

**Judicial control of competition decisions  
in the UK and EU****21 September 2004****Introduction by Peter Freeman, Deputy Chairman****Introduction**

Ladies and Gentlemen, it is my pleasurable task to introduce our two distinguished speakers this evening, John Swift QC and Mario Siragusa.

I should like to set the scene by offering some comments on the question of judicial control from the point of view of the Competition Commission.

**The question for discussion**

To point up the potential polarization, consider the two following quotes from a recent US Federal Appeals Court case (concerning a decision by the Federal Communications Commission, the FCC, on media ownership rules).

We have identified several provisions in which the (FCC) falls short of its obligation to justify its decision ... with reasoned analysis.  
(Ambo and Fuentes JJ) AND

It is not the job of the judiciary to second-guess the reasoned policy judgments of an administrative agency acting within the scope of its delegated authority.'  
(Scirica J).

**The Competition Commission's perspective**

'Hear, hear', you might expect me to say to the second quotation; but not necessarily so. The essential question from the CC's perspective is rather:

What kind of judicial review of the CC's decisions is appropriate, having regard to the respective rôles of the OFT, the CC, and the CAT?

It is clear that there should be some judicial review of competition authority decisions. Not only is this expressly provided by statute, it is an essential part of the system of administrative and judicial checks and balances and protects the 'human rights' of those subject to the decision-making process. The new UK merger control régime has been the subject of judicial review, in the 'Hospital Software' case, which will no doubt be considered tonight. Although it directly involved the OFT, it is nonetheless very relevant to the CC and there is much to ponder on, both in the CAT's two judgments and the two substantive Court of Appeal judgments.

The issue before us breaks down into two main parts, 'How much?' and 'Of what degree of intensity?' And we need to have a view of the respective rôles of the OFT, the CC and the Competition Appeal Tribunal.

## **The roles of the three institutions**

Taking the last point first, may I suggest as a working description that it is the CC's job to investigate in depth and decide what should be done and it is the CAT's job to ensure the investigation is fair, that the decision is within the law and that it is justified by the evidence considered. The OFT's job, in this area of UK competition law at least, is to decide what should be investigated in depth and what need not be.

## **How much judicial review?**

This involves considering first:

- *What measures should be subject to review?* At one extreme, one could review our decision to adjourn a hearing for lunch; at the other extreme, review could be limited to the final substantive decision only. The ECJ, in a celebrated case, declined to regard the issuing of the Statement of Objections as an appealable act. The statute refers to review of 'a decision' (EA ss 120 and 179) (including a failure to take a decision that is 'permitted or required'). (There are separate provisions for penalties.) In the CC's case that would certainly cover our final reports on SLC and our final decisions on remedies. Should the provisional conclusions also be reviewable? One would think not—no final decision has been made and the inquiry process is not exhausted.
- What about *interim measures*—the acceptance of undertakings and decisions on variations or non-variations? One can see arguments both ways, but preferably a right of review should only arise if the CC decides, on an interim basis, something of which the consequences are irreversible—eg to permit a factory closure which an interested third party might wish to purchase following implementation of a final remedy.
- What about *disclosure of confidential information*? Should the excision process be subject to judicial review? The consequences of wrongful disclosure may be irreversible and prevention may be better than cure.
- *Who may seek judicial review?* How widely should the net be cast? Clearly affected 'third' parties (any person 'aggrieved by' a decision or failure to take a decision) are eligible. But the grievance must have some objective basis and not just reflect a passing attitude of melancholy. The Hospital Software application was brought at the behest of a third party who thought a proposed merger ought to have been investigated in greater depth.

## **With what degree of intensity should the review be conducted?**

- One aspect of this is *how often* should a review occur in any one case?. The CC has to conduct inquiries in a reasonable way within a reasonable time. However attractive to some, a process in which every step is subject to detailed review risks being unable to deliver a practical result in a realistic time. Preferably, review of decisions of the CC should go with rather than against the grain of the inquiry in the

sense that issues should preferably be reviewed when a final decision is made and the full reasons and underlying evidence can be studied.

- As to *the level of review*, this may vary according to the subject matter. Questions of legality and procedural fairness may be looked at more closely: where it is a matter of the CC's assessment of the evidence and whether its conclusion is justified then, arguably, it should concentrate on assessing what evidence was before the CC and whether the material relied on by the CC reasonably justified the decision reached. Going further risks turning the review into a 'Phase III' investigation and turning the Tribunal into a 'super Commission', which would not seem to be what is contemplated in the Enterprise Act.

### **Summary of the CC's position**

So, in circular response to my initial proposition, may I suggest that, what is needed is an *appropriate* level of judicial review. More precisely:

- This should be broad enough in application to provide the necessary discipline both during and after the process.
- Review should preferably take place after the final decision is made, rather than at each stage of the inquiry.
- The degree of intensity should be enough to reflect the balance of functions between the CC and the Tribunal, with some room for distinction between cases involving:
  - legality;
  - procedural fairness; and
  - assessment of the evidence.
- Where the review is related to the assessment of the evidence and the justification for the decision, the level of review should be lighter, to avoid judicial review turning into a third phase of investigation.