A EUROPEAN PERSPECTIVE ON THE INSTITUTIONAL DIMENSIONS OF ANTITRUST ADJUDICATION

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Bill Rooney has kindly asked me to comment on Dan Crane's insightful contribution on antitrust and judicial virtues, in which Professor Crane seeks to identify the most conducive virtues for "good judging" in U.S. antitrust cases. Being a foreigner, I will adhere to the internationally sanctioned principle of non-interference, and will carefully avoid stepping into the debate about what "good judging" should mean in U.S. antitrust law. The focus of my comment will be on competition law adjudication in the European Union and, more specifically, whether it is conducted under conditions that deliver "good judging," to use Professor Crane's phrase.

As a preliminary observation, I would like to note that the institutional structure of competition law enforcement at the European Union level is very different from that of the United States. EU antitrust law enforcement is mostly public and essentially rests on the European Commission, which is the sole enforcement authority. The Commission is an administrative body comparable in some respects to the U.S. Federal Trade Commission, with the difference being that the European Commission has the power to fine companies found guilty of competition law infringement. These fines can be quite high, as illustrated by the *Intel* decision, which imposed a fine of more than one billion

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euros.[1] In this enforcement system, the EU judiciary's main role is to review the legality of Commission competition decisions.

Of course, EU competition law can also be privately enforced in member state courts. Private antitrust litigation in Europe is growing, even though it is still relatively modest by U.S. standards. In that context, the European Court of Justice may be called upon by a member state court to respond to a request for a preliminary ruling on questions of EU antitrust law. These requests may be made in disputes between two private parties, or in an appeal by a private party against a decision of a member state competition authority that applied EU competition law in addition to or instead of its own national competition law. As discussed below, it is possible to detect a difference in judicial attitude between the cases in which the EU judiciary reviews public enforcement decisions made by the Commission, and those in which it provides preliminary rulings in disputes in which the Commission is not directly involved.

Appeals against Commission competition decisions may be lodged with the General Court of the European Union (formerly called the Court of First Instance). That Court was set up in 1988 at the request of the Court of Justice in order to discharge it from disputes involving questions of fact, in particular, competition and staff cases.[2] The jurisdiction of the General Court was gradually expanded to cover appeals by private parties against all administrative decisions made by the European institutions. Judgments of the General Court may, in turn, be appealed to the Court of Justice on questions of law.

Even though the General Court comprises 27 judges, 1 per member state, assisted by more than 100 law clerks, it has proven itself unable to keep pace with its workload of

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1 Summary of Commission Decision of 13 May 2009 Relating to a Proceeding Under Article 82 of the EC Treaty and Article 54 of the EEA Agreement, 2009 O.J. (C 227) 13, 17 (summarizing Case COMP/C-3/37.990, Intel Corp. (May 13, 2009), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:227:0013:0017:EN:PDF).

2 *See* Council Decision 88/591, 1988 O.J. (L 319) 1 (EC).

currently 600–700 cases per year. As a result, it has accumulated a considerable backlog, amounting to 1,308 cases in 2011.[3] There is a general consensus that the duration of proceedings before the General Court is excessively long. On average, competition cases take fifty months, which is roughly twice as long as it took the Court of Justice to handle such cases before the General Court was established. A number of solutions have been envisaged to resolve this problem. The General Court has proposed the creation of a lower court specializing in intellectual property that would relieve it of the trademark cases that currently account for a third of its workload. The solution currently being examined by the Council, an increase in the number of judges, is set out in a Court of Justice proposal endorsed by the Commission.[4] Another, perhaps less costly solution, would be improved management of the General Court, a suggestion made by one of its judges in a recent paper.[5]

Another problem brought to light by the vetting committee set up under Article 255 of the Lisbon Treaty is the uneven quality of the judicial candidates for the General Court.[6] In its first two years of existence, the committee, which reviews the suitability of candidates proposed by the member states for the Court of Justice and General Court, has vetoed five nominations to the General Court made by member states as diverse as Malta, Greece, Romania, Italy, and Sweden, finding that they lacked the necessary qualifications.

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3 CT. OF JUSTICE OF THE EUR. UNION, ANNUAL REPORT 2011, at 193 (2012), *available at* curia.europa.eu/jcms/upload/docs/application/pdf/2012-06/ra 2011_version_integrale_en.pdf.

4 Council of the European Union, *Draft Amendments to the Statute of the Court of Justice of the European Union and to Annex I Thereto*, Doc. 16904/11, at 4 (Nov. 14, 2011), *available at* http://register.consilium.europa.eu/pdf/en/11/st16/st16904.en11.pdf.

5 Franklin Dehousse, *The Reform of the EU Courts: The Need of a Management Approach* 3 (Royal Inst. for Int'l Relations, Egmont Paper No. 53, 2011), *available at* http://www.egmontinstitute.be/paperegm/ep53.pdf.

6 Consolidated Version of the Treaty on the Functioning of the European Union art. 255, Sept. 5, 2008, 2008 O.J. (C115) 47, 159.

In addition to these organizational difficulties, the General Court has come under attack for the standard of review it applies in competition cases.[7] The debate has taken on increased significance following the 2011 *Menarini* judgment of the European Court of Human Rights.[8] The question addressed by the Court was whether an antitrust enforcement model whereby fines for competition law infringements are imposed by an administrative authority is consistent with Article 6 of the European Convention of Human Rights. The Article provides for the right to a fair trial by an independent and impartial tribunal in criminal cases.[9] While confirming the criminal nature of competition law fines because of their severity, the Court nevertheless held that an administrative authority can lawfully impose a criminal sanction as long as its decision is subject to review by a court having "full jurisdiction" to examine that decision.

Even though the *Menarini* judgment concerned a decision made by the Italian competition authority, it is directly relevant to the legality of the EU antitrust enforcement system, which is based on the same model. In fact, a few months after the *Menarini* judgment, the European Court of Justice rendered two judgments which appear to echo

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[7] *See, e.g.*, Firat Cengiz, *Judicial Review and the Rule of Law in the EU Competition Law Regime After* Alrosa, 7 EUR. COMPETITION J. 127, 129 (2011); Ian Forrester, *A Bush in Need of Pruning: The Luxuriant Growth of "Light Judicial Review," in* EUROPEAN COMPETITION LAW ANNUAL: 2009—THE EVALUATION OF EVIDENCE AND ITS JUDICIAL CONTROL IN COMPETITION CASES 407 (Claus-Dieter Ehlermann & Mel Marquis eds., 2011); Nicholas Forwood, *The Commission's "More Economic Approach"—Implications for the Role of the EU Courts, the Treatment of Economic Evidence and the Scope of Judicial Review, in* EUROPEAN COMPETITION LAW ANNUAL: 2009, *supra*, at 255; Damien Geradin & Nicolas Petit, *Judicial Review in European Union Competition Law: A Quantitative and Qualitative Assessment* (Tilburg Law & Econ. Ctr., Discussion Paper No. 2011-008, 2010), *available at* http://ssrn.com/abstract=1698342.

[8] A. Menarini Diagnostics S.R.L. v. Italy, Case No. 43509/08 (Sept. 8, 2011), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-106438.

[9] European Convention for the Protection of Human Rights and Fundamental Freedoms art. 6, Nov. 4, 1950. 213 U.N.T.S. 221, 228 [hereinafter European Convention on Human Rights].

Menarini: *KME*[10] and *Chalkor*.[11] Like the European Court of Human Rights, the European Court of Justice concluded that the General Court provides effective judicial protection when it reviews the legality of competition decisions made by the Commission.[12] This conclusion was reached despite numerous references to the Commission's wide margin of discretion throughout the General Court's judgments on appeal.[13] On this point, the Court of Justice in *KME* stressed that the General Court "cannot use the Commission's margin of discretion . . . as a basis for dispensing with the conduct of an in-depth review of the law and of the facts."[14] The Court of Justice then found, notwithstanding the impression created by the General Court's language, that the General Court had actually met that standard in the judgments under appeal.[15]

Whether a higher standard of review of Commission competition decisions by the General Court will emerge as a result of the *KME/Chalkor* case law remains to be seen. In the meantime, an analysis of the General Court's judgments in competition cases over the last ten years brings to mind the famous quote by U.S. Supreme Court Justice Potter Stewart about litigation under Section 7 of the Clayton Act; namely, that the sole consistency in the case law was that "the Government always wins."[16] Since the entry into force

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10 Case C-389/10 P, KME Germany v. Comm'n (Dec. 8, 2011), http://curia.europa.eu/juris/document/document.jsf?text=&docid=116124&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=658397.

11 Case C-386/10 P, Chalkor AE Epexergasias Metallon v. Comm'n (Dec. 8, 2011), http://curia.europa.eu/juris/document/document.jsf?text=&docid=116123&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=658134.

12 *See KME Germany*, *supra* note 10, ¶¶ 118–34; *Chalkor*, *supra* note 11, ¶¶ 45–67.

13 *See* Case T-21/05, Chalkor AE Epexergasias Metallon v. Comm'n, 2010 E.C.R. II-01895, ¶¶ 61–63; Case T-25/05, KME Germany v. Comm'n, 2010 E.C.R. II-00091, ¶¶ 52–55, 99, 114, 120, 126, 136, 150.

14 *KME Germany*, *supra* note 10, ¶ 129.

15 *See id.*; *see also Chalkor*, *supra* note 11, ¶ 62.

16 United States v. Von's Grocery Co., 384 U.S. 270, 301 (1966) (referring to 15 U.S.C. § 18 (1964)).

of Regulation No. 1/2003 on May 1, 2004,[17] the so-called "modernization" regulation, the Commission has tended to restrict its enforcement activity to only two categories of infringement: cartels and abuses of dominance. It has not adopted any decision concerning vertical restraints or non-cartel horizontal agreements, leaving these matters to self-assessment by companies or enforcement by member state competition authorities. Due to the success of the Commission's leniency program, most cartel cases are substantively uncontested; litigation before the General Court tends to be restricted to peripheral issues bearing on the amount of the fine, such as the duration of the cartel or the existence of aggravating circumstances—for instance, ring-leadership.

Substantive challenges to Commission infringement decisions are mostly brought under Article 102 of the Treaty on the Functioning of the European Union ("TFEU"), which prohibits abuses of a dominant position. Nevertheless, the last time an abuse of dominance finding by the European Commission was overruled on substantive grounds was in 1983, and this was by the Court of Justice.[18] The General Court has consistently relied on the Commission's wide margin of discretion in assessing complex economic facts to systematically uphold Commission decisions establishing infringements of Article 102 TFEU. The standard of review actually applied by the General Court in handling appeals in Article 102 TFEU cases has been described by a senior General Court judge, Josef Azizi, in the following terms:

> According to Article 2 of Regulation No. 1/2003, the burden of proving an infringement rests on the Commission. Where the Commission has, in the contested decision, presented a highly developed discussion of questions of fact, the applicant contesting the Commission's findings of fact must present arguments that are at least as well argued and, in terms of methodology, at least on a par. The

17 Council Regulation No. 1/2003, 2003 O.J. (L 1) 1 (EC).

18 Case 322/81, NV Nederlandsche Banden Industrie Michelin v. Comm'n, 1983 E.C.R. 03461.

> applicant's submission can, in turn, be refuted by way of a special counter-argument by the Commission in its capacity as the defendant to the proceedings. However, in case of equal plausibility of both parties' submission, the Commission's wide margin of assessment shall prevail and its decision thus be upheld.[19]

In the same article, Judge Azizi also observed that:

> Even though, in principle, the [General Court] has far-reaching powers to supplement, by itself, the findings of fact made by the Commission or may even completely reassess the Commission's findings of fact, for example, by using various measures of inquiry (see Article 65 of the Rules of Procedure), including the commissioning of an expert's report, actual use of such legal options remains highly theoretical and unrealistic.[20]

Judge Azizi then put forward two reasons explaining the General Court's reluctance to conduct an in-depth review of complex Commission decisions concerning abuses of dominance: the "principle of economy of procedure," and the General Court's wish "to avoid the perception that it upsets the inter-institutional equilibrium by systematically repeating the assessment already undertaken by the Commission."[21]

This approach needs to be fundamentally reconsidered following *Menarini*, *KME*, and *Chalkor*. Bearing in mind the criminal nature of the fines imposed by the Commission in Article 102 TFEU cases, a standard of review under which the balance of plausibility is systematically tipped in favor of the Commission is hardly compatible with the principle that

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19 Josef Azizi, *The Limits of Judicial Review Concerning Abuses of a Dominant Position: Principles and Specific Application to the Communications Technology Sector*, *in* TODAY'S MULTI-LAYERED LEGAL ORDER: CURRENT ISSUES AND PERSPECTIVES 1, 9–10 (Tristan Baumé et al. eds., 2011) (footnotes omitted).

20 *Id.* at 8.

21 *Id.*

any reasonable doubt should benefit the defendant.[22] Further, the Court of Justice in *KME* and *Chalkor* made it clear that the General Court may not rely on the Commission's margin of discretion to refuse to conduct an in-depth examination of the facts alleged by the Commission.

The current highly deferential attitude of the General Court stands in stark contrast with the robust judicial review that was characteristic of the first decade of its existence. As a result of the *Bayer* judgment of the General Court (then known as the Court of First Instance), the Commission stopped applying the prohibition on restrictive agreements in Article 101 TFEU to practices that are effectively unilateral conduct.[23] Even more spectacularly, the Court of First Instance annulled three Commission merger control decisions in a five-month period in 2002 (*Airtours*,[24] *Schneider Electric*,[25] and *Tetra Laval*[26]), in judgments that had a profound impact on the Commission's merger control policy. The Commission's guidelines on horizontal mergers subsequently incorporated the rules for the assessment of coordinated effects laid down by the court in *Airtours*. After *Tetra Laval*, the Commission showed much more caution in dealing with conglomerate mergers. The Commission also appointed a chief economist, and set up internal procedural mechanisms to ensure more objective case handling.

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22 The principle that defendants must enjoy the benefit of the doubt forms part of the general principle of the presumption of innocence, which is safeguarded by Article 6 of the European Convention on Human Rights and Article 48 of the European Charter of Fundamental Rights. *See* European Convention on Human Rights, *supra* note 9, at 228; Charter of Fundamental Rights of the European Union art. 48, Dec. 7, 2000, 2000 O.J. (C 364) 1, 20.

23 Case T-41/96, Bayer AG v. Comm'n, 2000 E.C.R. II-03383.

24 *See* Case T-342/99, Airtours plc v. Comm'n, 2002 E.C.R. II-02585, ¶ 295.

25 *See* Case T-310/01, Schneider Elec. SA v. Comm'n, 2002 E.C.R. II-04071, ¶ 463.

26 *See* Case T-5/02, Tetra Laval BV v. Comm'n, 2002 E.C.R. II-04381, ¶ 338.

As previously noted, the Court of Justice may issue preliminary rulings at the request of member state courts. These cases do not involve enforcement by the Commission, and, echoing an observation made by Dan Crane in his paper, this different institutional context seems to impact the substantive content of some preliminary rulings in competition cases. For example, the approach to the issue of "essential facilities" in *Bronner*,[27] a preliminary ruling rendered in a dispute between two private parties in Austria, exhibits a more independent proclamation of the law than does *Microsoft*,[28] an appeal from a Commission decision. Similarly, the fairly liberal approach to rebates in *Post Danmark*,[29] a preliminary ruling, is difficult to reconcile with the harder line taken by the court in *Tomra*,[30] a case involving public enforcement by the Commission.

Judges at the EU level face many of the same dilemmas with which their U.S. counterparts grapple. A major difference between the two enforcement systems, however, is the role played by public enforcement, such as the power given to administrative competition authorities in Europe to impose what are now widely acknowledged to be criminal sanctions. Against the background of the European Convention of Human Rights, as interpreted by the European Court of Human Rights, the standard of review applied by the General Court to European Commission competition decisions must evolve. At the same time, the General Court is plagued by organizational problems, which

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[27] *See* Case C-7/97, Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs-und Zeitschriftenverlag GmbH & Co. KG, 1998 E.C.R. I-07791, ¶¶ 24–37.

[28] *See* Case T-201/04, Microsoft Corp. v. Comm'n, 2007 E.C.R. II-03601, ¶¶ 368–422.

[29] *See* Case C-209/10, Post Danmark A/S v. Konkurrencerådet, ¶¶ 8–11 (May 24, 2011), http://curia.europa.eu/juris/document/document.jsf?text=&docid=81522&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=398990.

[30] *See* Case C-549/10 P, Tomra Systems ASA v. Comm'n, ¶¶ 59–82 (Feb. 2, 2012), http://curia.europa.eu/juris/document/document.jsf?text=&docid=119011&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=39874.

directly impact the Court's effectiveness. All of these challenges must be addressed in order for the EU antitrust adjudication process to deliver "good judging."