Notes From a Small Island: Natural Justice and the Institutional Design and Practice of Competition Authorities and Appellate Courts

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The relationship between the institutional design, decision-making powers, and policy-making functions of competition authorities raises a diverse range of complex issues. These include how the authority's independence can be safeguarded, how it is funded, how to optimize resources, how to avoid confirmation bias, how to relate with non-competition authorities (e.g., sectoral regulators with concurrent powers or overlapping jurisdiction), and the relationship with the judiciary. This article starts from the optimistic—not to mention extremely presumptuous—position of trying to use the concepts of natural justice and procedural fairness as developed in the United Kingdom as something of a template for good practice and institutional design in competition law decision-making and appeals generally. Apart from familiarity (from the authors' perspective), there are some good reasons to do so. First, outside the realms of antiquity, the United Kingdom can lay a fair claim to popularizing the notion of a rule of law. Second, the United Kingdom is one of the oldest and most prominent adopters of a system of adversarial justice where the ability to challenge evidence remains paramount. Third, the common law is characterized as much by pragmatism as strict principle. The common law has developed an adaptable, rather than rules-based, approach to natural justice. As a result we consider that it is a useful resource when considering institutional design and operation of competition authorities. The law develops in real time, and not from the basis of an historic code. Fourth, in respect of competition law specifically, a fairly rich body of case law has developed in the United Kingdom around principles of natural justice, procedural fairness, and the use of evidence. That case law certainly appears richer than the corresponding case law of the EU Courts in Luxembourg. Finally, the United Kingdom has itself undergone major institutional reform of its various competition authorities, most notably by the creation of the Competition and Markets Authority, effective from April 1, 2014. This significant exercise prompted a period of introspection as to whether, for example, the practices applied by the competition authorities for the previous decades could be improved or adapted. The resulting guidance and related documents that emerged might therefore fairly be considered to be the state of the art in these matters.

I. INTRODUCTION

The relationship between the institutional design, decision-making powers, and policy-making functions of competition authorities raises a diverse range of complex issues. These include how the authority's independence can be safeguarded, how it is funded, how to optimize resources, how to avoid confirmation bias, how to relate with non-competition authorities (e.g., sectoral regulators with concurrent powers or overlapping jurisdiction), and the relationship with the judiciary.

The design and use of evidence by competition authorities within the European Union has attracted considerable attention in recent years. In the first instance there is of course a need to ensure that the authority has the requisite legal powers, resources, and trained personnel to secure the relevant evidence. A second

important facet is the desire to ensure that the rights of defendants or other affected parties are guaranteed, in both law and practice, by competition authorities and courts to whom an appeal against their decisions lie. This has led to a lively debate in the European Union as to whether the current practices of the Commission are fit for purpose and the supervisory role played by the EU Courts in this regard.[2]

The increasing emphasis on due process and the gathering and appreciation of evidence by competition authorities is unsurprising. First, the fines imposed by competition authorities have increased very significantly indeed, particularly at the EU level. Fines of *circa* EUR 1 billion have been imposed on Intel, Microsoft (cumulatively), and various cartelists (cumulatively). As the stakes increase, so too will concern as to process and institutional design on critical matters such as evidence. The concepts of natural justice and procedural fairness can and do adapt with the times. What was considered fair at the time of the EU's inception, with very limited enforcement and nominal fines, may not be acceptable today.

WHAT WAS CONSIDERED FAIR AT THE TIME OF THE EU'S INCEPTION, WITH VERY LIMITED ENFORCEMENT AND NOMINAL FINES, MAY NOT BE ACCEPTABLE TODAY

Second, the EU model of competition law has been exported with considerable success to a very large number of other jurisdictions—the International Competition Network has well over 120 members, many of whom have modeled their laws and institutions on the EU model. The export of substantive law almost inevitably leads to interest in the procedural and due process safeguards that underpin the application of that substantive law. Or perhaps more accurately, the significant fragmentation in enforcement has triggered a desire to identify the underlying common principles in relation to due process and evidence.[3]

Third, at least in the European Union, there has been a very significant trend towards the settlement of cases via (ostensibly) voluntary commitments, early resolution agreements, leniency, and other forms of resolution. These facilities have been applied in major global cartel cases as well as leading unilateral conduct cases. The rise and rise of these arrangements has raised twin connected concerns: whether a lack of fairness in the process leading to a prohibition decision practically compels defendants to settle cases, and whether the relative lack of formality within these settlement procedures can itself lead to procedural and evidential unfairness.

THE PROPER DEVELOPMENT OF SUBSTANTIVE COMPETITION LAW MAY BE MATERIALLY AFFECTED BY MATTERS OF PROCEDURE AND EVIDENCE AND INSTITUTIONAL DESIGN IN WAYS THAT ARE NOT ALWAYS FULLY APPRECIATED

Fourth, the issues of institutional design and procedural fairness in the European Union have taken on particular prominence in the light of the ongoing debate concerning whether the appellate role of the EU Courts complies with the requirements of Article 6(1) of the European Convention of Human Rights ("ECHR") and the equivalent provision in Article 47 of the EU's Charter on Fundamental Rights. If concerns arise as to the effectiveness of judicial review, this will also inevitably lead to increased focus on whether the procedure for decision-making by the Commission is deficient in material respects. Or put differently, if there

is less confidence in the administrative decision-making process, more will be demanded of the appeal courts.

Fifth, the proper development of substantive competition law may be materially affected by matters of procedure and evidence and institutional design in ways that are not always fully appreciated. If the undoubted discretion vested in a competition authority is not subject to effective procedural safeguards, the likely result will be an expansion of the jurisdiction and impact of competition law: a "mission creep." This in turn is likely to result in an over-inclusive, or at least more haphazard, application of competition law since there may be insufficient internal checks and balances on the end-product: a competition authority's decisions. In short, procedural deficiencies may have at least an indirect impact on the substantive application of competition law. Better and fairer procedures are likely to restrain any unwarranted 'mission creep'.

THE COMMON LAW HAS DEVELOPED AN ADAPTABLE, RATHER THAN RULES-BASED, APPROACH TO NATURAL JUSTICE

Finally, matters of evidence and procedural fairness are not simply a one-way street intended to confer ever-increasing rights on defendants or other affected parties. Competition authorities will be better able to defend their own decision-making if appellate courts have greater confidence that the best evidence has been gathered and in a way that is fair to those affected. If the appellate courts have a high level of confidence in the robustness of the competition authority's institutional structure and procedures and practices in relation to evidence, they are not only much less likely to overturn decisions on matters of procedure, but are also likely have greater confidence in the decision-making as a whole.

THERE IS NOTHING LIKE UNIVERSAL AGREEMENT ON WHAT, PRECISELY, NATURAL JUSTICE AND PROCEDURAL FAIRNESS DEMAND IN THE CONTEXT OF COMPETITION LAW PROCEEDINGS (OR, INDEED, MORE GENERALLY)

This article starts from the optimistic—not to mention extremely presumptuous—position of trying to use the concepts of natural justice and procedural fairness as developed in the United Kingdom as something of a template for good practice and institutional design in competition law decision-making and appeals generally. Apart from familiarity, from the perspective of the authors, there are some good reasons to do so. First, outside the realms of antiquity, the United Kingdom can lay a fair claim to popularizing the notion of a rule of law. Second, the United Kingdom is one of the oldest and most prominent adopters of a system of adversarial justice where the ability to challenge evidence remains paramount. Third, the common law is characterized as much by pragmatism as strict application of principle. The common law has developed an adaptable, rather than rules-based, approach to natural justice. As a result we consider that it is a useful resource when considering institutional design and operation of competition authorities. The law develops in real time, and not from the basis of an historic code. Fourth, in respect of competition law specifically, a fairly rich body of case law has developed in the United Kingdom around principles of natural justice, procedural fairness, and the use of evidence. That case law certainly appears richer than the corresponding case law of the EU Courts in Luxembourg. Finally, the United Kingdom has itself undergone major institutional reform of its various competition authorities, most notably by the creation of the Competition and Markets Authority ("CMA"), effective from April 1, 2014. This

significant exercise prompted a period of introspection as to whether, for example, the practices applied by the competition authorities for the previous decades could be improved or adapted. The resulting guidance and related documents that emerged might therefore fairly be considered to be the state of the art in these matters.

The above rather highfalutin claims should not of course be overstated. In reality competition law is a small component of national legal systems and the approach to it will be conditioned heavily by the general approach to administrative and constitutional law and the legal system in individual jurisdictions. The United Kingdom system of enforcement and appeals in competition law cases is also by no means the predominant model even within the European Union. More fundamentally, there is nothing like universal agreement on what, precisely, natural justice and procedural fairness demand in the context of competition law proceedings (or, indeed, more generally). But the pragmatism at the heart of the common law means that much of what is contained in the case law and guidance in the United Kingdom is often a useful starting point when considering what is common sense or basic good practice. In this reductionist sense it may therefore have something to commend it more generally.

What follows divides broadly into four parts:

• Part II provides an overview of how the concepts natural justice and fairness have evolved under the general common law.

• Part III deals with two separate but related aspects of the European dimension to the debate, namely (1) the standards developed under the Article 6 case law of the European Court of Human Rights ("ECtHR") and (2) the position under EU law in respect of competition law proceedings and appeals to the EU Courts.

• Part IV sets out how the concepts of fairness and natural justice have been employed in U.K. competition law proceedings by reference to the guidance of the CMA and case law.

• Part V condenses our views into a series of core principles, set out as bullet points in the conclusion.

II. EVOLUTION OF NATURAL JUSTICE AND FAIRNESS UNDER ENGLISH LAW GENERALLY

The English common law has long antecedents in dealing with the scope and nature of the right to a fair trial and procedural fairness.[4] The leading case concerning what English judges have traditionally called natural justice is *R v Secretary of State for the Home Department ex parte Doody*.[5] The case concerned the setting of life sentences for serious criminals. The Secretary of State was entitled to set a minimum tariff to be served, having taken into account the view of the judge who sat at trial. The House of Lords held that the Secretary of State could not make that determination without first informing the prisoner what the sitting judge had recommended. He also had to allow the prisoner to make written submissions as to the proper punishment.

Lord Mustill's leading judgment summarized the principles of fairness from the authorities as follows (p. 560 at D-G):

> What does fairness require in the present case?...1. Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. 2. The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. 3. The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. 4. An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. 5. Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favorable result; or after it is taken, with a view to procuring its modification; or both. 6. Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.

Thus, the judgment established two key overriding principles. First, that fairness has certain hallmarks that are likely to apply in most cases: a person who may be adversely affected will very often need to be given an opportunity to make representations and they must ordinarily be made aware (at the very least) of the "gist of the case he has to answer." Second, that the standards that should be applied are not always the same, and will depend on the context.

Building on the principle of fairness identified in the common law, the cases may broadly be broken down into four headings:

A. The Right of Access to the Court

Parties to litigation must be allowed access to the court; that right has frequently been dubbed a "constitutional right" notwithstanding the lack of any written constitution in the United Kingdom. That constitutional right may be subject to qualification, for example on procedural grounds: a plaintiff may lose its claim as a result of excessive delay. However, as Scrutton J held in *R v Boaler*,[7] the right of access to the court is "one of the valuable rights of every subject to the King... I should be slow to give effect to [any ouster of that right which] is a most serious interference with the liberties of the subject."

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B. The Right to be Heard

The right to make submissions, on your own behalf, is an historic feature of English civil and criminal law. One of the

best known statements on this issue was set out in a case concerning the right of a local authority to demolish buildings. The plaintiff's house had been destroyed because of his failure to give proper notice of his intention to build it. Willes J held that the property should not have been destroyed without first giving the owner the right to put his objections first:[8]

> a tribunal which is by law invested with power to affect the property of one Her Majesty's subjects, is bound to give such subject an opportunity of being heard before it proceeds: and that the rule is of universal application and founded on the plainest principles of justice.

C. The Right to Know the Case Against You

EQUALITY OF ARMS EXTENDS BOTH TO THE RIGHT TO PRIOR NOTICE OF THE CASE AGAINST YOU AND ALSO TO KNOW THE EVIDENCE THAT IS RELIED UPON AGAINST YOU

The right to be heard is closely connected to the further right to know the case against you. In *Ridge v Baldwin*, the Chief Constable of Brighton had been dismissed, after criminal proceedings were initiated against him.[9] He was not given the right to appear before the Watch Committee (which terminated his employment) or to make submissions in his defense. The House of Lords held that the Watch Committee had acted unlawfully. As Lord Morris explained (at 114):

> It is well established that the essential requirements of natural justice at least include that before someone is condemned he is to have an opportunity of defending himself, and in order that he may do so that he is to be made aware of the charges or allegations or suggestions which he has to meet: see Kanda v Government of Malaya. My Lords, here is something which is basic to our system: the importance of upholding it far transcends the significance of any particular case.

The common law courts have frequently described this principle as the requirement that there be "equality of arms." Equality of arms extends both to the right to prior notice of the case against you and also to know the evidence that is relied upon against you.

There has also been a substantial new body of case law, arising out of the new Closed Material Procedures (where defendants are not made aware of all of the evidence against them) in terrorism cases. The Courts have held, following *Doody*, that fairness must be determined by reference to the circumstances of the case as a whole.[10]

D. The Right to Test Evidence Brought Against You

The common law authorities establish that the right to an oral hearing is not absolute; the Court must ask whether the parties should be given an oral hearing in order to properly put their case. Where an oral hearing has been ordered, the normal position is that a party should be entitled to cross examine witnesses

who have given evidence against them.[11] In a criminal case, the House of Lords has held that a defendant must know the identity of the party making allegations and accusations against them.[12] Witness anonymity is only allowed in cases where Parliament has expressly provided for it.

III. THE EUROPEAN DIMENSION

A. The ECHR Dimension

Article 6 (1) provides that:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...

The precise scope of procedural protection provided by Article 6 in competition cases has been the subject of extensive judicial and extra-judicial comment in recent years. The Article 6 case law imposes a higher standard of protection in the context of criminal, as opposed to civil, cases. At first glance, the position in respect of competition matters appears clear. Regulation 1/2003 provides that any fine imposed by the Commission, in respect of infringements of competition law "shall not be of a criminal law nature." However, legislation cannot oust the application of Article 6(1) protections if, on a proper analysis, the matters at issue fall within the scope of Article 6(1). Indeed, it had long been accepted by the EU Courts prior to Regulation 1/2003 that at least some of the Article 6(1) protections are engaged in competition law cases.[13] That was also the unanimous view of the ECtHR in *Menarini Diagnostics v Italy*.[14]

THE DISPUTE HAS TURNED, AT LEAST IN THE COMPETITION LAW SECTOR, ON WHETHER OR NOT COMPETITION LAW PROCEEDINGS SHOULD STILL BE TREATED AS "NON-TRADITIONAL" CASES THAT ATTRACT A LOWER LEVEL OF JUDICIAL SUPERVISION

The legal and procedural complexity arises out of the fact that not all criminal cases need to be treated in the same fashion. There is a longstanding historic distinction within the case law of the ECtHR between the procedural protections afforded in "hardcore" criminal cases and in less substantial matters.

The leading case (at least until recently) which elaborated on that distinction was *Jussila v Finland* (Application no 75053/01). The Applicant had had his tax returns examined by the Finnish authorities, who had imposed a EUR 308 surcharge, following reassessment.[15] The Applicant challenged that determination but was not offered an oral hearing in order to contest the tax authorities' decision. Under Finnish law, the imposition of the surcharge was an administrative punishment. Nonetheless, the Grand Chamber held that the imposition of a tax surcharge was a matter that attracted the protection of the criminal case law under Article 6.[16]

THE LEGAL AND PROCEDURAL COMPLEXITY ARISES OUT OF THE FACT THAT NOT ALL CRIMINAL CASES NEED TO BE TREATED IN THE SAME FASHION

However, the Grand Chamber went on to find that no oral hearing was necessary in such a case:

> There are clearly 'criminal charges' of differing weight. What is more the autonomous interpretation adopted by the Convention institutions of the notion of a 'criminal charge' by applying the Engel criteria have underpinned a gradual broadening of the criminal head to cases not strictly belonging to the traditional categories of the criminal law, for example administrative penalties (Ozturk, cited above), prison disciplinary proceedings... customs law... competition law... Tax surcharges differ from the hardcore of criminal law; consequently the criminal-head guarantees will not necessarily apply with their full stringency.[17]

The different protections afforded in "hardcore" criminal cases, as opposed to "non-traditional" cases has become the object of intense focus in recent years. The dispute has turned, at least in the competition law sector, on whether or not competition law proceedings should still be treated as "non-traditional" cases that attract a lower level of judicial supervision.

In *Menarini v Italy* (Application no. 43509/08), Menarini had been fined EUR 6 million for participating in a price-fixing cartel in the diabetes diagnostics sector. It complained that the standard of review applied by the domestic courts was only a review of legality, implying that its Article 6 (1) rights had been breached because the Italian courts had not conducted a full merits review by a court of full jurisdiction.

The Second Section of the Strasbourg Court affirmed, once again, that the imposition of a fine in a competition law context is a criminal sanction, for the purposes of Article 6. Where such a sanction is imposed in a non-judicial context (for example by an administrative authority), Article 6 requires that it be subject to review by a court of unlimited jurisdiction.[19]

> The features characterizing a judicial body with unlimited jurisdiction include the power to quash all aspects of fact and law of a contested decision issued by the lower body. It must in particular have competence to examine all questions of fact and law relevant to the dispute brought before it.

The Court went on to hold that, in this case at least, the review had been a review of full jurisdiction. The various appellate courts, and the Conseil d'état in particular, had examined the facts in detail and had reviewed the sanction imposed. Therefore, there had been no violation of Article 6(1).[20]

THE DEBATE OVER ISSUES OF NATURAL JUSTICE AND THE RIGHT TO A FAIR TRIAL (AND THE IMPLICATIONS THAT THESE HAVE FOR COMPETITION LAW PROCEEDINGS) HAS IF ANYTHING, LONGER ANTECEDENTS—AND RAISES GREATER CONCERNS—AT AN EU LEVEL

However, the Court was not unanimous on this question. In a powerful dissenting opinion, Judge Pinto de Albuquerque determined that: "control by the administrative courts was simply formal since it did not touch upon the hardcore of the reasoning underlying the administrative decision to impose a fine... The applicant was deprived of an independent analysis of the grounds for its appeal."[21] In his view, Menarini had not been entitled to properly challenge the findings of fact that had already been made against it.

B. Evaluating EU Competition Law Procedure

The debate over issues of natural justice and the right to a fair trial (and the implications that these have for competition law proceedings) has if anything, longer antecedents—and raises greater concerns—at an EU level. Two separate but related criticisms have been ventilated. The first is that the Commission's procedures for the adoption of competition law decisions are no longer fit for purpose.[22] The second is that the level of judicial scrutiny of Commission decisions in competition law appeals to the EU Courts is insufficient and, in particular, that there is a light touch review of matters said to involve complex economic assessments by the Commission.

1. Criticisms of Commission Procedure

The essential elements of the Commission's procedures have remained in similar form since Regulation 17/62 in 1962.[23] The changes effected by Regulation 1/2003 were relatively minor in this regard.[24] In an attempt to address the concerns expressed, the Commission has made a number of changes to its procedures, such as having internal "peer review" teams in more difficult cases,[25] adding oversight from the Chief Economist Unit,[26] publishing Best Practices guidance on procedure for Article 101 and 102 TFEU cases,[27] some tinkering with the role of the Hearing Officer,[28] and the creation of the post of European Ombudsman.[29] But these changes are relatively minor overlays on a procedure that has remained largely unchanged for decades. They do not address the following fundamental criticisms:[30]

THE MOST FUNDAMENTAL CRITICISM OF THE COMMISSION'S PROCEDURE IS THAT IT ACTS AS "JUDGE AND JURY," WITH THE SAME OFFICIALS DRAFTING BOTH THE STATEMENT OF OBJECTIONS AND THE ULTIMATE DECISION

a. The Commission as Judge and Jury

The most fundamental criticism of the Commission's procedure is that it acts as "judge and jury," with the same officials drafting both the Statement of Objections and the ultimate Decision. Most of the officials are lawyers or economists and few—if any—will have had any training on making judicial-type assessments, including the skills and techniques of objective, forensic decision-making. The oral hearing before the Commission tends to be window-dressing because the same people presenting the Commission's case are also the decision-makers. The hearing is not public and involves no cross-examination of witnesses or any other real testing of evidence.

The Commission's recent changes to its procedures, while commendable, do not address this fundamental issue. The "peer review panel" process is private and, while reputedly probing, does not require the panel to read and review all the evidence and arguments. Their report is not made available to the defendant. The same applies to the Chief Economist's opinion. The Hearing Officer deals only with procedural issues, and does not really deal with substantive legal or factual issues. The Ombudsman too is mainly limited to procedural issues and competition law is a very small part of the office's overall work.[31]

BUT LOBBYING TENDS TO BE EXTENSIVE IN MAJOR COMPETITION LAW CASES, AND IN A MANNER THAT LACKS TRANSPARENCY.

b. The Decision-making Process is Arcane

The actual decision in a competition law case is taken by the College of 28 EU Commissioners. These are political appointees who will not have seen any of the evidence in the case and will typically have little or no detailed awareness of the issues that arise for their decision. Lobbying of Commissioners is rare nowadays but it does occur—usually in the cases that matter most. When lobbying does occur, the submissions made are not part of the Commission's case file and it is entirely unclear what influence they may have had on the outcome.

c. The Actual Decision-making Process Has Become Diffuse and Lacks Transparency

It is of course a democratic right of undertakings and individuals to lobby public institutions and, in particular, legislative bodies. But lobbying tends to be extensive in major competition law cases, and in a manner that lacks transparency. Commissioners, Commission officials, the Legal Service, and other Directorates-General may be lobbied but it is typically unclear who has been contacted and whether they have been influential. The chain of command may be ignored so those with formal responsibility for decision-making may not be the ones who are most influential in the actual decision-making. Again, notes of meetings will not usually appear on the Commission's case file. As one commentator notes "the procedure in practice has become less structured, less formal, and more diffuse."[34]

IT HAS BEEN SUGGESTED ANECDOTALLY THAT THE COMPETITION COMMISSIONER OFTEN DECIDES THE HEADLINE FIGURE, HIMSELF/HERSELF, WITH OFFICIALS THEN TASKED WITH WORKING BACK TO THAT FIGURE USING THE FINING GUIDELINES.

d. Record Fines and Significant Discretion

The levels of fines in many recent competition law cases have been staggering, with Intel fined EUR 1.06 billion in 2009 and Microsoft paying a similar cumulative amount for its various transgressions in respect of tying and interoperability abuses. This has led one commentator to say, probably correctly, that "the amount of the fines imposed by the Commission ... exceed fines imposed by the public authority in any democracy of which I am aware for any offence."[25] While the Commission has published Fining Guidelines,[26] it has been suggested anecdotally that the Competition Commissioner often decides the headline figure, himself/herself, with officials then tasked with working back to that figure using the Fining Guidelines.

e. Commission Procedures Not Compliant With the ECHR

It is frequently argued that the Commission's procedures do not correspond with the standards laid down in Article 6.[27] As a leading commentator notes:[38]

> the procedures of the European Commission in determining guilt or innocence under the competition rules, and in imposing sanctions, manifestly do not correspond to the standards established by the ECHR. Condemned parties have often invoked these arguments before the Community courts, so far with little success. The number of cases has grown and the concerns become more strident as the penalties have become fiercer.

This view is shared by others.[39] Concerns in this regard have become more pressing given greatly increased fines in recent years and the increasing role of the Commission as a lead enforcement agency in major cases such as *Microsoft, Intel*, and *Google*. Moreover, the Charter of Fundamental Rights is now fully part of EU law,[40] and guarantees as a minimum the ECHR rights. It is also envisaged that the European Union will soon become a party to the ECHR.[41]

2. Criticisms of "Light Touch" Judicial Review by the EU Courts

Criticism has also been voiced about the robustness of judicial review of Commission decisions in competition law appeals.[42] The EU Courts have developed a self-imposed restraint based on limited oversight of "complex economic assessments."[43] This is not objectionable in itself—on matters of economic policy or judgment there may not be a single "right" answer—but it has been suggested that the notion of limited deference has been distorted. The initial notion of deference to Commission assessments had a decidedly narrow context.[44] However, its scope has expanded to comprise all manner of assessments by the Commission, including technical assessments where the Commission does not obviously possess any expertise or superior ability.[45]

It has also been suggested that the EU Courts have been too unwilling in recent years to make use of their own rules of procedure on matters such as oral testimony, expert evidence (they can appoint their own expert(s)), and a willingness to inspect places and things that may be of relevance to the issues on appeal.[46]

CRITICISMS OF JUDICIAL REVIEW BY THE EU COURTS HAVE PERHAPS BEEN MOST ACUTE IN RELATION TO ARTICLE 102 TFEU APPEALS.

The issue of oral testimony is particularly important. Experience in adversarial litigation shows that documents read in context, with the benefit of oral explanation and testing from different parties, often have a quite different meaning to what one might suppose by merely reading the document "cold." In legal cases, context is everything. It is also suggested that the EU Courts have not been rigorous enough in establishing a clear forensic hierarchy that distinguishes evidence according to its inherent value.[47] The best evidence in any case is clearly contemporaneous evidence. *Ex post* statements, particularly those made by rivals or customers with a vested interest in the outcome of a decision/appeal, and which have not been tested in evidence, are of much less value. The position is *a fortiori* in relation to anonymous evidence.

ON THE OTHER HAND, THE EU COURTS PLAINLY HAVE ENGAGED IN VERY DETAILED AND SOPHISTICATED REVIEW OF COMMISSION DECISIONS ON OCCASION.

Criticisms of judicial review by the EU Courts have perhaps been most acute in relation to Article 102 TFEU appeals.[48] In many cases, the EU Courts have engaged in extremely cursory analysis of anticompetitive effects, based largely on assumed, or inferential, effects. For example, in *BA/Virgin*, the Court of Justice concluded that the Commission had satisfactorily demonstrated the concrete anticompetitive effect of the rebates in question.[49] But there is no reference to what this "concrete" evidence was, and it is difficult to see what it could have been given that the Commission itself did not base its decision on such concrete effects. Similarly, in *Tomra*, the Commission set out a series

of diagrams in its decision that were said to illustrate the anticompetitive "suction" effect of the Tomra rebates—based on negative prices at the margin. It was clear that those diagrams contained multiple admitted errors. However, that was considered to be irrelevant by the EU Courts on appeal.[50] The logical conclusion of those errors was that Tomra's prices at the margin were not negative, and would therefore allow an equally efficient rival to survive. For the Commission to posit anticompetitive effects based on rivals' difficulties to match the prices seems hollow in such circumstances. Even if this did not vitiate all of the Commission's analysis, it clearly affected, and undermined, some of it.[51]

ONE SOMETIMES HAS THE IMPRESSION THAT MUCH DEPENDS ON THE COMPOSITION OF THE INDIVIDUAL CHAMBER OF THE EU COURTS THAT HAPPENS TO DEAL WITH THE PARTICULAR CASE.

On the other hand, the EU Courts plainly have engaged in very detailed and sophisticated review of Commission decisions on occasion. The best recent example is *AstraZeneca*.[52] The General Court devoted over 260 paragraphs of its judgment dealing with the issues of market definition and dominance, and engaged in a degree of review that was extremely detailed, irrespective of whether one agrees with the outcome. Ordinarily one would think that such assessments were complex economic assessments *par excellence.* As impressive, the General Court engaged in a rigorous review on the issue of causation in respect of the second abuse of deregistration. While it accepted that AstraZeneca's deregistration tactics were capable of restricting competition insofar as it related to delaying generic entry, it held that the Commission's case insofar as it was alleged that deregistration prevented parallel trade had not been made out. The Court held that the Commission had to demonstrate that the public authorities in question were liable to withdraw, or did usually withdraw, parallel import licenses following deregistration.[53] In the case at hand, the Commission had established a causal link between deregistration and the revocation of parallel import licenses in Sweden, but not in Denmark or Norway.[54] Thus, the Court annulled the decision insofar as it was alleged that AstraZeneca's deregistration had prevented parallel trade to occur in Denmark and Norway.[55]

Overall, however, there is a lack of consistency in approach from the EU Courts under Article 102 TFEU. It is, for example, extremely difficult to reconcile the Court of Justice's apparent endorsement of the principles underpinning the Guidance Paper in *Post Danmark*[56] with its judgment, only two weeks later, in *Tomra*.[57] Another striking feature of the case law is inconsistency between Court of Justice judgments in Article 267 TFEU preliminary references and appeals in direct actions. Most of the Article 102 TFEU cases that are generally regarded as progressive arise in the context of Article 267 TFEU preliminary references, and not direct actions.[58] It is equally difficult to reconcile the low intensity of the General Court's review in cases such as *BA/Virgin* with its robust approach in *AstraZeneca*. One sometimes has the impression that much depends on the composition of the individual chamber of the EU Courts that happens to deal with the particular case. There does not appear to be a single overall coherent direction or approach.

THE EU COURTS' (SELF-REFERENTIAL) VIEW IS NOT WITHOUT CONTROVERSY

C. The EU Courts and Article 6 ECHR

The division within the ECtHR in *Menarini* has been reflected in the commentary that has followed it. Much of the debate has focused on the standard of review applied by the EU Courts in competition law cases. Some commentators regard *Menarini* as an endorsement of the procedure and practices of the General Court.[59] Others have criticized the judgment as contradicting the ECtHR's own pre-existing case law and, in any case, regard the EU Courts practices and procedures deficient in material respects under Article 6(1).[60]

NONETHELESS, WHERE AN APPELLATE COURT RARELY IF EVER ACTUALLY HEARS LIVE WITNESS EVIDENCE, THAT IS LIKELY TO BE AN INDICATION THAT THE COURT'S GENERAL APPROACH AND METHODOLOGY INVOLVES SOMETHING RATHER LESS THAN A REVIEW OF FULL JURISDICTION.

The EU Courts have, perhaps not surprisingly, rejected these criticisms of their judicial review functions.[61] They consider that the review of legality provided for under Article 263 TFEU—supplemented by the unlimited jurisdiction in respect of the amount of the fine, provided for under Article 31 of Regulation No 1/2003 in accordance with Article 261 TFEU—meets the requirements of the principle of effective judicial protection in Article 47 of the Charter of Fundamental Rights and, therefore, Article 6(1). In particular, they have held that the EU Courts' review of the law and the facts means that they have the power to assess the evidence, to annul the contested decision, and to alter the amount of a fine.[62] Accordingly, they have concluded that Article 6(1) does not preclude a "penalty" from being imposed by an administrative body such as the Commission which does not itself satisfy the requirements laid down in Article 6(1) since there is subsequent review by a judicial body that has full jurisdiction.

The EU Courts' (self-referential) view is not without controversy. Article 263 TFEU limits the EU Courts' review to Commission decisions to one of control of "legality" and this can only logically be understood as being a lesser form of review that the "unlimited jurisdiction" conferred on the EU Courts in respect of fines. Therefore, what the EU Courts' judgments on this issue appear to be saying is that, despite Article 263 TFEU only providing for a review of legality, the EU Courts **in practice** engage in a deeper review that includes review of findings of fact and—to a certain extent—more complex (non-factual) assessments made by the Commission. But this position is open to the forceful criticism that the protections of Article 6 /Article 47 are not therefore actually enshrined in the TFEU but depend on the willingness of the particular Chamber of the EU Courts to engage in a review compliant with these provisions in practice.[63] In short, it is argued, judicial protections ensured in this precarious way are simply not compatible with the obligations under Article 6/Article 47.

THE COURTS SHOULD NOT RELY ON ANY MARGIN OF APPRECIATION TO BE GRANTED TO THE COMMISSION AS A BASIS FOR FAILING TO CONDUCT "AN IN DEPTH REVIEW OF THE LAW AND THE FACTS

The critical question has now become whether the combination of a "limited" review of the decision itself, combined with the full review of the sanction by the EU Courts, is sufficient to satisfy the requirements

of Article 6(1). In *Schindler,*[64] Schindler had been fined over EUR 100 million for participating in a cartel in the elevator installation market. The Court of Justice affirmed that the combination of the roles of investigator, jury, and judge within the Commission was not, of itself, a breach of the company's Article 6 rights.[65] The crucial question is whether the decision is subject to review by a court of unlimited jurisdiction and whether or not, in practice, that court did conduct a full review. The courts should not rely on any margin of appreciation to be granted to the Commission as a basis for failing to conduct "an in depth review of the law and the facts."[66] The Court concluded that the General Court had conducted a proper and sufficient appeal on the basis of its unlimited jurisdiction.

The second plea raised in *Schindler* concerned the failure of the General Court to hear evidence from live witnesses. The Court's answer to that question was less than satisfactory. It pointed out that the burden lies on the appellant to put in evidence of the facts that it relies upon.[67] While that is true, as far as it goes, the Court failed to address the substantive issue underlying the complaint: whether the justice of the case made it useful to call witness evidence that might have a material bearing on key issues in the grounds of appeal.

IF THE DISTINCTION BETWEEN HARDCORE CASES AND THOSE WHICH ARE NOT HARDCORE LIES IN THE SCALE OF THE SANCTION, THEN IT HAS CLEARLY BROKEN DOWN IN THE COMPETITION CONTEXT IN THE EUROPEAN UNION

The decision in *Schindler* demonstrates some of the less-than-satisfactory consequences of the Menarini decision. In the first place, the Court in Menarini answered the question by reference to the particular investigation and appeal process in the case itself. As a result, it failed to answer the critical question: whether or not control of legality review is sufficient **in principle** to satisfy the requirements of Article 6(1)? The Court made findings of fact as to what happened in that case, and avoided making findings of law that would have been of general application. Whether or not that approach was correct in this individual case, it failed to comprehensively clarify the issue. In order to determine whether or not a review of full jurisdiction has taken place, future courts will need to inquire into the precise nature of the review carried out in each particular case.

Furthermore in *Menarini* itself, the Strasbourg court did not provide much assistance as to the kinds of factors, or hallmarks, that would characterize a substantive merits review. For example, it can be argued with some force that the hearing (or otherwise) of evidence functions, in at least some cases, as an indicator of the kind of review that is being conducted. At a hearing where the appellate court calls witnesses (whether of its own motion or in response to a request by one or more parties), forms its own impressions of the evidence, and makes its own determinations as to reliability, it is highly likely that the court is conducting a substantive review on the merits. Of course a court will not always need to hear live evidence in order to conduct a full review: in the circumstances of a particular case it might well be possible to conduct a merits review without witnesses appearing in court. Nonetheless, where an appellate court rarely if ever actually hears live witness evidence, that is likely to be an indication that the court's general approach and methodology involves something rather less than a review of full jurisdiction. At the very least, in our view, an appellate court should ask itself, in all cases,

whether witnesses should be called in order to assist it in formulating its decision.

The second reason why the *Menarini* decision is unsatisfactory is that it failed to address the central underlying issue within the Article 6 case law: the distinction between "hardcore" and "non-traditional" criminal matters. The ECtHR relied on *Jussila* as its authority for the proposition that there are different types of criminal case. In principle that reasoning is sound. The procedural protection that is afforded where a small tax surcharge has been imposed need not be the same as the level of protection required in, say, a murder trial. Nonetheless, it is by no means clear that competition law now falls into the "non-hardcore" camp. *Jussila* itself was concerned with tax surcharges on a comparatively minor scale. The case relied upon in *Jussila* for the proposition that competition law cases were not "hardcore" (*Société Stenuit*) itself concerned with a fine of 100,000 French francs applied during the 1970s. By contrast, the fines imposed by the Commission on individual companies in recent years have on occasion exceeded EUR 1 billion. If the distinction between hardcore cases and those which are not hardcore lies in the scale of the sanction, then it has clearly broken down in the competition context in the European Union.

It might be argued that competition cases are not hardcore on the grounds that competition law infringements are found against legal persons, not private individuals. Therefore, they are not criminal cases in the ordinary sense; they do not attract the full protection of Article 6(1). In the U.K. context, at least, that is no longer the case. The Enterprise Act 2002 has introduced individual criminal liability for certain types of cartel-based activity. However, even in jurisdictions where that is not the case, the severe sanctions imposed and the social stigma attached to an adverse finding may well affect private, as well as legal, persons.

In summary, *Menarini* was, at best, a missed opportunity. At worst, it affirmed an outdated and unwarranted distinction. It upheld the boundary between hardcore and non-hardcore cases and determined that competition cases do not attract the full criminal protections of Article 6(1). We consider that that distinction has lost its usefulness. The scale of sanction and the social stigma that arise in connection with competition law infringements make them more akin to hardcore criminality and less akin to taxation surcharges or small administrative fines.[68] It may well be that competition law was not hardcore at some point in the past but it is becoming impossible to credibly argue that that is the position now. Furthermore, *Menarini* failed to provide what would have been useful guidance concerning the standard of review that should be applied to non-hardcore cases. In short, the standard of review must be assessed against only a somewhat opaque set of criteria, on a case-by-case basis. As a result, we consider that Menarini is unlikely to be the final word on this question.

A TREATY AMENDMENT COULD DO THE SAME THING OR GO EVEN FURTHER IN TERMS OF INSTITUTIONAL REDESIGN

D. The Options for Reform

If compliance with Article 6 /Article 47 is not ensured by the practical availability of effective judicial review, there are two basic alternatives. The first is that the TFEU is amended to make expressly clear that the review

is not limited to a control of legality but involves a full appeal on the merits or unlimited jurisdiction.[69] The second alternative is that the prosecutorial and decision-making elements of the Commission's process should be split, thus making the EU Courts an adversarial forum in which the Commission and the defendant(s) would put forward evidence and submissions. One commentator suggests that "the only way in which these criticisms could be satisfied without an amendment of the EU Treaties would be to give the General Court (formerly the Court of First Instance), instead of the Commission, the power to adopt prohibition decisions and to impose fines in competition cases."[70] This solution is not as radical as it seems: it was proposed by the European Parliament as early as 1981.[71] A Treaty amendment could do the same thing or go even further in terms of institutional redesign.

IV. PROCEDURAL FAIRNESS IN U.K. COMPETITION PROCEEDINGS

A. The CMA's Guidance

IN BASIC TERMS, THE CMA SEEMS TO HAVE ESTABLISHED A HIERARCHY OF CONFIDENTIALITY TREATMENT, WHERE INFORMATION HAS BEEN RELIED UPON AGAINST A PARTY

In recent years, the topic of procedural fairness in the context of competition proceedings has largely been articulated as a debate concerning the rights of parties to access information and the use of that evidence by the various U.K. regulators.

The UK's new consolidated regulator, the CMA, came into being on April 1, 2014. The CMA has published both general guidance and specific guidance for the competition context: *Transparency and disclosure: Statement of the CMA's policy and approach and Guidance on the CMA' investigation procedures in Competition Act 1998 cases*. This guidance builds on the considerable experience of its two predecessor competition authorities, the OFT and Competition Commission, in such matters.

The General Guidance stresses the CMA's commitment to openness and transparency. It grants the Authority a wide discretion to determine whether or not information that has been passed to it should be treated as confidential (¶¶4.12-4.24).

The CMA has a general power to redact confidential information and also to use confidentiality rooms and data rooms in order to enable disclosure, while also protecting the confidentiality of the data itself (¶4-29):

> Sometimes the CMA may use confidentiality rings or data rooms as a means of making disclosure of confidential information while recognizing the restrictive nature of the disclosure. Their use will be restricted to when it is necessary to make the disclosure for the purpose of facilitating the CMA's functions by ensuring due process...

Data rooms and confidentiality rings are described as a mechanism to enable the legal representatives of the parties to test the evidence that has been relied upon against them. The CMA reserves to itself the right

to impose restrictions on the bringing into and taking out of the data room of "such items as materials, notes and equipment." (¶¶4.31-32)

THIS BEGUILINGLY SIMPLE PRINCIPLE GIVES RISE TO SIGNIFICANT COMPLEXITIES IN COMPETITION LAW CASES.

In basic terms, the CMA seems to have established a hierarchy of confidentiality treatment, where information has been relied upon against a party. Material that is particularly confidential will be disclosed only through a data room, and possibly subject to restrictions concerning what notes are taken from that material. Less confidential material will be disclosed into a confidentiality ring.

THE ADVERSARIAL PROCEDURE FOLLOWED IN A COURT OF LAW IS NOT APPROPRIATE FOR INVESTIGATIONS BY A COMPETITION AUTHORITY THAT ACTS AS AN ADMINISTRATIVE DECISION-MAKING BODY

The specific guidance relating to Competition Act 1998 investigations notes that the CMA will act in line with its confidentiality obligations (as set out in Part 9 of the Equality Act). It does not go much further than the general guidance. The CMA exercises its discretion to determine whether or not to use data rooms and confidentiality rings; they are used where it is proportionate to do so and where there are "clearly identifiable benefits" from doing so. The CMA's guidance also makes clear that they will only be used where "any potential legal and practical difficulties can be resolved swiftly in agreement with the parties involved." (¶11-24) What is not clear, in this context, is what the CMA will do with information that it does not consider should be placed into a confidentiality ring and/or data room. The CMA does not state explicitly that such information will be discounted from its analysis of any potential infringement. Nonetheless, the clear implication must be that information that cannot be shown in any form to the parties cannot be relied upon in order to find against them. This seems axiomatic under principles of natural justice in English law.

The mechanisms set out in the new CMA Guidance do not differ materially from those that were employed by the CMA's predecessors (the OFT and the Competition Commission). The Competition Commission's *Guidance on Disclosure of Information in Merger Enquiries, Market Investigations and Reviews of Undertakings and Orders Accepted under the Enterprise Act 2002 and the Fair Trading Act 1973* provides, in similar but different form, that "fairness" should be considered when deciding how to handle the dual imperatives of confidential information and the need to disclose. It also considers the possibility of using data rooms and confidentiality rings. But it is fair to say that the new CMA Guidance on this topic is more comprehensive and more detailed.

B. The Case Law

In the 1990s U.K. competition law received a significant overhaul, bringing its essential features more closely in line with EU competition law. But even under the older legislation such as the Fair Trading Act 1973 the English courts had identified a duty of fairness on competition authorities when conducting investigations and

found breaches of that duty in appropriate cases.[73]

In *Interbrew S.A.* and *Interbrew UK Holdings Ltd v. Competition Commission and others* [2001] EWHC Admin 367, the High Court summarized the principles in relation to fairness in competition law proceedings as follows:

> 1. A competition authority owes a duty of fairness in conducting its investigation (in casu merger control).

THE CAT FOUND THE DATA ROOM REGIME FUNDAMENTALLY DEFICIENT IN THREE RESPECTS

> 2. The standard of review on appeal in relation to procedural fairness is not based on principles of judicial review, namely whether the procedure adopted was one that no reasonable decision-maker could have adopted. Thus, the standard of review in respect of procedural unfairness does not require the degree of unreasonableness needed to overturn a decision on normal judicial review grounds under administrative law.
>
> 3. The content of the duty will vary from case to case but generally it will require the decision maker to identify in advance areas which are causing him concern in reaching the decision and to act fairly by giving to the person whose activities are being investigated reasonable opportunity to put forward facts and arguments in justification of his conduct before a conclusion is reached that may affect him/her adversely.
>
> 4. Where ECHR rights are at stake those adversely affected should be involved in the decision making progress to a degree sufficient to provide them with the "requisite protection of their interests."
>
> 5. The adversarial procedure followed in a court of law is not appropriate for investigations by a competition authority that acts as an administrative decision-making body. As a result, the authority has a wide discretion as to how its proceedings should be conducted.
>
> 6. Fairness is a flexible concept that is fact-and context-dependent. However, the Court will be slow to intervene in procedural matters (on the basis that, if the authority has directed itself properly on the requirements of fairness it will be unlikely that its choice of procedure will nonetheless be unfair).

THE EVER-INCREASING USE OF QUANTITATIVE AND OTHER EVIDENCE OF CONSIDERABLE GRANULARITY AND DATA INTENSITY IN COMPETITION LAW PROCEEDINGS MEANS THAT THERE MAY BE REAL PRACTICAL DIFFICULTIES IN DISCLOSING ALL AVAILABLE INFORMATION TO THE AFFECTED PARTIES

On the facts, the High Court upheld Interbrew's complaint that it was given no opportunity to deal with the crucial ground upon which the Competition Commission recommended a divestment of Bass Brewers during its merger assessment. In particular, it was given no fair opportunity to deal with the reason why the Competition Commission took the view that Whitbread, with Stella Artois, would not be a viable and independent competitor that would remedy the

consequences of the duopoly.

Following the entry into force of the Competition Act 1998, the U.K. Courts have had multiple occasions to contend with the application of the concept of procedural fairness in the context of competition law proceedings. This body of case law has considerably developed the basic concepts of natural justice and procedural fairness as articulated in the earlier (non-competition) cases and adapted them to a competition law setting.

C. The Right to be Informed of the Case Against You

One of the basic tenets of administrative law decision-making is that the objections formulated by a public body must be made known to the defendant so that it has a proper opportunity to respond to, challenge, or correct objections made against it. This beguilingly simple principle gives rise to significant complexities in competition law cases.

THE DUTY TO COMMUNICATE THE GIST OF THE CASE DID NOT IMPLY THAT DISCLOSURE WAS ALWAYS TO BE EITHER DETAILED OR LIMITED

First, the need to make the affected party aware of the case against it will often run up against the need to ensure the confidentiality of sensitive information provided by third parties. Indeed, in many cases, the third parties concerned will be direct rivals of the affected party and disclosure of the third-party information would in normal circumstances be likely to amount to a serious violation of competition law in other contexts.

A second related point is that the competition authorities will in many cases have a legal duty to protect third-party confidential information that is co-extensive with any duty they owe at common law or otherwise to comply with principles of natural justice.[74] At the very least, trade-offs may be required between the two sets of obligations.

Third, in certain cases, disclosure even of the identity of the third party providing the information may create issues regarding retaliation or other commercial consequences. This applies in particular for smaller rivals or downstream purchasers or customers.

Finally, the ever-increasing use of quantitative and other evidence of considerable granularity and data intensity in competition law proceedings means that there may be real practical difficulties in disclosing all available information to the affected parties, at least in a time frame that makes meaningful consideration of it possible. More importantly, one can query the need to disclose all such information to allow the affected party to meet the objection(s) against it. Typically, the communication of the gist of the information or point will suffice.

The English courts have grappled with these competing considerations in various competition law cases. In *BMI Healthcare Limited & others v Competition Commission* [2013] CAT 24 the Competition Appeal Tribunal (CAT) concluded that the measures put in place by the Competition Commission allowing the

affected parties and their access to a specially-created on-site "data room" for confidential information were fundamentally deficient and unfair. The case concerned the market investigation regime operated by the Competition Commission under the Enterprise Act 2002 whereby it can investigate whether the features of a particular market have an adverse effect on competition and, if so, then impose wide-ranging remedies. The Competition Commission sought to protect confidentiality by establishing an on-site data room, which its own guidance envisaged. Confidential information was made available in the data room and was accessible during working hours on two consecutive days.

IN PARTICULAR, THE CAT HELD THAT, PROVIDED THAT THE GIST IS PROPERLY DISCLOSED, REDACTIONS OR OTHER FORMS OF WITHHOLDING OF MATERIAL CAN BE PERFECTLY PROPER

The CAT found the data room regime fundamentally deficient in three respects.[75] First, the regime limiting the affected parties' advisers (e.g., economists) to recording in their notes only own client data or information derived solely from own client data and/or from data in the public domain was wrong in principle. This was because that information was already available to the advisers outside the data room from their own client(s). Moreover, the real information of interest was not confidential information that was own client data or in public domain, the parties' crucial concern was to see how the Competition Commission relied upon that data.

Second, while it may have been justified on confidentiality grounds to prevent the removal of items from the data room—in contrast to a confidentiality ring where the information is provided to a circumscribed list of individuals—the Competition Commission failed to put in place measures to ensure that this obstacle did not undermine the drafting of a proper and considered response by those affected by the market investigation. In particular, the advisers: (1) had no access to other material that they might need to look at, (2) had no opportunity to discuss matters with persons outside the data room, and (3) had no opportunity to test the robustness of the confidential information (for example, by analyzing and cross-checking data contained in tables of information and data redacted by the Competition Commission in its decision setting out its provisional findings).

Finally, the period of time in which the advisers were allowed access to the data room was unreasonably short. As a general rule of thumb, the CAT considered that a data room ought to be open at reasonable business hours up until the end of the consultation period, and ought to provide for multiple visits due to the iterative process of responding to the Competition Commission's provisional findings.

In two more recent cases—*Ryanair Holdings plc v Competition Commission* [2014] CAT 3 and *Group Eurotunnel SA v Competition Commission* [2013] CAT 30—the CAT grappled with situations in which confidential information had not been entirely withheld but the affected parties were only informed of the gist of the information or the point against them.

In *Ryanair*, the Competition Commission's final report concluded that Ryanair's minority stake in Aer

Lingus granted it material influence over Aer Lingus and resulted in a substantial lessening of competition. The final report referred to the views expressed and evidence given to it by a number of airlines that had been specifically identified. However, certain passages referring to discussions that had taken place between Aer Lingus and other airlines were redacted to protect the identity of the airlines concerned and the confidentiality of those discussions.

Ryanair contended that disclosure of the identity of the various airlines referred to in redacted passages was important so that it could test the credibility of the evidence in question. The CAT disagreed, concluding that the Competition Commission did in fact disclose in broad terms the gist of the information which was redacted and that disclosure of the identity of the individual airlines was unnecessary. The redactions went no further than was necessary to protect the confidentiality of very sensitive commercial matters between airlines who were competitors or potential competitors of Ryanair. The duty to communicate the gist of the case did not imply that disclosure was always to be either detailed or limited. The CAT emphasized that the duty to disclose the gist of the information or objection varies from case to case depending on the context (at [8]):

> We agree that you do have to look at the facts of each case. At one end of the spectrum there may be a case where numbers are involved and you need to see the relevant numbers or data in order to understand the gist of what is being put. In other cases, more like the present, you need to know what the general position is.

A similar conclusion was reached in *Eurotunnel*. Eurotunnel, the operator of the Channel tunnel passenger and freight services, was one of several bidders for the assets of Sea France, a ferry operator between Dover and Calais. A competing bid was put in by DFDS, another ferry operator. The Competition Commission concluded that the Eurotunnel/Sea France merger might be expected to result in a substantial lessening of competition (i) in the market for the supply of transport services to passengers on the short sea and (ii) in the market for the supply of transport services to freight customers on the short sea.

In reaching the conclusions it did in its final report, the Competition Commission had to balance Eurotunnel's right to know the case against it with the need to protect third-party confidential information. The Competition Commission sent summaries or descriptions of specified information to (typically) the party who had provided it, in order to verify the factual correctness of the content and to identify any confidential material, prior to publication. The party was then asked to provide reasons for any requests of excisions of the material from published documents. Where the Commission considered appropriate, the names of parties were anonymized and ranges of figures substituted for actual figures. Eurotunnel complained about the redactions and requested that the unredacted materials be disclosed into a confidentiality ring. The Competition Commission refused this request.

The CAT concluded that there was nothing in the Competition Commission's general approach to criticize. It sought to balance the interests of confidentiality and the interests of disclosure. Eurotunnel's argument that—in withholding information in the manner that it did (i.e., by using summaries of information provided, redacting, anonymizing, and using ranges)—the Commission acted unfairly could only

succeed if the Competition Commission was obliged to disclose to Eurotunnel all inculpatory and exculpatory material including transcripts or summaries of evidence provided to it by third parties. The CAT rejected this argument, essentially because the gist of the points made had been communicated to Eurotunnel, in some detail, and it was in a position to make responsive submissions. In particular, the CAT held that, provided that the gist is properly disclosed, redactions or other forms of withholding of material can be perfectly proper. The situation would only be different if the defendant could show that this withholding meant that it was unable to understand the gist of the case being made against it. Thus, for example, the Competition Commission was justified in making omissions and redactions from the summaries of evidence from DFDS and customers and the transcripts of their oral evidence and of other persons who attended for interview because the gist of the points made by them was disclosed to Eurotunnel.

ORAL EVIDENCE HAS ALSO BEEN USED TO GREAT EFFECT IN COMPETITION LAW APPEALS IN THE UNITED KINGDOM

D. Third Parties and the Right to be Heard

As noted above, it is trite that objections formulated by a competition authority must be made known to the party/parties affected by them. This typically applies to defendants in competition law proceedings and the need to inform them of the objections made against the conduct or agreement(s) under scrutiny. But in *Unichem Limited v Office of Fair Trading* [2005] CAT 8 the CAT applied a more granular version of this general principle and further extended it to cover the situation of third parties.

UniChem complained about the OFT's decision not to refer the proposed acquisition by Phoenix Healthcare Distribution Limited of East Anglian Pharmaceuticals Limited to the Competition Commission. One of the grounds of appeal was that the OFT purported to make findings of primary fact about the logistics and economics of UniChem's distribution system, UniChem's past pattern of success in certain regions, and UniChem's service levels on the basis of information supplied largely by the merging parties, without checking certain facts with UniChem itself or discussing with UniChem the inferences about UniChem which the OFT was minded to draw from the material supplied by the merging parties.

Even though the CAT considered it "strongly arguable" that the OFT's decision not to refer the merger remained within the bounds of reasonableness,[76] it nonetheless quashed the decision on the basis that the OFT did not know enough about the reach and logistics of UniChem's network and the economics of delivery routing to have an adequate factual basis for its decision. In particular, the OFT's omission to seek comments from UniChem on those matters was considered to be of "decisive importance."[77]

TOBACCO IS A STRIKING CASE WHERE ORAL EVIDENCE AND CROSS-EXAMINATION HAD A MATERIAL—IF NOT DECISIVE—BEARING ON THE QUASHING OF THE COMPETITION AUTHORITY'S DECISION

Similar issues were raised in *CTS Eventim v Competition Commission* [2010] CAT 7.[78] Eventim, a provider of ticketing services and a ticket agent and a promoter of live music events, challenged the

Competition Commission's decision to approve the merger between Live Nation and Ticketmaster. One of the grounds of appeal was that the Competition Commission had deprived Eventim of a reasonable opportunity to respond to the main reasons for the Competition Commission's reversal of its provisional view that the merger would result in a substantial lessening of competition, as well as the Competition Commission's analysis of (i) Eventim's own German language board documents and/or (ii) Eventim's own forecasts for its proposed U.K. activities before adopting its final decision.[79] The Competition Commission evidently considered that there was considerable force in these procedural arguments since it agreed to retake the decision before the appeal was even concluded before the CAT.

E. The Ability to Call and Challenge Witnesses

One of the most striking manifestations of natural justice in appeals in competition law cases in the United Kingdom is the fact that witnesses are often called by one or more parties to give evidence on matters of fact or expert opinion. This includes the competition authorities themselves tendering witnesses to support key factual or contextual aspects of the relevant theory of harm. Once a witness is tendered in this way, he/she can then be cross-examined by one or more adverse parties.

This oral tradition in English law reflects of course the adversarial nature of proceedings in common law jurisdictions. This tradition contrasts with the more judge-led inquisitorial model applied in many civil law jurisdictions (although some civil law jurisdictions do allow for questioning of witnesses upon application or for a party to submit questions for the judge to put to a witness). Oral evidence certainly plays a very important role in civil (and criminal) proceedings in the United Kingdom.

> FIRST, THE BEST EVIDENCE WILL GENERALLY BE RELEVANT CONTEMPORANEOUS DOCUMENTS, SUBJECT OF COURSE TO THEIR MEANING BEING AT LEAST TOLERABLY CLEAR.

Oral evidence has also been used to great effect in competition law appeals in the United Kingdom. Perhaps the most notable example is a series of appeals in relation to decisions rendered by the OFT regarding price parity clauses in the tobacco sector, for which various manufacturers and retailers were fined a cumulative total of almost £200 million. The clauses concerned multiple different brands of the two main tobacco manufacturers, Imperial and Gallaher. The parity clauses were expressed in different ways, such as requirements that a particular Imperial brand be sold at a price "not more expensive than," "at least 5 pence less than" or "not more than 3 pence more expensive than" the competing linked Gallaher brand. In elaborating the theory of harm the OFT posited four key effects of the price parity clauses:[80]

> a. If the retail price of Gallaher's brand increases, then the retail price of [Imperial]'s rival brand must also increase.
>
> b. If the retail price of [Imperial]'s brand increases, then the retail price of Gallaher's rival brand must also increase.

c. If the retail price of [Imperial]'s brand decreases, then the retail price of Gallaher's rival [brand] must also decrease.

d. If the retail price of Gallaher's brand decreases, then the retail price of [Imperial]'s [rival] brand must also decrease.

The only witness tendered by the OFT was a former tobacco buyer for one of the major retailers. She had given a signed witness statement to the OFT in 2005. In that statement she stated that if the price of Imperial's brands went up because of a wholesale price increase, she would not put up the price of the Gallaher brand if Gallaher had not announced a price increase. She also said that the Imperial account manager would ask her to move the prices up and down on his own brands but her recollection was that "he never told me to do anything with a competitor brand." Moreover, when asked in cross-examination whether she had regarded herself as bound by the four constraints identified above by the OFT she said firmly that she had not. Thus, there was nothing in her oral evidence that was inconsistent with what she had said in her witness statement. The fact that the OFT's own principal witness did not support the OFT's theory of harm led to the decision being quashed by the CAT. Critically, this lack of support was in part elicited in cross-examination, albeit the CAT did suggest that had OFT tested the evidence more stringently, the implications of that evidence for the OFT's theory of harm would have become clearer, and sooner.

ORAL EVIDENCE MAY ALSO HAVE SOMEWHAT LESSER VALUE IN COMPETITION LAW CASES WHERE THE CREDIBILITY OF THE WITNESSES IS NOT CENTRAL TO THE ISSUES IN THE CASE, E.G., AS IN A FRAUD CASE

Tobacco is a striking case where oral evidence and cross-examination had a material—if not decisive—bearing on the quashing of the competition authority's decision.[81] But it is not atypical.[82] Indeed, in multiple appeals before the CAT, both appellants and competition authorities have sought to tender witnesses on key factual issues in the appeal. For example, in *Tesco v OFT* [2012] CAT 31, Tesco relied on witness evidence, among other things in the context of a so-called ABC information exchange, to determine circumstances where A may be taken to intend that B will make use of that information to influence market conditions by passing that information to other retailers.

Tesco also laid considerable emphasis on the OFT's failure to interview witnesses during its investigation or indeed to call witnesses for the appeal. The CAT did not consider that this circumstance was dispositive, since there was a credible explanation for the witnesses' absence—namely the OFT's position that its case stood or fell on the contemporaneous documents. But the CAT did not consider this explanation wholly satisfactory and it noted, for example, that (1) a number of the documents relied upon by the OFT were far from clear and explanations had not been available because of the OFT's decision not to gather evidence from the authors and/or recipients of the documents, (2) in light of the OFT's decision not to seek witness evidence, any doubt in the mind of the CAT as to the content or meaning of documents relied on by the OFT must operate to the advantage of Tesco, and (3) the lack of a formal power of witness compulsion should not be thought to either preclude or discourage the OFT from even attempting to contact witnesses who might be able to provide details or evidence of material facts, and the failure to do so may lead the court

to conclude that the evidence of the infringement was not sufficiently strong.

F. Evidence and Corroboration

Because of the strong oral and adversarial tradition in English law, the English courts have also developed an acute—and nuanced—appreciation of the hierarchy of evidence that often appears lacking in analogous cases at an EU level. Several points bear emphasis. First, the best evidence will generally be relevant contemporaneous documents, subject of course to their meaning being at least tolerably clear. The position was well-summarized by Leggatt J in *Yam Seng Pte Limited v International Trade Corporation Limited* [2013] EWHC 111 (QB) (para. 8):

> I approach the evidence on the basis that, as in almost every case where there is a contemporaneous documentary record, the documents provide the best evidence of what happened.

THE PROCESSES THAT COMPETITION AUTHORITIES ACTING AS INVESTIGATOR, JUDGE, AND JURY FOLLOW ARE NOT ORDINARILY, ON THEIR OWN, ENOUGH TO SATISFY THE BASIC STANDARDS OF PROCEDURAL FAIRNESS

Second, not all written evidence is equal. A contemporaneous document is clearly primary evidence whereas, say, a written response to a request for information by a competition authority is *ex post* (and often self-serving) evidence, usually made on behalf of a body corporate or undertaking.[83] The same may be true of leniency statements or settlement agreements,[84] particularly in systems where subsequent applicants to obtain any reduction must bring to light matters not already known to the competition authority.[85] The temptation to gild the lily in such circumstances may be significant.[86] There is also a good, if rather old-fashioned, case for preferring written evidence accompanied by a statement of truth from the individual concerned.[87]

Third, care may need to be taken with oral evidence given some time after the facts in the context of a trial. Leggatt J, again, in *Yam Seng Pte Limited v International Trade Corporation Limited* [2013] EWHC 111 (QB), put it well (para. 8):

> Human memory is notoriously unreliable, and the strong interests and emotions to which disputes resolved through litigation give rise are powerful distorting factors, however honest and well-intentioned the witness. Indeed, the more patently honest and convincing the witness, the greater can often be the risk of placing reliance on their testimony.

Oral evidence may also have somewhat lesser value in competition law cases where the credibility of the witnesses is not central to the issues in the case, e.g., as in a fraud case. In competition law cases one is also not always dealing with a primary fact but with matters of appreciation that do not have a single "right" answer. And one has to control for the fact that (i) evidence in chief will often be prepared with considerable assistance from lawyers and (ii) oral evidence given a long time after the fact may have the gilt edge of hindsight.

The context in which the oral evidence is given may also matter. There may, for example, be a significant

difference between witness statements tendered by business executives in the context of agreements which the parties operate in a clandestine fashion because they know they are acting illegally (and evidential difficulties arise because the participants deliberately failed to record or retain information about what they were doing) and situations in which agreements are entered into openly for legitimate purposes, albeit they may also have some anticompetitive effect.[88] The executives' evidence may, for example, shed important light on the purpose of particular agreements or practices or their effects. To state the obvious, those who conceived of and implemented an agreement or business practice, with novel- or difficult-to-discern effects, may be able to shed some useful light on its purpose(s) and effect(s).

THE PRECISE MEANING OF "FULL JURISDICTION" IS STILL, DISAPPOINTINGLY, UNCLEAR

Finally, while there may in appropriate cases be caveats as to the value of oral testimony, it can be an important source of evidence where the written evidence is fragmentary or expressed in a telegraphic manner. In particular, oral evidence may have considerable value in resolving a conflict between documents, which is a frequent occurrence. In *Armagas Ltd v Mundogas SA (The Ocean Frost)* [1985] 1 Lloyd's Rep 1 at 57, Goff LJ stated as follows:

> Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a Judge in ascertaining the truth.

V. CONCLUSION—THE PRINCIPLES

In democratic countries, certain principles of institutional design and decision-making ought in our view to be regarded as immutable in competition law cases. They are:

1. The guaranteed independence of the decision-maker, which not only includes freedom from outside interference but also the resources and personnel to take effective decisions;

2. The right to know the case against you;

3. The right to see the evidence, both inculpatory and exculpatory, and to challenge it;
4. The right to be heard by the actual decision-maker;

5. The right to a reasoned decision within a reasonable period; and

6. The right to an appeal of the decision before an independent, competent court.

The above principles are in our view a non-negotiable minimum. But progressive jurisdictions interested in the quality of decision-making and fairness should in our view endeavor to go beyond this. Issues to bear in mind in this regard include:

1. Competition authorities need to develop a proper understanding of, and training in, the gathering and assessment of evidence. These are skills entirely separate from technical competence in substantive matters. The best evidence will usually be contemporaneous documents, assuming that their meaning is at least tolerably clear. But competition authorities should also make more use of oral evidence in appropriate cases, both to corroborate or explain documents and to understand the purpose and likely effects of particular agreements or conduct. This will entail the need for formal powers to take statements.

2. Competition authorities frequently act as investigator, judge, and jury. While obviously far from ideal, it may not be *per se* objectionable if there is a proper right of appeal (see (4) below). In any event, the processes that competition authorities acting as investigator, judge, and jury follow are not ordinarily, on their own, enough to satisfy the basic standards of procedural fairness (whether established under the common law or Article 6 EHCR). So, at the very least they should aim to ensure:

a. Genuine separation between the investigative teams and decision-makers.

b. A transparent decision-making process. For example, records should be kept of meetings and transmitted to the defendants or affected parties as a matter of course.

c. A proper, adversarial hearing before the actual decision-maker.

d. Parties should know the case against them in full and should be able to test the evidence against them properly. There is no reason why decision makers should not hear live evidence, where necessary and useful.

e. Informality and lobbying should be deprecated.

3. Competition authorities will often have to balance the need for disclosure against the obligation to protect confidential information emanating from third parties. In general, the competition authorities should be given some leeway in doing so since the interests at stake require trade-offs to be made. The competing interests can normally be accommodated by the following sliding scale: (i) making the defendant or affected party aware of the gist of the information or point—the extent of which will depend on the context, including the importance of the issue and the level of confidentiality concerns; or (ii) putting it into a confidentiality ring accessible to circumscribed persons; or (iii) operating a data

room at which the information may be meaningfully accessed by a party's advisers but not physically removed.

4. A competition authority's decision should be subject to oversight by a court with full jurisdiction. The precise meaning of "full jurisdiction" is still, disappointingly, unclear. Nonetheless, it is clear that a review by a court of "full jurisdiction" must include:

a. A review on the merits extending to the review of evidence, findings of fact, findings of law, and the penalty imposed.

b. The capacity to substitute the findings of the competition authority with its own determinations. This may not imply a full rehearing on all issues, but nor should the appeal proceed on the basis of a premise that just because a competition authority has made a decision in respect of a matter that requires some appreciation of complex matters, the competition authority must be presumed to have got it right. It should also be appreciated that competition authorities have no particular expertise in making technical assessments unrelated to their core expertise (e.g., patent quality), and should be afforded no deference in such matters.

c. Parties should be given an opportunity to make full and detailed submissions in their defense.

d. While it is not necessary in every case, the court should be able and willing (on occasion) to call for live evidence and to make its own determinations on the facts. Documentary evidence is often expressed in telegraphic terms, or lacks context, or is fragmentary in nature. Novel agreements or practices may also benefit from explanation by those most familiar with them. ▲

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[1] Robert O'Donoghue & Tim Johnston, Barristers, Brick Court Chambers.

[2] For an overview see International Chamber of Commerce, *Due Process in EU Antitrust Proceedings, Discussion Paper*, 15 April 2014. This is a draft document that has recently become unavailable. The *CPI Antitrust Chronicle* also recently ran a full series of articles on due process and competition law enforcement. See 6(1) CPI Antitrust Chron. (June 2014).

[3] For an overview of these issues see P. Lugard, *Procedural Fairness and Transparency in Antitrust Cases: Work in Progress*, 6(1) CPI Antitrust Chron. (June 2014). *See* also S. Wong, *Thinking About Procedural Fairness of Competition Law Enforcement Across Jurisdictions: A Suggested Principled Approach*, ICN *Column in Competition Pol'y Int'l,* (April 23, 2014), *available* at https://www.competitionpolicyinternational.com/thinking-about-procedural-fairness-of-competition-law-enforcement-across-jurisdictions-a-suggested-principled-approach.

[4] When describing the common law, it is normal to talk of "English law" (more properly the law of England and Wales). That common law differs from Scottish law. However, where we refer to competition law it is as U.K. law: the substantive and procedural law of competition in the United Kingdom is broadly

consistent.

[5] [2004] 1 AC 531.

[6] R. Clayton & H. Tomlinson, the Law of Human Rights, ¶11.44 (2009). See the judgment of Lord Diplock in *Bremer Vujlkan Schiffbau and Maschinenfabrik v South India Shipping Corporation Ltd* [1981] AC 909, at 977.

[7] [1915] 1 KB 21.

[8] *Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 180.

[9] [1964] AC 40.

[10] *Secretary of State for the Home Department v MB* [2008] 1 AC 440.

[11] *R v Newmarket Assessment Committee, ex p Allen Newport* [1945] 2 All ER 371.

[12] *R v Davis* [2008] AC 1128.

[13] Cases C-204/00P C-205/00P, C-211/00P, C213/00P, C-217/00P, and C-219/00P *Aalborg Portland and Others v Commission* [2004] ECR I-123.

[14] Application no. 43509/08 & 44.

[15] *Jussila v Finland* (Application no 75053/01) ¶ 10.

[16] *Id.* ¶¶38-39.

[17] *Id*. ¶43.

[18] *Id.* ¶¶41-45.

[19] *Id*. ¶59.

[20] *Id*. ¶¶64-67.

[21] Dissenting judgment, ¶7.

[22] *See*, e.g., J. Temple Lang, *Three Possibilities For Reform Of The Procedure Of The European Commission In Competition Cases Under Regulation* 1/2003, CEPS Special Report (November 2011), *available* at http://aei.pitt.edu/32989/1/Reform_of_Commission_Procedure_in_Competition_Cases_with cover.pdf; I. Forrester QC, *Due Process In EC Competition Cases: A Distinguished Institution With Flawed Procedures,* 34 Eur. L. Rev. 817 (2009). This debate is not new: *see*, e.g., F. Montag, T*he Case For A Radical Reform Of The Infringement Procedure Under Regulation* 17, 8 Eur. Competition L. Rev. 428 (1996).

[23] EEC Council Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty, OJ 1962 L 13/204.

[24] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L1/1.

[25] This involves selecting an internal "shadow" team to play devil's advocate on the core aspects of the case, leading to an internal debate. It is sometimes said to be influential, although it is impossible to verify such claims. For a discussion see P. Marsden, *Checks And Balances: EU Competition Law And The Rule Of Law*, Competition L. Int'l (February 2009).

[26] See L.H. Röller, *Using Economic Analysis To Strengthen Competition Policy Enforcement*, Modelling European Mergers: Theory, Competition Policy and Case Studies (P. Bergeijk & E. van Kloosterhuis, eds. 2005).

[27] *See* DG Competition, Best Practices on the Conduct Of Proceedings Concerning Articles 101 and 102 TFEU, OJ 2011 C 308/6. The most significant changes were the introduction of (voluntary) state of play meetings between the Commission and defendant(s) to give greater transparency on the stage of the

Commission's proceedings. Three-way meetings between the complainant, Commission, and defendant were also proposed. For an overview *see* M. Glader, *Best Practices In Article 101 And 102 Proceedings: Some Suggestions For Improved Transparency*, 1 COMPETITION POL'Y INT'L (April 2010). On due process and EU competition law generally, see I. Van Bael, Due Process in European Union Competition Proceedings (2011).

[28] *See* Decision of the President of the European Commission on the function and terms of reference of the hearing officer in certain competition proceedings, OJ 2011 L 275/29.

[29] *See* http://www.ombudsman.europa.eu/en.

[30] It bears emphasis that these criticisms are institutional or organizational, and are in no way reflective of DG Competition's (or the EU Commission's) officials, who are high caliber, extremely diligent, and of high integrity.

[31] A notable intervention by the Ombudsman was his decision in *Intel*. It concerned the Commission's failure to keep a note of a five-hour meeting with a senior Dell executive. Dell was the most important customer in the case and the Commission's decision relied extensively on evidence from Dell (including the individual concerned) to inculpate Intel. The Ombudsman found that this event should have been classed as a meeting for the purposes of Article 19 of Regulation No 1/2003, that it could not be excluded as it concerned potentially exculpatory evidence, and that the failure adequately to record it constituted maladministration on the part of the Commission. He did not, however, make any finding as to whether the Commission had infringed Intel's rights of defense. *See* Decision of the European Ombudsman Closing His Inquiry Into Complaint 1935/2008/FOR Against the European Commission of July 14, 2009. On appeal, the General Court held that (1) the meeting was not a formal meeting for purposes of Article 19 of Regulation No 1/2003 and (2) by making available to the applicant, during the administrative procedure, the non-confidential version of the note to the file and by offering it the possibility to submit its observations on that document, the Commission remedied the initial omission in the administrative procedure, with the result that that procedure was not vitiated by an irregularity. *See* Case T-286/09 *Intel Corporation Inc. v Commission* [2014] ECR II-nyr.

[32] In Case T-286/09 *Intel Corporation Inc. v Commission* [2014] ECR II-nyr, Intel argued that the Commissioner for Competition, Neelie Kroes, had stated publicly that the Commission had applied a certain price/cost test in its decision in that case, which the Commission then sought to disavow on appeal. The General Court dismissed this argument on the basis that the decision was made by the College of Commissioners, not the Commissioner for Competition (¶159).

[33] This echoes a comment often attributed to Henry Kissinger: "Who do I call if I want to call Europe?"

[34] See J. Temple Lang, *Three Possibilities For Reform Of The Procedure Of The European Commission In Competition Cases Under Regulation* 1/2003, CEPS Special Report (November 2011), *available at* http://aei.pitt.edu/32989/1/Reform_of_Commission_Procedure_in_Competition_Cases_with cover.pdf. The same author, using Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, forced the Commission to publish its internal Manual of Procedure, which can now be *found at* http://ec.europa.eu/competition/antitrust/antitrust_manproc_3_2012_en.pdf. Following publication, he criticized the Manual of Procedure in certain respects, including: (1) it does not deal with submissions to other parts of the Commission in competition cases, which has been a feature of some recent (and controversial) decisions; (2) it

does not deal with the legal principle of good administration, including in particular the need to take notes of meetings; (3) it does not refer to the Charter on Fundamental Rights, which is now part of EU law; and (4) it does not deal with due process and impartiality. See J. Temple Lang, *The Strengths And Weaknesses Of The DG Competition Manual Of Procedure*, 1(1) J. Antitrust Enforcement 104-131 (2013).

[35] I. Forrester QC, *Due Process In EC Competition Cases: A Distinguished Institution With Flawed Procedures*, 34 Eur. L. Rev. 817 (2009).

[36] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ 2006 C 210/2.

[37] This also assumes that the Commission's procedures are not purely administrative in nature but have sufficient quasi-criminal character to fall within Article 6 ECHR. As discussed earlier in this article, by far the better view is that Article 6 ECHR is engaged.

[38] Forrester, *supra*.

[39] Temple Lang, *supra*.

[41] *See* Article 6 TEU. The Charter has the same legal value as the EU treaties.

[41] Accession became a legal obligation under Article 6(2) TEU. The Court of Justice will, however, need to render an opinion on the compatibility of the accession with EU law. But the EU Courts, the EFTA Court, and the ECtHR have taken a series of steps even before accession to subject Commission proceedings and judicial review of competition decisions to many of the obligations reflected in Article 6 ECHR. *See* Case C-389/10 P, *KME Germany AG, KME France SAS and KME Italy SpA v Commission* [2011] ECR I-13125; Case C-407/08 P, *Knauf Gips KG v Commission* [2010] ECR I-6375; Case E-15/10, *Posten Norge AS v EFTA Surveillance Authority*, judgment of 12 April 2012, not yet reported (EFTA Court); and Case 43509/08, *A. Menarini Diagnostics SRL v Italy*, judgment of the European Court of Human Rights of September 27, 2011.

[42] See I. Forrester QC, *A Bush In Need Of Pruning: The Luxuriant Growth Of Light Judicial Review*, European Competition Law Annual 2009: Evaluation of Evidence and its Judicial Review in Competition Cases, pp. 407-452 (C.D. Ehlermann & M. Marquis, eds. 2010).

[43] *See*, e.g., Case 42/84, *Remia and others v Commission* [1985] 2425, ¶34. For a detailed discussion see the contributions from Panel II in European Competition Law Annual 2009: Evaluation of Evidence and its Judicial Review in Competition Cases, pp. 9-473 (C.D. Ehlermann & M. Marquis, eds. 2010), and in particular those by Judge Forwood, Judge (and now Advocate General) Wahl, and Judge Ó Caoimh from the EU Courts.

[44] *Remia, ibid (in casu* duration of a non-compete clause and the doctrine of ancillary restraints).

[45] Forrester, *supra* note 42 at 407-452.

[46] *Id.*

[47] *Id.*

[48] The Commission has enjoyed a staggering success rate in Article 102 TFEU appeals, and one that is asymmetrically better than other areas of competition law appeals. Data gathered in 2006 by the former Chief Economist, Damien Neven, record that the Commission's success rate in Article 102 TFEU cases was 98 percent, compared to only 58 percent under the EU Merger Regulation and 75 percent in Article 101 TFEU cases. *See* D, Neven, *Competition economics and antitrust in Europe* at 17, *available at* http://ec.europa.eu/dgs/competition/economist/economic_policy.pdf. While Neven attributes this disparity in success rates to the fact that appeals outside the Article 102 TFEU context typically look at the effects of practices and not their form,

this is not a fully satisfactory response. The disparity between Article 101 and 102 TFEU appeals is striking, since most Article 101 TFEU cases concern admitted cartel infringements. More to the point, in Article 102 TFEU cases the EU Courts are clearly looking at issues of anticompetitive effects in more detail than before: the concern is that it appears to be making no difference to the outcome in those cases whereas it has in the areas of merger control and Article 101 TFEU. Equally, the Commission's success rate in cases in the appeal courts in Luxembourg is not matched by the success rates of private litigants in national courts involving Article 102 TFEU or the success rates of NCAs applying Article 102 TFEU or its national law equivalent. This cannot be explained solely by the discretion the Commission enjoys over which cases to pursue. If anything, the incentives of private litigants should be at least as good in this regard, and probably more so in those national legal systems where the loser pays the winning side's costs.

[49] Case C-95/04 P, *British Airways plc v Commission* [2006] ECR I-2331, ¶31. ("the Court further held not only that the bonus schemes at issue were likely to have a restrictive effect on the United Kingdom markets for air travel agency services and air transport, but also that such an effect on those markets had been *demonstrated in a concrete way by the Commission*.") (emphasis added). Given that the Commission and EU Courts eschewed any need to demonstrate actual or likely anticompetitive effects with concrete evidence, it is difficult to see how this conclusion was justified.

[50] Case T-155/06, *Tomra Systems ASA and others v Commission* [2011] ECR II-4361, ¶258 *et seq*.

[51] The EU Courts' approach in appeals against Commission decisions under Article 102 TFEU contrasts with their robust approach in reviewing Commission merger control decisions. The best examples are Case T-342/99, *Airtours plc v Commission* [2002] ECR II-2585 and Case T-5/02, *Tetra Laval BV v Commission* [2002] ECR II-4381, and Case T-80/02, *Tetra Laval BV v Commission* [2002] ECR II-4519, on further appeal in Case C-12/03, *Commission v Tetra Laval BV* [2005] ECR I-987.

[52] *AstraZeneca*, OJ 2006 L 332/24, on appeal Case T-321/05, *AstraZeneca v Commission* [2010] ECR II-2805 and Case C-457/10 P, *AstraZeneca v Commission* [2012] ECR I-nyr.

[53] *Id*., ¶¶806-808.

[54] *Id*., ¶845.

[55] The General Court's findings in this regard were upheld on appeal in Case C-457/10 P, *AstraZeneca v Commission* [2012] ECR I-nyr.

[56] Case C-209/10, *Post Danmark A/S v Konkurrencerådet,* [2012] ECR I-nyr.

[57] Case C-549/10 P, *Tomra Systems ASA and others v Commission* [2012] ECR I-nyr.

[58] See, e.g., Case C-7/97, *Oscar Bronner GmbH & Co KG v Mediaprint Zeitungs und Zeitschriftenverlag GmbH & Co KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co KG and Mediaprint Anzeigengesellschaft mbH & Co KG* [1998] ECR I-7791; Case C-418/01, *IMS Health GmbH & Co OHG v NDC Health GmbH & Co KG* [2004] ECR I-5039; Case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I-527; and Case C-209/10, *Post Danmark A/S v Konkurrencerådet* [2012] ECR I-nyr.

[59] K. Lenaerts, *Due Process In Competition Cases*, 1(5) Neue Zeitschrift fur Kartellrecht – NZKart, 5 (May 2013): "the system of judicial review of Commission decisions relating to proceedings under Articles 101 TFEU and 102 TFEU affords all the safeguards required by Article 47 of the Charter [and by implication Article 6 of the European Convention on Human Rights]."

[60] International Chamber of Commerce, *Due Process in EU Antitrust Proceedings. Comments on and analysis of the European Commission's and EU Courts' Antitrust Proceedings* 225/717 (April 15, 2011): "Current

EU Antitrust Proceedings Are Not in Line with the European Convention on Human Rights (ECHR)."

[61] *See* most recently Case T-286/09 *Intel Corporation Inc. v Commission* [2014] ECR II-nyr, paragraphs 1609*ff*, citing Case C-386/10 P *Chalkor v Commission* [2011] ECR I-13085 and Opinion of Advocate General Mengozzi in Case C-521/09 P *Elf Aquitaine v Commission* [2011] ECR I-8947, paragraph 31.

[62] *See* Case C-386/10 P *Chalkor v Commission* [2011] ECR I-13085, ¶67. *See* also Case C-389/10 P, *KME Germany AG, KME France SAS and KME Italy SpA v Commission* [2011] ECR I-nyr ; Case C-407/08 P, *Knauf Gips KG v Commission* [2010] ECR I-6375; Case E-15/10, *Posten Norge AS v EFTA Surveillance Authority*, judgment of 12 April 2012, not yet reported (EFTA Court)

[63] See Sir C. Bellamy, *ECHR and Competition Law Post-Menarini: An Overview Of EU And National Case Law*, 47946 E-COMPETITIONS (July 5, 2012). In *MasterCard*, AG Mengozzi accepted that Article 6(1) ECHR compliance by the EU Courts depended on "the way in which that review is actually exercised." See Case C-382/12 P *MasterCard and others v Commission* [2014] ECR I-nyr, ¶122.

[64] Case C -501/11 P *Schindler Holding and others v Commission* [2013] ECR II-nyr.

[65] *Id*. ¶¶33-35.

[66] *Id*. ¶37.

[67] *Id*. ¶46.

[68] This appeared to be the position of Advocate General Eleanor Sharpston in *KME*. While she had "little difficulty in concluding that the procedure whereby a fine is imposed for breach of the prohibition on price-fixing and market-sharing agreements in Article [101(1) TFEU] falls under the 'criminal head' of Article 6 ECHR," she added that the fining procedure in EU competition law cases "differ[s] from the hardcore of criminal law; consequently, the criminal-head guarantees will not necessarily apply with their full stringency." *See* Opinion in Case C-272/09 P *KME and others v Commission* [2011] ECR I-nyr, ¶¶64, 67. The Court of Justice did not explicitly address this distinction.

[69] Bellamy (*supra*) has proposed some suggested amendments in this regard.

[70] *See* J. Temple Lang, *Three Possibilities For Reform Of The Procedure Of The European Commission In Competition Cases Under Regulation 1/2003*, CEPS Special Report 194 (November 2011).

[71] *See* Resolution on the Tenth Report of the Commission of the European Communities on Competition Policy, OJ 1982 C 11/78.

[72] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284387/cc7_revised_.pdf.

[73] *See*, e.g., *R -v- Take-over Panel ex parte Guinness PLC* [1991] QB 146.

[74] *See*, e.g., Sections 169(1)-(3) (duty to consult) and Section 169(4) (protection of confidentiality) of the Enterprise Act 2002 in the context of market investigations by the Competition Commission.

[75] *See* ¶¶70ff.

[76] *See* ¶278.

[77] *Id.*

[78] In S*tagecoach v Competition Commission* [2010] CAT 14, Stagecoach's ground of review that the Competition Commission acted unfairly in preferring evidence of Preston Bus Limited's witnesses over that of Stagecoach's witnesses (Preston Bus Limited being the (hostile) takeover target) was not ruled upon by the CAT since other grounds disposed of the appeal.

[79] *CTS Eventim AG v Competition Commission* [2010] CAT 7 (ground 1).

[80] *See, Imperial Tobacco Limited and others v OFT* [2011] CAT 41, ¶28.

[81] By way of counter-example, in the recent General Court judgment in Case T-540/08, *Esso v Commission* [2014] ECR II nyr, there was a clear conflict between the witness statement relied upon by one of the parties and certain documents on the Commission file. The General Court did not call the witness and cross-examine him, in order to resolve that conflict ¶ 67ff.

[82] The approach of the English courts to the hearing of evidence in competition law cases stands in marked contrast to the recent practice of the General Court in similar appeals. In *Duravit,* the General Court refused a request under Article 68 of its Rules of Procedure to hear witnesses in a cartel case. *See* Case T-364/10, *Duravit AG and others v Commission*, [2012] ECR II-nyr, ¶¶135, 147, 196, 200.

[83] Several commentators at a recent conference on the *Intel* judgment of the General Court questioned the Court's treatment of the evidence. Criticisms included: (1) the Court's preferring various "nuances" derived from Dell's response to a Commission Request for Information over a clear statement that the agreement on rebates was not "explicitly conditioned on exclusivity or minimum volume commitments" (*see* ¶468); (2) the Court considering a Lenovo response to a Request for Information as "not credible" (¶¶1070, 1078), despite its relying heavily on other responses in other contexts being sufficient evidence by themselves or, at most, as evidence requiring only weak additional corroboration; (3) the Court preferring the unsworn evidence of a single, apparently lower level Dell employee over sworn testimony given by Dell's CEO in U.S. proceedings (¶¶495, 502, 558, 566); (4) reliance on customer "expectations" and/or "impressions" to show *de facto* exclusive dealing, without evidence that Intel itself was aware of those expectations/impressions (or could avoid them being created or formed) (¶¶525, 527); and (5) ignoring evidence of individuals directly involved in negotiations with Intel in favor of evidence from individuals who were not. See "*Intel v Commission*: More Eco- Or More Ordo-Friendly?," Liège Competition and Innovation Institute (LCII), Brussels (June 16, 2014).

[84] *See, Tesco v OFT* [2012] CAT 31, ¶110(a) ("The [Early Resolution Agreements] are unsworn documents, containing admissions which Tesco has not had the opportunity to test by cross-examining the individuals who it is alleged engaged in the conduct or had the relevant state of mind.")

[85] Indeed, in U.K. case law, the leniency regime if anything has resulted in more adverse inferences being drawn **against** competition authorities in relation to evidential gaps. The reason is that a condition of leniency is that the applicant has an ongoing duty to assist the competition authority (including in appeals) and that the failure of a competition authority to secure support for its theory of harm or core factual evidence from a cooperating leniency applicant may be an eloquent silence justifying some adverse inference against the competition authority. *See*, e.g., See *Tesco v OFT* [2012] CAT 31, ¶110(a) ("This, it seems to us, is a particularly important factor given the obligation contained in each [Early Resolution Agreement] requiring the relevant admitting party to use its reasonable endeavors to secure the co-operation and attendance of witnesses—an undoubtedly powerful tool in the hands of the OFT but one of which it has not availed itself.")

[86] See, *Tesco v OFT* [2012] CAT 31, ¶110(d) ("Although entering into an [Early Resolution Agreement] with the OFT is, in one sense, contrary to the interests of an admitting party, which might be thought to make it more likely than not that the admission is true, there are a number of other factors that might lead an undertaking to take a 'commercial' decision to admit liability for an infringement, which might be, at least in part, untrue or which the undertaking simply has not investigated. These factors include the prospect of a substantial penalty reduction and the avoidance of potentially protracted proceedings both before the OFT and, possibly, before this Tribunal."). This comment was made in the context of early resolution agreements,

which are not the same as leniency statements. But the general point remains good.

[87] *See, Imperial Tobacco Limited and others v OFT* [2011] CAT 41, ¶86.

[88] *Id*. ¶88.