Judicial Review: Which Standards to Control Dynamic Enforcement Outcomes?

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Topics

1. The role of judicial review for different enforcement outcomes
2. The applicable review standards for fining, commitment and settlement decisions
3. Ongoing challenges
The role of judicial review for different enforcement outcomes

- **Settlement decisions**
  - **Narrow review**: few cases; the court must ensure that companies have received equal treatment

- **Commitment decisions**
  - **Limited review**: few cases; the court must ensure that commitments are not excessive / insufficient

- **Fining decisions**
  - **Full review**: the court must ensure that the decision is based on a sound analysis of facts and law and that the fine is appropriate
1. Full review of fining decisions

- **Legality review** (Art. 263 TFEU):
  - Unrestricted review of law and facts on the basis of the parties’ arguments (**Chalkor**, C-386/10 P) … even if submitted for the first time on appeal (**Galp**, C-603/13 P, §72)

- **Unlimited jurisdiction** on fines (Art. 31 Reg 1/2003)
  - Courts can substitute their own appraisal for the Commission’s and, consequently, cancel, reduce or increase the fine…within the boundaries of the infringement legally established (**Galp**, C-603/13 P)
Discretion for complex economic assessments?

“[…] Whilst, in areas giving rise to complex economic assessments, the Commission has a margin of discretion with regard to economic matters, that does not mean that the Courts must refrain from reviewing the Commission’s interpretation of information of an economic nature. Not only must those Courts establish, among other things, whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it.” (Chalkor, C-386/10 P, §54)

“[…] When imposing fines for infringement of the competition rules, ESA cannot be regarded to have any margin of discretion in the assessment of complex economic matters which goes beyond the leeway that necessarily flows from the limitations inherent in the system of legality review.” (Posten Norge, E-15/10, §100)
### Full review in practice

<table>
<thead>
<tr>
<th>Judicial outcomes before GC (Nov. 2011-Dec 2016)</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appeal dismissed</td>
<td>50%</td>
</tr>
<tr>
<td>Full annulment</td>
<td>10%</td>
</tr>
<tr>
<td>Partial annulment</td>
<td>32%</td>
</tr>
<tr>
<td>Adjustment to fine only</td>
<td>8%</td>
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</table>
Full review in practice

Courts fairly interventionist on **procedural rights**
- e.g. *Nexans* (T-135/09), *Deutsche Bahn* (C-583/13 P), *DB Schenker* (E-14/11), *HeidelbergCement* (C-247/14 P), *Air Freight* cases

Perhaps less so on the **merits**
- Rare findings of no infringement (e.g. *CISAC*, T-442/08)
- More often: duration, awareness (e.g. *Toshiba* (T-104/13), *Soliver* (T-68/09))
- Reluctance to intervene on fines? (some exceptions: e.g. *Donau Chemie*, T-406/09, on leniency discount)
Full review in practice

- Number of cases: **54 (out of 171)**
- Average fine reduction: **47.7%**
- Median fine reduction: **32.3%**
2. Review of commitment decisions

- *Alrosa* (C-441/07 P), *Morningstar* (T-76/14)
  - Commission has "*wide discretion*” to make a proposed commitment binding or to reject it.
  - Review of the *proportionality* of the commitments
    - whether the commitments are ‘sufficient’ and can respond ‘adequately’ to the concerns…
    - …by taking account of the seriousness of the concerns and the interests of third parties
    - But review limited to manifest error standard (*Morningstar*, §41, 46)
3. Review of settlement decisions

- By their nature, only exceptionally scrutinized by courts
  - *Société Générale*, T-98/14 (withdrawn); *Printeos*, T-95/15 (fine annulled)
  - Main issues: equal treatment with respect to fines; deficient reasoning

- **Hybrid settlements**
  - Risk for presumption of innocence if Commission adopts the settlement decision before the infringement decision (*Libor, Euribor, steel abrasives, canned mushrooms*)
  - Can the Commission increase the fine by more than 10%? *Timab* (T-456/10): *tabula rasa* (but parties should not be penalised for not settling)
4. Ongoing challenges (1): intensity of review

- **Varying degrees of thoroughness** depending on the case
  - *E.g. pre-stressing steel* appeals vs *CRT* appeals
  - Negative impact of GC reform?

- **Greater control by the ECJ** on the standard of review?
  - See *Cartes Bancaires* (C-67/13 P, §90) for failure of GC to carry full review
  - **BUT**
  - Increasing use of orders at ECJ level (34.8% of the cases decided in 2015 vs 7.1% in 2014 and 11.6% in 2013) => a trend or exceptional circumstances?
4. Ongoing challenges (2): speed of review

- Length of proceedings **varies greatly** depending on the case:
  - 69 months in *Industrial bags* (*Kendrion*, C-50/12 P and *Gascogne*, C-58/12 P)
  - **BUT** 25 months in *Smart Card Chips* (*Infineon*, T-758/14 and *Philips*, T-762/14); 36 months in *Lundbeck* (T-472/13)
  - 47.8 months on average since 2011 (2015: 47.8 months; 2014: 45.8 months)

- Positive impact of GC reform?
4. Ongoing challenges (3): scarcity of review

- **40-50% less** incoming cartel cases since the Commission began using the settlement procedure

- Growing importance of **national precedents** and risk of **divergence** across the EU
  - Greater role for the preliminary ruling procedure? e.g. *Post Danmark I and II*, C-209/10 and C-23/14, on rebates; *Coty*, C-230/16, on e-commerce; *Huawei*, C-170/13, on SEPs; *Ski Taxi and others*, E-3/16, on restrictions by object
Thank you

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