FOREWORD

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The 2010 Conference of the Global Competition Law Centre discussed the judicial adjudication of competition law problems, primarily in the General Court of the European Union, formerly the Court of First Instance (CFI), and on appeal the Court of Justice (ECJ). The speakers at the Conference had detailed practical experience from different points of view and it is particularly valuable to have their thoughts developed here. This Foreword records some of the impressions I formed over fourteen years as a Judge of the CFI and then of the ECJ.

It is always important to keep in mind the context in which courts have to operate. Unlike policy-makers and administrative decision-makers, judges work within a framework of rules where the scope for discretion and innovation is strictly limited. This is particularly so in the Luxembourg Courts. Their powers are limited to those conferred on them by the Treaties and the Statute of the Court and their procedure is governed by the Statute and Rules of Procedure which the courts cannot themselves alter, modify or adjust.

The key Treaty texts have hardly changed since 1951 when the Court was first established for the Coal and Steel Community. The role of the Court is to "ensure that in the interpretation and application of the Treaties the law is observed" (now Article 19(1) TEU). "The law" in this context is a wide concept (*ius*, *droit or Recht*, rather than *lex*, *loi or Gesetz*). In examining decisions of the other institutions its role is to review their legality (*légalité* or *Rechtmässigkeit*) and may do so on grounds of "infringement of the Treaties or any rule of law relating to their application" (Article 263 TFEU). So the Court is instructed to draw, not only upon the Treaties and other texts, but also upon general principles of law derived from sources such as public international law, national constitutions and learned writings.

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As regards competition decisions, however, the Court's jurisdiction is limited to judicial review of their lawfulness and does not extend to review of the merits (except as regards fines under Article 31 of Regulation 1/2003). The primary jurisdiction for review of competition decisions now lies with the General Court subject to appeal to the Court of Justice on points of law only (Article 256 TFEU). In an appeal, the role of the ECJ is to review the legal correctness of the judgment of the General Court, not the decision of the Commission.

The Rules of Procedure are strict as regards the form and content of written pleadings and the time limits for lodging them. A party contesting a Commission decision must, within a relatively short time, lodge an application setting out a summary of the "pleas in law" (*moyens*) and the nature of any evidence offered in support. The defence, again within a relatively short time, must state the arguments of fact and law relied on, and the nature of any evidence offered. No new plea in law on either side may be introduced later unless it is based on matters of law or fact that came to light in the course of the procedure. A party may offer further evidence but must give reasons for delay in offering it.

The purpose of these rules is to ensure that the nature and scope of the dispute is clearly defined at the outset, and to avoid the successive lodging of new pleadings, introducing new arguments and new evidence. For a court that is already burdened with a heavy case load and has to work in multiple languages, this is particularly important. But it also gives rise to misunderstanding and dissatisfaction, particularly amongst lawyers and clients from the common law countries including the United States.

The Council Decision of 24 October 1988 setting up the Court of First Instance (CFI), now the General Court, stated that its purpose was to "improve judicial protection *[in]* actions requiring close examination of complex facts" and to "maintain the quality and effectiveness of judicial review". The rules outlined above place severe limits on what the Court can do to achieve these aims. But the CFI was able to introduce some changes.

The first change was to introduce a new form of case management through measures of organisation of procedure. This required a variation of the rules of procedure and did not go through without initial opposition on the part of some Member States, including my own.

The second change was possible because in the CFI, unlike the ECJ, cases are assigned to Chambers at the outset before submission of the Judge Rapporteur's Preliminary Report, and there is no Advocate General except in very rare cases. The Judges of the relevant Chamber can therefore pro-

ceed directly to discussion of the case and the problems it raises, decide what preliminary measures of organisation or instruction are necessary and decide how the hearing should be organised. From the start, we had longer hearings and more detailed questioning of issues in the case. To that limited extent we were able to improve the examination of complex facts.

We had no idea how the ECJ would approach the question of appeals: would it be severe and analyse the reasoning of the CFI in detail or would it take what a more restrained approach? It soon became clear that the Court would take the second approach. One of my last cases as Judge Rapporteur (C-204/00 P *Aalborg Portland*) synthesised the case law on the role of the two Courts and the approach to evidence in competition cases.

Against that background, what are the problems of judicial control?

First, as I have explained, the roles of the General Court and the ECJ, the limits of their jurisdiction and their procedure are prescribed by the texts. The Court can propose amendments, but apart from the long delays that may be involved, the process of amendment itself is not a straightforward process. There are many potentially conflicting interests and points of view within the other institutions and the Member States that must be taken into account and reconciled. In my view, an adverse consequence of the Courts' limited jurisdiction is undue concentration on procedural technicalities precisely because a straightforward and honest review of the merits is not open.

Second, the requirement to state all pleas and offer all evidence within a short time scale means that the written pleadings are long, detailed and sometimes not very well organised. The requirement to produce all the evidence at one time means that lorry loads of documents are produced since it is too risky to leave them out. In my experience, most of them will never leave the Registry and will never be looked at again. All this poses problems for the Rapporteur and Advocate General who have to absorb and summarise the pleadings and documents to be sure that all relevant points are understood and taken into account.

Third, there are cultural constraints on the way in which the Courts exercise such procedural autonomy as they have. So, for example, the CFI was subject (and I in particular as Rapporteur was subject) to criticism in some quarters for the degree of detail with which we examined the documents in the Italian Flat Glass case (T-68/89 and others). I believe it was justified, particularly in that case, but others look for greater passivity from judges.

Fourth, there is the character of the basic texts of competition law, Articles 101 and 102. These are expressed as prohibitions of conduct. They are

readily justiciable if the question is limited to how somebody has behaved and whether that falls within the scope of the prohibition. But the cases have increasingly raised the question: what is competition law about? Is it about regulating conduct or is it about regulating markets? If it is about regulating markets then we are moving out of the justiciable area of prohibitions of conduct without, at the same time, changing the basic texts.

In the same vein, prohibitions of conduct do not readily accommodate differences of view about economics and competition theory. The Courts receive no guidance from the texts as to how far they are to come into the discussion.

Fifth, we now have a disorganised variety of expressions in the Treaty. "Free competition" was removed over the dinner table at the insistence of President Sarkozy from one article of the Treaty, but it still appears elsewhere. Is "free competition" the same concept as "fair competition" and is either of them the same as "undistorted competition"?

Sixth, a new consideration following the Lisbon Treaty is: what will be the place of subsidiarity and proportionality in the context of competition law and policy? And what is the significance for competition policy of Protocol No. 26 on the application of the rules of the Treaty to services of general interest, which draws attention to the regional and local dimension?

Lastly, and perhaps most importantly, the texts do not prescribe how the Commission is to exercise its multiple functions of investigation, prosecution and decision, nor the extent of its discretion and margin of appreciation. In one sense, this is understandable, but it does not make the Courts' task any easier. Must the Commission's procedures be compliant with Article 6 of the ECHR? Where do factual findings end and economic appreciation begin? What, indeed, is the place of economic assessment within the scope of limited judicial review? And how should a case law system which relies, to some extent at least, on precedent embrace new ideas of competition theory?

That only scratches the surface, so I recommend this book to all those who take an interest in these problems.