

THE COURT'S ROLE IN CARTEL LAW

I am very grateful for the opportunity to come to Saarbrücken because Georg Röss has been with us in Edinburgh and he is a good friend of our Centre. I hope that, as he said, there will be further opportunity for cooperation between the Europa-Institut here and the Centre in Edinburgh.

I am in the unfortunate position of anybody who speaks after the lunch break or the coffee break, and I regret that I do not really understand the German language which presents me with the further difficulty that I do not know what has been said before. That brings to my mind a story about an occasion when President de Gaulle and Madame de Gaulle went to visit our Prime Minister Harold Macmillan. We all remember that President de Gaulle was not altogether favorable to the United Kingdom, and Madame de Gaulle became more and more unpleasant and displeased. Macmillan's wife thought she would take her out and make her happy. So she took her from their house in Kent, drove her down to Dover, stopped the car on the coast of Dover and said: Now, Madame de Gaulle, there is France. And the reply was: Je l'ai déjà vue. - So I hope you have not heard of all that I am going to say already.

The role of the Court in competition law is of course a vast subject. Competition law brings the Community directly into the board rooms of virtually every company in Europe and in many cases every company in the world. So I assume that you all have some familiarity with it. What I hope to do is to share with you some half-thoughts about the future role of the Court in competition cases in the light of five relatively recent developments. First, the proposal to create a court of first instance; second, the recent events regarding the investigation in the premises

of the German company Hoechst; third, the evidence of an increased judicial restraint in the field of competition; fourth, the growth of references to the Court under Article 177 in competition cases and correspondingly the desire of the Commission to devolve competition to the national authorities; and fifth, the proposal for a regulation on merger control. Perhaps there is another one which appeared in the newspapers today, which is the statement of President Delors that by 1995 there must be an effective European government.

Now the first one, the Court of first instance: Competition practitioners have wanted a specialist competition tribunal for many years. Their reasons have been several. They have complained of the unsatisfactory nature of the procedures of the Commission. They have complained of the inadequacy of the process of fact-finding by the Commission and the control of that process by the Court of Justice. And some have also felt that the procedures both in the Commission and the Court do not produce a very satisfactory method of developing what is a complex but important aspect of economic law. Now the Single European Act empowers the Council to establish a court of first instance. It imposes limitations on what that court will be able to do, but it does not precisely define how it may do it. The current indications are that the court will deal with staff cases and competition cases. But there will be no specialist judges and no specialist chambers of the court. That being so, it becomes difficult to understand how, for example, somebody can write the following: "The new court will give a more detailed assessment of facts and their economic analysis involving a greater use of expert witnesses, economic data and industrial statistics". The question is, how will this happen, how indeed can it hap-

pen? Because the jurisdiction of the court of first instance will be no different from the existing jurisdiction of the European Court of Justice, only narrower. Specifically the jurisdiction of the court of first instance excludes all references under Article 177 and therefore all references from national courts on competition issues. The Court of Justice itself has limited its own interpretation of its powers under Article 172 (the unlimited jurisdiction). Its jurisdiction under Article 173 is solely concerned with legality, with lawfulness.

So, what precisely is it that the court of first instance is going to be able to do in competition cases that the Court of Justice is not able to do at present? Another question which arises is: What will be the basis of appeal to the Court of Justice? Article 168 (a) says that there will be a right of appeal to the Court of Justice on points of law only. But if the jurisdiction under Article 173 is a jurisdiction to consider lawfulness, in what respect will the two jurisdictions differ? One has to consider, will the court of first instance produce better procedures, better control of the Commission, better fact-finding or a more thorough analysis of competition issues? First set of questions.

The next question arises out of the competition investigation in Germany where, as I assume, you know the complaint was that the Commission sought to enter premises and seize documents without a court order. That illustrates a general concern which in a sense has been more obvious in the U.K. than in the original six member states. But it is only perhaps logical that the specific issue which arose in the Hoechst case¹ arose in Germany where the Basic Law provides that everyone shall have recourse to a court. And

we know that according to the Court of Justice the Commission is not a tribunal within the meaning of Article 6 of the Convention on Human Rights. So the question is, by what authority do the officials of something that is not a tribunal, which is not authorized by a tribunal, enter private premises and seize private documents?

Now the third point that arises, or the third theme, is the growth of judicial restraint. We know that Article 33 of the Coal and Steel Treaty excluded from the Court of Justice the evaluation of the situation resulting from economic facts of circumstances in the light of which the High Authority took its decisions. No such limitation is written into the EEC Treaty, and yet in the case of Remia² recently and repeated³ in the field of anti-dumping in the case of Mineaba, the Court said: "Although as a general rule the Court undertakes a comprehensive review of the question whether or not the conditions for the application of Article 85 I are met, it is clear that in determining the permissible duration of a non-competition clause the Commission has to appraise complex economic matters. The Court must therefore limit its review of such an appraisal to verifying whether the relevant procedural rules have been complied with, whether the statement of the reasons for the decision is adequate, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or a misuse of powers". Thus the Court is specifically withdrawing from anything involving complex economic matters. Now the motive of that is no doubt to discourage an overload of the Court. Nevertheless the consequence is to leave the assessment of complex economic matters to a body which is not a tribunal and which has extensive powers to intervene in commercial activity and to impose enormous financial penalty.

The fourth theme is the⁴ growth of references under Article 177. The Leclerc⁵ cases in France about book prices, the Pronuptia case⁵ in Germany about franchise agreements, the Nouvelles Frontières case⁶ in France about airline cartels illustrate how Article 177 can be used to develop the law in the field of competition. At any rate it shows that many important competition issues can be raised in the national courts. If the Commission is successful in increasing the extent to which competition issues are decided by the national courts rather than by complaints to the Commission, then one must expect the volume of Article 177 references on competition issues to grow. What is going to be the position of the European Court of Justice in that issue? It is perhaps relatively easy for a court to say whether Art. 85 I, the first part of Article 85, applies. To say what are the consequences in law of Article 85 II, second paragraph, or whether a particular agreement falls within the legal scope of a block exemption, this is possible. But Article 86, abuse of a dominant position, raises highly complex economic questions as does the exemption of agreements under Article 85 III. These are questions which will certainly come to the European Court of Justice. What is its position to be, if it is not to become involved in complex economic questions?

Finally, merger control: The decision in Continental Can⁷ illustrates the difficulty of applying the observations of the Court of Justice in the field of merger control. We know that the Commission takes one view and some of the member states take a completely different view. But let us assume that there is a regulation on merger control. That will bring the Commission directly into conflict with the economic policy of the member states. We have seen it already. It is there in the current question of the merger

between British Aerospace and Rover. If there is a regulation on merger control, how is the Commission to be controlled, if the Court of Justice is not to be involved in complex economic issues? In particular, I think we have to have in mind that the future of the Community depends not just on the application of competition policy, but on the other aspect of the Single European Act which is cohesion, regional policy. Free competition tends towards the centre, that is where decisions tend to be made in a completely free market. It is clear that the drive towards the centre in the Community will produce a situation in the peripheral regions which they find unacceptable. Any merger control policy must have regard to its regional implications, specifically the leaving of some decision-making power in the peripheral regions. How is that to be controlled? These are questions which occur to me as being raised now about the relationship of the Court of Justice to competition law. In a sense some of these problems are not new. In a sense they are as old as at least the eighteenth century: the discussion of the separation of powers between the administration and the judiciary. We all know that - according at least to the French conception - that theory involved the abstention of the judiciary from involvement in the province of the administration. We tend to forget that the theory has another side which is that the administration should not be the judge and should not punish violation of the law. Now it is said that competition fines are not penalties, are not criminal penalties. Is that true in any meaningful sense? And is it acceptable to proceed in this way when there is neither judicial control nor any democratic control, or only minimum democratic control of the activities of the Commission?

Finally, it seems to me that we have to recognize that

competition law will become more and not less complex. We are passing from a stage at which it was accepted that the theory of competition is a simple theory to be applied in the form which it was first stated in the United States under the Sherman Act. A simple situation where you can say: We forbid certain acts, and if you do those acts, then you breach the law. It is now clear that competition law involves political choices. Specifically in the context of the Community, for reasons I suggested, we have to consider whether competition exists for the purely economic purpose to create a world of free competition or exists for the purpose of economic and therefore political integration. Because the two, for the reasons of the fight between the centre and the periphery, are not the same and economic integration may demand a decision contrary to what the world of free competition would normally demand. And so I would suggest that in considering what is the role of the Court of Justice in the field of competition law and competition policy, we are entering into an era in which it may not be enough to say: We leave complex economic matters to the Commission. Some choices have to be made, and given the creation of the court of first instance, these choices will have to be made soon.

Notes

- 1) Hoechst v. Commission, Case 46/87, Order of 26 March 1987, [1988] CMLR 4, 430; Case 227/88.
- 2) Case 42/84 Remia v. Commission, 11 July 1985, [1985] ECR 2545.
- 3) Case 260/84 Mineaba v. Council and Commission, 7 May 1987.
- 4) Case 229/83 Leclerc v. Au Blé Vert, 10 January 1985, [1985] ECR I; Case 254/87 Syndicat des Librairies de Normandie v. Société d'Aigle Distribution, Centre Leclerc, 14 July 1988.
- 5) Case 161/74 Pronuptia de Paris v. Schillgalis, 28 January 1986, [1986] ECR 353.
- 6) Case 209/84 Ministère Public v. Asjes (Nouvelles Frontières), 30 April 1986, [1986] ECR 1425.
- 7) Case 6/72 Europemballage & Continental Can, 2 February 1973, [1973] ECR 215.