

- Under which conditions can consumers access the procedure and what are their procedural rights?
- Competition law procedure Reg.773/2004
  - model of judicial trial type procedures
  - *adversarial nature*
  - *bilateral structure*
- Object: assessing the conduct of undertakings on possible infringements
- Result: decisions addressed to undertakings or associations of undertakings

# Procedural status of persons concerned

- Undertakings under investigation
  - right to be heard “a *fundamental principle of [EU] law* which must be respected even if the proceedings in question are administrative proceedings”
    - C-85/76, *Hoffmann-La Roche* para. 9
    - right to fair hearing, Art.6 ECHR
  
- Third parties (consumers, etc.)
  - right to be associated to the procedure
  - participate *if they show*
    - a legitimate interest - complainants  
(*Reg 773/2004, Art. 6*)
    - a sufficient interest  
(*Reg 1/2003, Art. 27 (3)*)

# Design of the procedure

- the way the procedure is designed does not ignore the position of consumers + potentially, gives them a role in the public enforcement of competition
- BUT 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
- Bilateral structure of competition law procedures places the economic interests of consumers (one of the public interests that competition law protects) in a secondary place in the public enforcement of competition law
- Decision may be technically sound and legally accurate BUT can actually fail to ensure "an inclusive and fair treatment of the competing public interests involved"