



CHATHAM HOUSE

Multinational Competition Law: The Fall-Out and Benefits for Industry Friday 29 June 2007

<p style="text-align: center;">SESSION FOUR Challenging Regulators' Decisions: Either Way they May get it Wrong</p>
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Keynote Address:

Appeals to the ECJ - Living in Interesting Times
Professor Sir David Edward

On 23rd April 2007 the European Union Committee of the House of Lords published its Report on “An EU Competition Court”¹. The stimulus for the House of Lords’ inquiry was a proposal by the CBI that a new EU Competition Court should be established – technically a “judicial panel” established under Article 225A of the EC Treaty, from which there would be a right of appeal to the Court of First Instance and a further, but limited, right of appeal to the Court of Justice.

The main concern of the CBI, which this proposal was intended to meet, is the time taken to deal with merger cases which, it was said, could result in the proposed merger being abandoned, even if it raised no competition concerns. The House of Lords Committee accepted that there is a problem but did not agree with the proposed solution – whether for the limited purpose of dealing with mergers or a wider purpose of dealing with competition cases generally.

It would be pointless for me to attempt, in 20 minutes, either to cover the ground already covered in detail by the House of Lords, or to attempt a survey of the current practice of the ECJ or CFI.

In my view, the crucial question is whether, and if so in what sense, “judicial control” of regulators’ decisions should be the focus of attention. I use the expression “judicial control” in a broad sense to cover the range of options from an open appeal on the law and the merits to strictly limited judicial review on questions of law only - in either case by recourse to a judicial body after the administrative phase is complete and a decision has been taken.

From the point of view of the undertaking(s) – the economic or business actors, the desiderata appear to be these:

¹ 15th Report of Session 2006-07, HL Paper 75.

- Speedy resolution of the competition issue so that (a) in the case of a merger, the competition investigation does not render the merger impracticable, (b) where anti-competitive practices are alleged, the undertaking(s) concerned can adjust their business practices to avoid further problems, and (c) where a fine is to be imposed, they can budget accordingly.
- Care taken by the investigating authority in gathering evidence, so that all the relevant facts are taken into account, whether in favour of the undertaking(s) or against them.
- Clarity in stating the case against the merger or practices in issue so that the undertaking(s) are in a position to rebut the allegations and, where appropriate, to produce contradictory evidence.
- Adequate examination and balancing of economic, as well as legal and factual, considerations.
- Adequate reasoning of any adverse decision, including taking account of all relevant evidence and disregarding irrelevant evidence.
- Objectivity on the part of the decision-maker, and freedom from political or ideological pressures.
- An appeal/judicial review procedure that will compensate for any failure in these respects on the part of the regulator.

Most regulators would probably agree (in theory) with these desiderata (or most of them). They are, however, faced with a number of difficulties in meeting them.

These include:

- Inadequacy of staff available to undertake investigations and take decisions, in terms both of numbers and of quality.
- Volume of case-load.
- Non-compliance, secrecy and obstructiveness on the part of undertakings.
- The formal structure within which they have to work:
 - separation or not of investigative and decision-making functions;
 - the involvement or not of a political element in decision-making (ultimate decisions taken by ministers or, in the EU, by Commissioners),
 - the imposition of time-tables for stages of investigation or decision-making.
- The involvement at the administrative stage of a judicial or quasi-judicial element – contrast the Hearing Officer in the Commission procedure and the Administrative Law Judge in FTC procedure.

From the point of view of judicial authorities called on to exercise judicial control, relevant considerations include:

- Staff, case-load and time constraints.
- The nature of the jurisdiction – limited judicial review as against extensive appellate jurisdiction on facts and merits.
- Ambiguous texts (e.g. the reference to “close examination of complex facts” in the Council Decision establishing the CFI, while not extending the scope of judicial review under Article 173 EEC, now Article 230 EC).
- The availability, within the court structure or membership, of economic expertise – economic experts as members of staff, as assistant rapporteurs, or as judges.

- Differing jurisprudential cultures as regards “evidence”, “expert evidence”, testing of evidence by cross-examination ...
- Language and procedural requirements laid down by texts over which the judicial authority has no control and which allow little or no scope for discretionary short-circuits.
- Formal requirements as to the structure and content of judgments and methods of reasoning.

We should not forget, either, that there is an element of public interest which is not necessarily co-extensive with the interests or focus of business or of the administrative or judicial authorities.

Lord Lester asked in the course of the House of Lords’ Inquiry (Q64) what is so special about competition in general and mergers in particular that calls for new (and expensive) arrangements to be made to deal with them. The existing structures for administrative decision-making and judicial control might be thought to have reached the limit of what is necessary (in terms of manpower and budget) for the reasonable protection of business interests. Business interests might ripost that the need for greater protection is due to an ideology of competition pursued by regulatory Ayatollahs without regard to the practical realities of doing business in a global environment. (I have heard both lines of argument urged with equal fervour.)

Taking all these considerations together, it seems to me that there is not, and cannot be, an ideal system that will reconcile all desiderata. Thus, for example, at the administrative stage, speed can be the enemy of thoroughness in investigation and rigour of reasoning, and one cannot always have both. Similarly, at the “appellate” stage, extensive review of facts and merits is bound to take longer and to call for special judicial skills or support, especially if it involves anything in a nature of a technical review of economic assessments.

I believe that the search for solutions in the court structure (i.e. after the end of the administrative, decision-making phase) is misconceived. Attention should rather be directed to the administrative phase, and to the introduction of a greater degree of objectivity and transparency at that stage.

If the administrative phase works well and inspires general confidence in the business community, the number of court challenges is likely to be less. Where challenges are unavoidable, limited judicial review of legality is likely to be sufficient.

There are at least four possibilities (not necessarily mutually exclusive, and not all involving treaty amendment) that might be adopted in the EU context:

- Separation of the investigative and decision-making functions within the decision-making body (the Commission).
- The introduction into the administrative process of a judicial or quasi-judicial person or body (analogous to the Administrative Law Judge), whose decisions would be binding on the decision-maker.
- Separation of the investigative and decision-making function from the political, policy-making function. Note, in this connection, that the UK has moved progressively away from political involvement (of ministers or civil servants) in the decision-making process.

- More radically, removal of competition regulation from the Commission altogether, and the adoption of a system analogous to the German system or the new UK system.