KLUWER LAW INTERNATIONAL

Views of European Law from the Mountain

Liber Amicorum Piet Jan Slot

Edited by

M. Bulterman
L. Hancher
A. McDonnell
and
H. Sevenster

Wolters Kluwer
Law & Business

AUSTIN BOSTON CHICAGO NEW YORK THE NETHERLANDS

Published by:
Kluwer Law International
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
Website: www.kluwerlaw.com

Sold and distributed in North, Central and South America by:
Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.care@aspenpubl.com

Sold and distributed in all other countries by:
Turpin Distribution Services Ltd.
Stratton Business Park
Pegasus Drive, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
Email: kluwerlaw@turpin-distribution.com

Printed on acid-free paper.

ISBN 978-90-411-2862-1

Printed in Great Britain.

Summary of Contents

About the contributors

Thomas Ackermann holds the chair for German, European and International Private and Economic Law and is director of the Institute for European Economic Law at the University of Erlangen-Nuremberg. He is a member of the editorial board of the Common Market Law Review.

René Barents is the Head of Division Research and Documentation Court of Justice EC and professor in European law, University of Maastricht (NL). He is a former legal secretary Court of Justice EC, former member of the Legal Service Commission EC.

Agustín Blanco-Bazán is Senior Deputy Director and Head of the Legal Office of the International Maritime Organization since 1999. He became Senior Legal Officer there in 1987. Has participated at numerous international intergovernmental, non-governmental and academic meetings and published several articles on international law, maritime law and the law of the sea.

Niels Blokker is professor of International Institutional Law (Schermers Chair), Leiden University. He is also deputy head of the international law division at the Netherlands Ministry of Foreign Affairs. From April 1983 to August 1984 he was student assistant of prof. Piet Jan Slot.

Laurens Jan Brinkhorst currently serves as Professor in International and European Law and Governance at the University of Leiden. He is also on the Board of Directors of the Salzburg Global Seminar and is senior adviser to the European Space Agency and coordinator of the European Commission for a Trans European Network. He has been Minister of Economic Affairs and Minister of Agriculture in the Netherlands. He was also a member of the Netherlands and European Parliaments. He has held chairs at Groningen, Leiden and Tilburg Universities.

Marco Bronckers practises international trade law and EC law in Brussels. He is also a professor of law at the University of Leiden, where he holds the chair of WTO and EC external trade relations law. He publishes extensively and is an associate editor of the Journal of International Economic Law.

Onno Brouwer is a partner at Freshfields Bruckhaus Deringer LLP (Brussels/ Amsterdam) and a member of the Amsterdam and Brussels Bar. He is specialized in European law and litigation, and EU and Dutch competition law.

Mielle Bulterman works as a senior legal adviser at the Netherlands Ministry of Foreign Affairs. Until November 2008 she was a senior lecturer at the Europa Instituut of the Leiden Faculty of Law.

Deirdre Curtin is Professor of European Law at the University of Amsterdam (since 2008) and Professor of European and International Governance at the Utrecht School of Governance (2003-present). Prior to that she was Professor of the Law of International Organizations at the Law Faculty, University of Utrecht (1991-2002). She has written widely on issues relating to the institutional and constitutional evolution of the European Union.

Alan Dashwood is Professor of European Law at Cambridge and a Fellow of Sidney Sussex College. He is also a Barrister in Henderson Chambers and a Bencher of the Inner Temple. Before election to his Chair at Cambridge, he was a Director in the Legal Service of the Council of the EU. He was appointed CBE in 2004.

Bruno de Witte is professor of European Union law at the European University Institute, Florence; Co-director of the Academy of European Law at the EUI. He was professor of European law at the University of Maastricht from 1989 to 2000.

Michael Dougan is professor of European Law and holds a Jean Monnet Chair in EU Law at the University of Liverpool. He is a member of the Editorial Board of the *Common Market Law Review*. He was Fellow in Law at Downing College, Cambridge and Newton Trust Lecturer at the Faculty of Law, Cambridge from 2000-2003.

Berend Jan Drijber graduated at Leyden University in 1981. He worked as associate for De Brauw in The Hague, Brussels and Amsterdam. In 1988 he joined the Legal Services of the European Commission, specializing in competition law and internal market law. He represented the Commission in a large number of cases before the European Courts. From 1998-2002 he was the legal advisor to the Dutch Permanent Representation to the EU. Since 2002 he is a partner of Pels Rijcken (The Hague). He has an extensive advisory and litigation practice for mainly public clients, covering all major fields of European and competition law, including energy regulation.

Thijs Drupsteen is member of the Netherlands Council of State. He was professor of Environmental and Administrative Law at Leiden University from 1981 till 2001.

Jacqueline Dutheil de la Rochere is Professor at Université Panthéon-Assas (Paris II), Jean Monnet Chair, Director of the Centre de Droit Européen, former President of the University. She is a member of the Editorial Board of the *Common Market Law Review*.

David Edward is Professor Emeritus at the School of Law, University of Edinburgh. Awarded KCMG, 2004; CMG, 1981. He was admitted Advocate, 1962, and became QC (Scotland), 1974. He was Judge of the Court of First Instance, 1989-92, and Judge of the Court of Justice of the European Communities, 1992-2004.

Wessel W. Geursen is part-time lecturer at the Europa Institute of Leiden University and PhD-fellow at VU University in Amsterdam, where he does research on the territorial functioning of European (tax) law. Before that he was a practising lawyer in the European and Competition law department of a Dutch law firm.

Luc Gyselen is a member of the Brussels Bar and a partner at the US law firm Arnold & Porter. Prior to joining the firm in 2004, he was a senior official at the EC Commission's DG Competition. In the earlier days of his career he was a member of the EC Commission's Legal Service and a law clerk at the European Court of Justice. He holds law degrees from Harvard, the College of Europe and the K.U. Leuven.

Leigh Hancher is Professor of European law at Tilburg University and Of Counsel, Allen & Overy in Amsterdam. P.J. Slot was co-supervisor of her PhD thesis ''Regulating for Competition'', defended in 1989. She worked at the International Institute for Energy Law until 1990, before becoming Professor of Public Economic Law at the Erasmus University Rotterdam. She has co-authored three editions of EC State Aids (Sweet & Maxwell) with P.J. Slot.

Christophe Hillion is Professor of European law at Leiden University, and member of the editorial board of the Common Market Law Review. He is a member of the Europa Institute at Leiden.

Rikki Holtmaat is professor at the Faculty of Law, Leiden; she has worked in Leiden since 1986. Over the past years, she has published many books and articles on conceptual and practical issues concerning equality and non-discrimination law in the UN and EU context. She is a member of the two European Commission's Networks of Legal Experts in the area of non-discrimination and gender discrimination.

Jan H. Jans is professor of Public Law at Groningen University. He is a member of the Dutch Commission on Environmental Impact Assessment, and vice-chairman of the Appeal Committee of the Netherlands Competition Authority, honorary judge at Assen District Court and member of the Editorial Boards of the *Journal of Environmental Law*, SEW, *Legal Issues of Economic Integration*, *Journal for European Environmental & Planning Law*, *Review of European Administrative Law*, and *The Columbia Journal of European Law*. He is a member of the Research Committee of the IUCN Academy of Environmental Law and the Avosetta Group of European Environmental Lawyers.

Angus Johnston (M.A. (Oxon., Cantab.), LL.M. (Leiden), B.C.L. (Oxon.)) is a University Senior Lecturer in Law at the University of Cambridge and a Fellow of Trinity Hall, Cambridge. He pursues research in the general fields of European and Comparative Law, with a particular focus upon Energy Law, constitutional, institutional and judicial issues in the European Union and (comparative) private law.

Herke Kranenborg worked for the Europa Institute in Leiden from December 2001 until September 2008, first as a Ph.D.-fellow and after the defence of his Ph.D.-thesis in September 2007 as assistant-professor. Since October 2008 he is working as a legal advisor for the European Data Protection Supervisor in Brussels.

Pieter Jan Kuijper returned as Professor in the Law of International (economic) Organizations to the University of Amsterdam in September 2007. Before then he was Principal Legal Advisor and Director for External Relations and Trade Law in the Legal Service of the European Commission (2002-2007) and Director of the Legal Affairs Division in the Secretariat of the World Trade Organisation (1999-2002). He is member of the editorial board of the Common Market Law Review.

Robert Lane is a senior lecturer in the School of Law, University of Edinburgh. He is concerned mainly with various strands of EC and EU law and with competition law. In the mid-1990s he spent two years as a university senior lecturer and Director of the LL.M. programme in European Community Law at the Europa Institute, University of Leiden.

Richard H. Lauwaars is professor of the law of European organizations at the Free University in Amsterdam (1972-1979). Visiting professor at the University of Michigan Law School (1979-1980). Professor of European Union law at the University of Amsterdam and director of the Europa Institute (1981-1993). Member of the Dutch Council of State (1994-2008).

Rick Lawson studied international law in Leiden. He now holds the Kirchheiner Chair (Protection of the Integrity of the Individual) in the law faculty of Leiden University. He is a member of the Europa Institute at Leiden.

Marc Maresceau teaches European Law and Institutions at Ghent University, where he is the Director of the European Institute and coordinator of the Jean Monnet Centre of Excellence. His main field of research is EU external relations.

Alison McDonnell is Associate Editor of the Common Market Law Review, and member of the Europa Institute at Leiden.

Arjen Meij is Judge at the Court of First Instance of the EC. Previously he was Judge at the Supreme Court of the Netherlands (1996), Judge and Vice-President at the College van Beroep voor het bedrijfsleven (Administrative Court for Trade and Industry), alternate member of various other Dutch courts; present chair on the board of curators of the Europa Institute Leiden.

Pablo Mendes de Leon is Professor of Air and Space Law and Director of the International Institute of Air and Space Law of Leiden University. He maintains a

vast range of memberships in organizations that work to combine law and practice of aviation law and policy. For instance, he is President of the European Air Law Association, a honorary judge at the District Court of Haarlem, a Fellow of the Royal Aeronautical Society, Membre titulaire de l'académie de l'air et de l'espace, Toulouse, France, Board Member of the KLM – Air France foundation, a member of the International Faculty of IATA, a Board Member of the magazines Air and Space Law, and Journal of Air Law and Commerce.

M. Robert Mok was born in1932 in Amsterdam. He was Advocate-General at the Netherlands Supreme Court and part-time Professor of Competition Law and Economic Law at the Groningen State University.

Kamiel Mortelmans gained his LLM and PhD at the University of Gent, Belgium. He worked as (senior) lecturer at the Europa Institute University of Leiden, 1971-1972, 1973-1977, 1982-84. He was legal secretary, at the Court of Justice of the European Communities 1978-1982. He was professor of Public Economic Law, Europa Institute University of Utrecht 1984-2005 and became a Counselor of State (Netherlands) in 2005.

Tom Ottervanger is a partner in the competition group of Allen & Overy. He is i.a. chairman of the Appeals Committee of the Amsterdam Power Exchange and member of the Board of the Europa Institute at Leiden, of the ''European Competition Lawyers Forum'' in Brussels and of the Journal ''Markt & Mededinging''. He is co-author with Professor Slot and Professor Hancher of a book on EC State aid law.

Jacques Pelkmans holds the Jan Tinbergen Chair of European Economic Integration and is Director of the Economic Studies department at the College of Europe, Bruges, (www. coleurop.be). He also holds the Chair on ''Business & Europe'' at the Vlerick School of Management (Leuven/Gent) and is an associate fellow of CEPS (Center for European Policy Studies, Brussels).

Wulf-Henning Roth is Professor of Law at the University of Bonn (since 1990), Director of the Institute of Private International and Comparative Law, Director of the Centre of European Economic Law; First State Examination, Munich 1970; LL.M. (Harvard), 1972; Dr. jur., University of Munich, 1975; Habilitation, University of Munich, 1983; Visiting Professor at the Universities of Berlin and Regensburg; Professor of Law at the University of Bonn (1984-1985) and Erlangen-Nurnberg (1985-1990). He is member of the editorial board of the Common Market Law Review.

Nico Schrijver is professor of international law and academic director of the Grotius Centre for International Legal Studies, Leiden University. He also serves as honorary visiting professor of the European Union and Co-operation with Developing Countries at the Institut d'études européennes of the Université libre de Bruxelles. As a member of the UN High-level Task Force on the Right to Development, Schrijver led in 2007 a UN mission to Brussels to assess the ACP-EU Cotonou Partnership Agreement.

Hanna Sevenster taught competition law and environmental law at the Europa Institute Leiden from 1987 until 1993. She received her doctorate degree in 1992, with a thesis on European environmental law, which was supervised by P.J. Slot. After private practice at the Hague law firm of De Brauw Blackstone Westbroek, in 2001 she became head of the EU Law department of the Ministry of Foreign Affairs, charged *inter alia* with ECJ litigation on behalf of the Netherlands government. She is now a member of the Dutch Council of State.

Andrew Skudder is a solicitor in the London office of Freshfields Bruckhaus Deringer where he specializes in contentious antitrust, competition and trade disputes. Prior to joining Freshfields in 2005, he was an academic in the Europa Institute of Leiden University.

Gert Straetmans is professor of European and Belgian Economic Law in the University of Antwerp. From 1999-2002 he lectured at Leiden University. Since 2000, professor Straetmans is visiting professor at the Rheinische Friedrich-Wilhelms-Universität Bonn and in 2006 also at the Université de Toulouse I. In 2008 he was appointed dean of the Faculty of Law of the University of Antwerp.

Christoph Swaak is Partner at Stibbe N.V., Amsterdam, The Netherlands and Brussels, Belgium. He holds a PhD from Leiden University, where he worked as lecturer in economic administrative law from 1994 to 1998. He is adjunct-professor of law at Fordham Law School, New York, and is ad hoc judge at the District Court of The Hague, The Netherlands.

Christa Tobler is professor of European law at the Europa Institutes of the Universities of Leiden (the Netherlands) and of Basel (Switzerland). In her research, she puts a particular emphasis on the legal concepts of equality and discrimination, both in economic and social law. She is part of two networks of legal experts of the European Commission in this field. Christa Tobler is also particularly interested in the legal relationship between Switzerland and the EU.

Hans van den Oosterkamp is Legal Advisor at the Permanent Representation of the Netherlands to the European Union. In 1983 he was University teacher at the Europa Institute to, respectively, the University of Amsterdam and the University of Leiden. After the University he worked as Legal Counsel to the Dutch Council of State, the Dutch Ministry of Economic Affairs and the Dutch Ministry of Foreign Affairs. He is on the editorial board of SEW.

Marc van der Woude is Professor of European Law at the Erasmus University, Rotterdam, The Netherlands and partner at Stibbe N.V., Amsterdam, The Netherlands and Brussels, Belgium.

Elaine Whiteford is Counsel in the Dispute Resolution and Antitrust Competition and Trade teams in Freshfields Bruckhaus Deringer in London. After a career as an academic (in Leiden and Nottingham), she qualified at the English bar before moving to Freshfields in 2000.

11.
Quality Control of Competition Decisions

*David Edward**

1. INTRODUCTION

Piet Jan Slot has maintained the splendid tradition of the Europa Institute of Leiden as an institution where a civilized and balanced Dutch view of the world is combined with careful scholarship, rigorous debate and intense international collaboration. Piet Jan Slot and I came to know each other as disciples of Henry Schermers who was the very embodiment of that tradition, so I am proud to contribute to this *Liber Amicorum* as a tribute from one disciple and friend to another.

For almost thirty years dissatisfaction has been expressed about the way that European competition cases are dealt with. The dissatisfaction continues in spite of the creation of the CFI and procedural reforms, including the new expedited procedure, and in spite of the best efforts of judges in the ECJ and CFI.[1] Why should this be so?

---

* Professor Emeritus of the University of Edinburgh; Judge of the Court of First Instance 1989-92 and of the Court of Justice 1992-2004. I would like to acknowledge the very helpful comments of Robert Lane, Niamh NicShuibhne and Sandra Keegan. None of them bears any responsibility for the opinions expressed.

1. See, for example, T. Cowen, "Justice Delayed is Justice Denied", 4 *European Competition Journal* (2008), 1.

Bulterman, Hancher, McDonnell and Sevenster (eds),
Views of European Law from the Mountain, pp. 143–150.

I leave aside the problem of language which imposes immense logistical burdens on every aspect of the European court system. In some ways, that burden is less in "pure" competition cases (direct actions for annulment of Commission Decisions) since the number of languages in use is normally very small, although the volume of paperwork (pleadings, productions and judgments) imposes its own burdens on the translation divisions.

The real question, so it seems to me, is whether judicial review on the existing Treaty basis can ever be sufficient to ensure transparent and objective decision-making.

2. FROM MARKET INTEGRATION TO "COMPETITION LAW"

Direct actions are not, of course, the only "competition cases" that come before the European Courts. Someone once said that "The whole Treaty is about competition"[2] and in a sense that was true. The Spaak Report identified the partitioning of markets as a major cause of Europe's economic weakness.[3] The strategy of the Treaty was to open national markets to competition through the four freedoms as well as through the "rules on competition".[4] Cases (mainly preliminary references) concerning the market-partitioning effects of national rule making[5] and intellectual property rights are about competition quite as much as actions for annulment of Commission Decisions.

Put another way, "competition law" in the EU context is, and always has been, more than a European variant of US anti-trust law. It is an essential component of the more complex strategy of European integration through market integration.[6] A consistent theme in the Court's early judgments is insistence upon the interpenetration of national markets as one of the basic objectives of the Treaty which the rules on competition are designed to encourage.[7]

---

2. I have never been able to trace this quotation which was attributed to Jean Monnet, but others have told me that Monnet would never have said such a thing.
3. *Rapport des Chefs de Délégation aux Ministres des Affaires Etrangères,* Brussels, 21 April 1956, *Avant-Propos*, 9.
4. Even the rules on equal pay for men and women (Art. 119, now Art. 141) were designed to prevent unfair competition between Member States which permitted pay differentials and those States (notably France) which did not.
5. Discussed in my contribution (*Competition and National Rule-Making*) to the *Festschrift* for Claus-Dieter Ehlermann, *European Integration and International Co-ordination* (Kluwer, 2002), pp. 129 et seq.
6. See, for example, Case 32/65, *Italy* v. *Council and Commission*, [1966] ECR 389: "Article 85 as a whole should be read in the context of the provisions of the Preamble to the Treaty which clarify it and reference should particularly be made to those relation to 'the elimination of barriers' and to 'fair competition' both of which are necessary for bringing about a single market."
7. See, for example, Case 48/69 *ICI* v. *Commission ('Dyestuffs')* [1972] ECR 619, para. 116; and, in the field of trade marks, Case 192/73, *Van Zuylen Frères* v. *Hag AG ("HAG I")*, [1974] ECR 731, para. 13.

At the beginning, the majority of "pure" competition cases concerned market-sharing cartels, differential pricing, and selective or exclusive distribution agreements, whose adverse effect on the creation of a single market was obvious. As long as the focus was on market-partitioning effects, there was little reason for any difference of approach between the Court and the Commission. The words and intention of the Treaty were clear enough and both institutions were committed to giving effect to them. There were no serious problems about the scope of the Court's jurisdiction in respect of preliminary references or direct actions.

During the late 1970s and early 1980s, the scene changed. Block exemption regulations largely eliminated the need for the Court to define the scope and permissible limits of vertical arrangements. Meanwhile, although there was a lull in competition litigation, the Commission adopted a more aggressive approach to horizontal agreements and industry cartels, applying its own variant of the effects doctrine[8] to target multinationals based in third countries.

The earlier pre-occupation with market integration gave way to an increasingly specialized approach to competition law with stronger emphasis on the links and parallels between European law, national law (especially German law) and US anti-trust law. Competition law came to be regarded as a self-standing professional discipline, strongly influenced by the outlook and methods of large law firms from the common law world – unflatteringly characterized by a former Commission official as "the new legal industry of European cartel litigation".[9]

3. CONSTITUTIONAL CHALLENGES

An important and beneficial consequence of these developments was the growth of "constitutional" challenges to the procedures and practices of the Commission. To common lawyers, Commission procedure had always seemed unusual (not to say objectionable) since it combined in one political institution the functions of investigation, prosecution and decision-making, including the quasi-penal power to impose swingeing fines. The justification usually advanced was that such arrangements were common in continental administrative systems and were in any event expressly authorized by Regulation 17.

In *AM&S* the Commission and the French Government argued that the Commission's powers of investigation were defined by Regulation 17 and could not be limited by any implied doctrine of confidentiality or privilege.[10] The Court's rejection of this position marked the end of an era in which the Commission could pretend that the text of Regulation 17 was the sole measure of its powers. It opened the way to a wide range of procedural challenges and the evolution of an extensive "rights of defence" jurisprudence.

---

8. Inspired by A.G. Mayras in *ICI*, previous footnote. Opinion of A.G. Mayras, para. 693 et seq.
9. C. Harding and J. Joshua, *Regulating Cartels in Europe: A Study of Legal Control of Corporate Delinquency*, (Oxford, 2003), pp. 130 et seq.
10. Case 155/79, *AM&S Europe Limited* v. *Commission*, [1982] ECR 1575, paras 9-12.

4. THE COURT OF FIRST INSTANCE

By the end of the 1980s, the volume of competition litigation before the ECJ had grown to such an extent that, in spite of earlier hesitations, jurisdiction in direct actions was transferred to the Court of First Instance. The Preamble of the Council Decision establishing the new Court announced that its purpose was "in respect of actions requiring close examination of complex facts [to] improve the judicial protection of individual interests" and "to maintain the quality and effectiveness of judicial review in the Community legal order".[11]

This high-sounding but cautious phraseology recognized that there was a problem. But the desire to improve judicial protection was not accompanied by any change in, or clarification of, the nature of the new Court's jurisdiction. This remained limited, as before, to review of legality according to the criteria of judicial review laid down in Article 173 (now Art. 230). Specifically, it was not made clear how the "close examination of complex facts" was to be conducted or how far it was to go.

The way in which the CFI approached its task, with longer oral hearings, detailed questioning and detailed judgments, was generally welcomed, although some officials in the Commission felt that the new Court was too intrusive and was overstepping the limits of its jurisdiction. The tension between the Commission and the Court came to a head with the *Italian Flat Glass* case,[12] where detailed examination showed that crucial words had been omitted from the text of documents on which the Commission had relied in its Decision, as disclosed to the parties and produced to the Court.[13] This led to the partial annulment of the Decision and some resentment and bad feeling of which, as Rapporteur in the case, I was made acutely aware. However, as one former Commissioner remarked to a disgruntled colleague, "it is simply a matter of quality control." The question is whether this kind of quality control should be for judges to carry out.

Failure adequately to define the role of the CFI in dealing with "complex facts" has led to what one of its former judges has called "a disquieting fluctuation of case law".[14] The Court's approach has ranged from detailed examination and criticism of the Commission's factual and economic findings as in *Tetra*

---

11. Council Decision of 24 Oct. 1988 establishing a Court of First Instance of the EC, O.J. 1988, L 319/1, with Corrigendum in O.J. 1989, L 241/4.
12. Joined Cases T-68/89, T-77/89 and T-78/89, *Società Italiano Vetro SpA*, [1992] ECR II-1403.
13. See *Società Italiano Vetro SpA*, ibid., paras 91 and 94 and subsequent paragraphs there cited. The reason for what had occurred was never satisfactorily explained. The most probable explanation is that the documents had been prepared for a Decision focused on anticompetitive conduct on the part of two of the undertakings concerned (SIV and FP). References to the third undertaking (VP) were therefore blanked out as irrelevant. It was then decided, without verifying the original documents, to pursue a case of collective dominance against all three undertakings – a classic case, as the saying goes, of "cock-up rather than conspiracy".
14. "*Un flottement jurisprudentiel inquiétant*", cf. Judge Hubert Légal, editorial entitled *Le contentieux communautaire de la concurrence entre contrôle restreint et pleine juridiction*, in (2005/2) *Concurrences.*

Laval,[15] to the almost completely hands-off approach to the Commission's findings in *Microsoft*.[16]

A "specialist competition court"[17] would be in no different position from the CFI, so long as the limits of judicial review prescribed by the Treaty remain as they are.

5. CHANGING PRIORITIES AND PERCEPTIONS

A more general problem is illustrated by the fact that President Sarkozy was able (with only feeble resistance) to question the place of competition as an objective of the Treaty.[18] Indeed, the Treaty has been characterized as "a model of failed neo-liberal economic nostrums and misplaced confidence in the market and competition as universal panaceas",[19] while the same former judge of the CFI has suggested that the Commission and the Court are excessively influenced by the "Ayatollahs of free enterprise".[20]

Uncertainty about the aims and priorities of the Treaty does not help the Court in its approach to interpretation, particularly if, as a result of Regulation 1/2003, it is to be faced with an increasing number of preliminary references from national courts on competition issues. In the present context, the uncertainty is due in part to injudicious use of terminology in the Treaty texts which have been amended, modified and supplemented with alarming insouciance and inattention to detail. The original EEC Treaty spoke of "a system ensuring that competition in the internal market is not distorted" (Art. 3(f) now 3(g)) which the Court interpreted as meaning "workable competition, that is to say the degree of competition necessary to ensure the observance of the basic requirements and the attainment of the objectives of the Treaty".[21] The Maastricht Treaty introduced the notion of "an open market economy with *free* competition" (Art. 3a, now Art. 4) – conceptually quite different from *fair* or *undistorted* competition.

There is no evidence, as far as I am aware, of the Court using the altered terminology to embrace "neo-liberal economic nostrums", even if they have enjoyed some *succès d'estime* in political rhetoric, including the rhetoric of the Commissioners for Competition and the Internal Market. What should perhaps

---

15. Case T-5/02, *Tetra Laval BV* v. *Commission*, [2002] ECR II-4381 – see Légal, note 14 *supra.*
16. Case T-201/04, *Microsoft Corporation* v. *Commission,* judgment of 17 Sept. 2007, nyr.
17. Discussed in *An EU Competition Court*, House of Laws European Committee, 15th Report of session 2006-07.
18. Showing, incidentally, that French attitudes have hardly changed since the EEC Treaty was negotiated half a century ago – Colbertism is alive and well. See R. Marjolin, *Memoirs 1911-1986*, (London 1989), Part 4, Chapter 4, pp. 276 et seq. translated from *Le Travail d'une Vie*, (Paris, 1986). See also the contributions by R. Barents and by R. Lane in this volume.
19. S. George, *Europe deserves much better than the Lisbon Treaty*, www.tni.org/detail_page.phtml?&act_id=18283&menu=11a.
20. See Légal, note 14 *supra*.
21. Case 26/76, *Metro SB-Großmärkte GmbH & Co. KG* v. *Commission*, [1977] ECR 1875.

give greater cause for concern is an apparent shift in the Commission's approach to Articles 81 and 82, particularly Article 82.

Until recently it was assumed – by others as well as myself – that the purpose of Articles 81 and 82 is to address the conduct or behaviour of economic operators. ''[Articles 81 and 82] are concerned primarily not with the structure of markets and the anticompetitive forces which may be a direct or indirect result of those structures, but with the manner in which operators conduct themselves on the market.''[22] Now, however, the Commission's Discussion Paper on exclusionary abuses[23] and some of the findings in the *Microsoft* case seem to presage a shift from regulation of the conduct of undertakings to a desire to regulate the markets themselves.[24]

6. THE CONSEQUENCES FOR THE COURTS

Changing perceptions of the role and purpose of Articles 81 and 82 will inevitably complicate the work of the Courts. It is one thing to ask a judge to determine whether there is sufficient evidence to support the facts found by the decision-maker, and whether those findings are sufficient to establish conduct contravening a statutory prohibition. That is a normal part of the function of a judge in criminal, civil, commercial or administrative proceedings. It is quite another thing to ask a judge to determine the *scope* of a statutory prohibition by reference, not to its terms, its context or its purpose, but to economic opinion or economic theory.

This aspect of anti-trust enforcement may be easier to handle in the US (and other common law jurisdictions) where a clear distinction is drawn between ''evidence'' and ''proof'',[25] and where expert economic opinion is ''opinion evidence'' open to cross-examination. In the EU context, the Courts cannot (at least in theory) do more than control ''manifest error of appreciation'' or ''misuse of powers'' on the part of the Commission.[26]

Predictability is an essential component of the rule of law and the maxim *nulla poena sine lege*, embodied in Article 7 ECHR, is one example only of a wider principle. *Ad hoc* adaptation of the scope of Articles 81 and 82 EC to regulate markets according to the prevailing economic preferences of a political institution is unacceptable without the opportunity for objective and transparent examination

22. R. Lane, *EC Competition Law*, (Longman, 2000), p. 31.
23. *DG Competition Discussion Paper on the application of Article 82 of the Treaty to exclusionary abuses*, Brussels, December 2005.
24. See, for example, the latest ambitions of the Commissioner for Competition at www.theregister.co.uk/2008/09/25/european_commission_fibre_unbundling/.
25. The absence of this clear distinction in French (and other continental languages) is evident from the different language versions of paras 106-108 of the Court's judgment in Case C-167/04 P, *JCB Service* v. *Commission*, [2006] ECR I-8935.
26. See Case T-201/04 *Microsoft* (see note 16 *supra*), para. 87 and, for example, para. 649: ''The Court finds that the Commission's findings at the recitals referred to in the preceding paragraph are not manifestly incorrect''.

of the validity of the underlying economic theory. It is not possible for any court to exercise such control when its jurisdiction is limited to control of manifest error. This is all the more problematic in a context where breach of the statutory prohibition may give rise to nullity of contracts and claims for damages.

It is of no assistance in this respect that the judgments of the CFI are subject to review by the ECJ. The appellate jurisdiction of the ECJ is even more limited than that of the CFI. It performs a useful function in that, in cases like *Compagnie Maritime Belge*,[27] the Court can stand back from the factual complications of the case in order to state principles of general application. But the ECJ cannot, any more than the CFI, assess the validity of the Commission's economic theories. The problem lies at an earlier stage.

7. EFFECTIVE QUALITY CONTROL

How should the objectivity and transparency of the Commission's procedures and findings be controlled?

The experience of the UK is instructive. Until 2000, when the Competition Act 1998 came into force, there was no coherent system of competition regulation. In many respects control of competition issues was political. It was only after long debate that a comprehensive and coherent structure of competition regulation, almost (but not quite) immune from political influence, was put in place, beginning with the Competition Act 1998. The regulatory structure now includes the Office of Fair Trading and a number of industry-specific regulators, as well as the Competition Commission.

The Competition Appeal Tribunal is a specialist judicial body with cross-disciplinary expertise in law, economics, business and accountancy. But it differs from the ECJ and CFI in that it has a wide jurisdiction which includes the power to review the merits of decisions taken by the regulators and the power to confirm, set aside or vary such decisions. No one, as far as I am aware, would favour a return to the former system (or lack of it).

By comparison, the system of competition regulation in the EU seems primitive. Subject only to limited judicial control by the CFI, competition decisions with immense economic repercussions (including decisions on State aids) are taken by a process that has become increasingly politicized. Public knowledge of the Commission's internal workings relies as much on leak and anecdote as on transparent explanation and performance. The system does not inspire trust, and that is not healthy in a democratic society. In particular, it is not healthy at a time when, if the French, Dutch and Irish referendums are any indication, there is a general lack of public trust in, and social acceptance of, the EU institutions.

A further consideration is that, in spite of Regulation 1/2003, the case load of the Commission in competition and merger cases remains enormous and is

27. Joined Cases C-395 & 396/96P, *Compagnie Maritime Belge* v. *Commission*, [2000] ECR I-1365.

growing. Apart from the constitutional arguments for separating the functions of investigation, prosecution and decision-making, there is a practical case for greater separation of functions within the Commission. ''The division of labour, so far as it can be introduced, occasions, in every art, a proportional increase in the productive powers of labour.''[28]

That said, there *are* strong constitutional arguments for separating functions within the Commission, and for establishing a body embedded, like the UK Competition Appeal Tribunal, within the regulatory structure to control the merits as well as the lawfulness of decisions. Such suggestions have been described as being ''only of academic interest at the present time''.[29] It is unfortunate if that be so. The fact that an idea is ''of academic interest'' is hardly a sufficient reason to ignore it: Adam Smith was, after all, a professor of logic and moral philosophy.

Objectivity and transparency in decsion-making are central to modern conceptions of the rule of law. And at a moment when global markets have been thrown into chaos, there are good political reasons to ensure that our systems of regulation are effective and trustworthy. This might be a more fruitful topic of discussion at the dinner table of Heads of State and Government than further tinkering with the terminology of the Treaty.

---

28. A. Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, (London, 1776), Book I, Chapter 1.
29. See House of Lords Report, *An EU Competition Court*, cited *supra,* note 17, para. 155. Note, however, the evidence of M. Petite and P. Lowe at Q339 (p. 71 et seq.) suggesting that this issue is not closed.