

## COMPETITION COMMISSION AUTUMN LECTURE

### Judicial control of competition decisions in the UK and EU

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#### Introduction

Ladies and Gentlemen, good evening.

It is a great honour to have been invited by the Competition Commission to give this lecture this evening. It is also a great pleasure to be sharing the platform with Peter Freeman and Mario Siragusa, who are old friends and colleagues.

I am going to limit myself to the UK system of judicial control and, specifically, the principles of judicial review that have been developed by the common law to ensure that there is an appropriate balance between judicial control and regulatory autonomy.<sup>1</sup>

More specifically I am going to concentrate on the OFT and the Commission as representing the autonomous regulatory authorities; and the CAT and, above that tribunal, the Court of Appeal, as representing judicial control, in respect of the new statutory functions being exercised under the Enterprise Act 2002: essentially mergers, market investigations and the rag bag of statutory functions related to the utilities or other regulated undertakings.<sup>2</sup> The main theme is that the balance is to be determined by the courts and that the type of judicial control will depend heavily on the quality, consistency and transparency of reasoning of the agencies in the formulation of the policies necessary for the operation of a world-class competition regime and in their reasoned application to the facts of particular cases. The matters now left in the hands of the autonomous agencies are so important to the future well being of this country that they cannot exercise power without direct accountability to the courts, however complex and difficult the area of decision-making.

#### **Part I: General considerations on the nature of judicial review and the issues of fact and of law**

##### ***The Common Law inheritance in judicial control of regulatory decisions***

The common law is, of course, no more and no less than the dynamic development and expression by the courts of principles for the settlement of civil disputes, including those arising between the State and undertakings subject to its jurisdiction. It is steeped in the history of challenges to the assertion of Executive power: it is not a *suprema lex*, nor can it be in the light of our traditional system of Parliamentary sovereignty, but it has shown flexibility and firmness in upholding some basic principles in its response to major changes in the relationship between the State and the citizen. There is no equivalent in UK statute law of the measures set out in the EC Treaty for challenging the decisions of Community

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<sup>1</sup>See PP Craig, *Administrative Law*, 5<sup>th</sup> Ed, p. 519. Craig uses the expression 'agency autonomy', but I think that 'regulatory autonomy' gets closer to the institutional hierarchy that exists in the field of competition and utility regulation law. Judicial control could also be said to include appeals to the CAT under the Competition Act 1998 or resolution of competition law disputes by the High Court, including the application of Article 81(3) of the EC Treaty but those matters are not considered further.

<sup>2</sup>See for instance section 168 of the Enterprise Act 2002 for the variety of functions that fall to the Competition Commission as a body reviewing decisions of utility regulators.

institutions, such as the EC Commission. But, whatever the route chosen, I doubt whether the differences outweigh the similarities of approach: each of the UK and EU systems is designed to achieve the appropriate balance, bearing in mind the importance of the principles of competition law to the economic development of the UK and the EU more generally.

### ***Summary of the principles of judicial review in relation to competition decisions***

Competition decisions have a special feature: certainly in respect of mergers and market investigations ( the old 'complex monopoly' situations ) in that the decision maker has to form a view as to what may be expected to happen in the future when determining whether to regulate or otherwise seek to control lawful commercial behaviour. In brief the conclusions depend a great deal on the judgment of the decision maker, as well as on the ascertainment of the correct principles to be applied in the collection of evidence, its analysis and its treatment. On the other hand, regulatory autonomy has been established to such a degree, through the Government's effective withdrawal from decision-making, that there has to be some system of accountability to the courts. Otherwise, there is a risk of a democratic deficit. The question is—do the principles of judicial review enable the appropriate balance to be established between judicial control and regulatory autonomy. Moreover, what are these principles—for unless they are clearly understood by the judiciary and the autonomous regulator there is a serious adverse effect on the public interest? I can summarize the principles broadly as follows—but to state them is one thing, to apply them to the particular circumstances of competition decisions is quite another. They fall essentially into two parts, connected but analytically distinct: the first is that the agency or regulator must proceed upon a correct interpretation of the statute or other legal instrument, which could well be an EU Directive; the second is that the decision on the facts falls within the bounds of reasonable judgment.

So far as I am aware, reform of statutory competition law and utility regulation, which began in the mid-1980s and has now been radically restructured by the Enterprise Act 2002, is at the point of legislative closure, in which there is a clear institutional hierarchy for the resolution of disputes as between individuals and, more to the point, between the State, now acting almost entirely through independent regulatory authorities,<sup>3</sup> and the citizen. Any system of judicial control must recognize that to a large degree both policy and the implementation of that policy are now in the hands of independent agencies, themselves responsible for publishing the criteria that they will adopt in decision-making.

### ***A footnote on due process***

Moreover, due process or procedural fairness is, as is well known, a principle of judicial review. I am not intending to cover that in this evening's lecture save to make two points.

First, it is a necessary part of the decision-making process—in the sense that the decisions are more likely to be correct and command respect if due process is followed. Therefore it makes sense to follow it and explain why it is being done and be transparent about it and so on. Obviously the devil is in the detail: but regulators have worked hard over the years to improve transparency in the decision-making process and to commit to good practice in a set of self-disciplining rules. In a sense, the rules have become the legal protection

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<sup>3</sup>There remains scope for intervention by the Secretary of State in various places within the total legislative matrix governing competition law and utility regulation: see in particular the powers reserved to the Secretary of State in the Enterprise Act in respect of Public Interest cases: they are not considered further in this lecture. It is worth noting, however, that those aggrieved by a decision taken by the Secretary of State have the same rights of review and use the same process as those aggrieved by decisions of the regulators, namely by application to the CAT: an interesting case of the Executive providing a means of statutory redress on public interest issues to an appeals tribunal set up under the same statute as that conferring the relevant rights on the Secretary of State.

procedures and form part of the decision-making process, significant departure of which can legitimately cause legal intervention.

Second, the risk of losing before the courts a decision that may have taken six months or more to prepare, because a point of fact or factual inference has not been put or put too late to interested parties is too awful for such a regulatory authority to bear. I am not going into the case law, other than to say that the error has to be significant in that had it not been made the decision could well have been different and that the error must involve some clear element of unfairness, including but not necessarily limited to a breach of the conventions by which the inquiry is conducted. It is worthy of note that the judge who found against the Commission in *Interbrew* was their champion in *Mobile Phones*. No bias, there.

### ***Judicial control and regulatory autonomy involving issues of economic principles and complex factual analyses: the starting point***

The case law on judicial review is enormous. The text books, including learned articles by academic writers, judges and legal practitioners, form part of the canon of administrative law and are regularly referred to and relied on by the courts.<sup>4</sup> But a review of the text books and the articles reveals the tension which has existed over centuries as to the right balance to be maintained as between judicial control and autonomy of tribunals in the exercise of their statutory functions and more generally as between the judiciary and the departments of State. Several concepts have been developed only to have been qualified or rejected later: for a court to suggest that the CAT might have benefited from recourse to the text books before it formulated its own grounds for review of the OFT decision in *IBA v Torex* itself implies that clear statements of principle on the meaning and scope of judicial review can be garnered from those text books and the existing case law. To an extent this is true: the most obvious statement is that judicial review is different from that of an appeal: thus the role to be played by the CAT on a judicial review reference from the OFT or CC is different from the role it is expected to play in an appeal from the OFT or a utility regulator exercising powers under the Competition Act. Its specialist status as a tribunal does not mean that it can depart from those standard principles of judicial review. So much is clear: it was put simply by Lord Bingham in *ex p MacDonald*<sup>5</sup> in the following way:

It is important to remember always that this is judicial review of, and not an appeal against, the judge's decision. We can only intervene if persuaded that his decision was perverse, or that there was some failure to have regard to material considerations or that account was taken of immaterial considerations or that there was some material misdirection.

Once it is recognized that the principles of judicial review are part of the common law and that the common law is itself a dynamic set of principles, adjusting to the changes within the State and as between the State and other countries, in particular membership of the EU, it can be understood that the judges, while giving appropriate weight to precedent, will not want to be shackled by linguistics or by legal concepts that appear irrelevant to today's problems. Therefore a lot of caution has to be exercised before assuming that the principles are there and readily ascertainable so as to be applied in every case that comes before the courts.<sup>6</sup>

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<sup>4</sup>See, for instance, De Smith, Woolf and Jowell; Wade and Griffiths; Craig; Fordham; Bradley and Ewing. Chapter 11 of Craig provides an excellent summary of the developments of the principles of judicial review in respect of the issue of jurisdiction, including analyses of the collateral fact doctrine, limited review, and cases such as *Anisminic*, *Racal*, *Page*, *O'Reilly* and *South Yorkshire*; and, in the United States, *Chevron*. Michael Fordham, in *Judicial Review Handbook*, 3<sup>rd</sup> Edition, warns of the "forbidden substitutionary approach" and cites substantial case law on impermissible interference and the importance of guaranteeing built in 'latitude' on the part of the public body, at least on 'soft issues'. See Fordham at Chapters P13–P16.

<sup>5</sup>*R v Crown Court ex p. MacDonald* [1999] 1 WLR 841,855 A-B.

<sup>6</sup>One of the features of judicial review litigation is the ability of applicant or respondent to pick and choose dicta from cases dealing with one aspect of policy or administration and transport them without any justification to quite different contexts. Thus a regulatory authority may contend that its decisions are reviewable only for a failure of process or error of law ( relying on the

The institutional system we have in the UK for the judicial control of competition law decisions raises large issues as to where the appropriate balance lies; it includes the fact that the area of decision-making and the rules that govern those decisions are based almost entirely on principles of economics relating to the efficient working of markets. It includes the establishment of a specialist tribunal, rather than, in the past, leaving review to the High Court. And it includes the CC, which is by any definition also a tribunal, required to work in accordance with statutory criteria and to publish guidance as to how it intends to comply with those criteria.

There are two important preliminary points to bear in mind. First, the more important the role of the autonomous regulators in controlling the destiny of those seeking to engage in economic activity in these markets, the more alert the judges should be to the ambitions of those authorities and the application of either untried theory or forced fit factual conclusions.

On the other hand, an intermediate tribunal such as the CAT should be sure that when applying principles of judicial review it does not substitute its own judgment, in whole or in part for that of the OFT, CC or Government, save where it is clear that there has been such error as to take the decision outside the bounds of reasonable judgment.

### ***Right balance: a question of judgment and legal principle and policy***

Although the Court of Appeal in the *Hospital software* case<sup>7</sup> suggested that the difficulties expressed by the CAT as to how the principles of judicial review were to be applied in the current institutional structure could be perhaps resolved through checking up on what was in the text books, there is no text book answer to resolving the key policy issue, which is to **achieve the right balance between judicial control and regulatory autonomy** in competition law, an area of law where *judgment* on the type of structure or conduct or performance compatible with sound economic theory and political aspirations is acutely difficult and where that judgement relates not only to the drawing of inferences from past conduct but predicting the nature of future conduct.

### ***The basic division between issues of law and fact and their meeting together***

Even though the boundary between issues of law and fact is blurred in most competition law cases, it does make sense, conceptually, to separate them for the purposes of ascertaining how this balance is to be achieved.

In the recent judgment of the House of Lords in *Moyna*, (the *Can He Cook a Main Meal* case),<sup>8</sup> Lord Hoffmann, giving the judgement of the court, reaffirms two established principles, articulated by Lord Reid in the *Brutus* case.<sup>9</sup> The first is that the proper construction of a statute is a question of law, whether the meaning is clear or unclear. Moreover,

it is because of the nature of language that, in trying to establish the legislator's meaning, it is seldom helpful to make additions or substitutions in the actual language he has used.

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*Hillingdon* case) or even that where the words of a statute are clear no question of law arises. This latter contention, described by Lord Woolf as the last refuge of a respondent, was dismissed with a typical act of judicial mercy killing by Lord Hoffmann in the *Moyna* case. The concern that judges will throw out 99 per cent of arguments based on *Wednesbury* unreasonableness may also lead applicants to avoid such arguments completely and seek to attack the substance of the decision through another route, based on error of law. But, as Carnwath LJ correctly observed in *IBA/Torex*, and as previously explained by Lord Hoffmann in *Moyna* there are questions of fact and questions of inferences or conclusions from the facts which lead to decisions being made having legal effects. The law does not stand back and ignore those conclusions if they are beyond the bounds of reasonable judgment.

<sup>7</sup> *OFT and Others v IBA Health Limited* [2004] EWCA 142.

<sup>8</sup> *Moyna v Secretary of State* [2003] UKHL 44.

<sup>9</sup> [1973] AC 854.

Therefore if the tribunal has misconstrued the meaning, the court will substitute its own judgment on that question of law. However, even without adding or substituting, the 'meaning' of the legislator may be capable of several different interpretations by those called on to take the relevant decisions: in other words it may not be so *hard edged* as to call for only one interpretation. So is the expression 'substantial lessening of competition' or 'meeting all reasonable demands' hard edged or protean? We will see.

The second issue relevant to judicial control is that in any inquiry into whether the legal test is established:

there are two kinds of questions of fact: there are questions of fact; and there are questions of law as to which lawyers have decided that it would be inexpedient for an appellate tribunal to have to form an independent judgment. But the usage is well established and causes no difficulty as long as it is understood that the degree to which an appellate court will be willing to substitute its own judgment for that of the tribunal will vary with the nature of the question: see *In re Grayan Building Services* [ 1995 ] Ch 241,254-255.<sup>10</sup>

## **Part II: First example of judicial control under the Enterprise Act 2002**

### ***Guidance from the Court of Appeal on IBA/Torex in respect of the duty to refer mergers to the CC***

The Court of Appeal had its first test of the new law in the *Hospital Software* case. It concluded that the CAT and the OFT had both misinterpreted the Enterprise Act. The CAT should not have effectively rewritten section 33 of the Act so as to require the OFT to carry out a 'two part' analysis before they could form a reasonable belief as to whether it *may be* the fact that a merger *may be* expected to result in a SLC.

But the Court of Appeal also criticized the OFT for the way in which it had put a 'gloss' on the meaning of section 33. The principle, according to the Court of Appeal, is that the test to be applied under section 33(1) is that stated in that subsection.

The words are ordinary English words; they should be applied in accordance with their ordinary meaning; the Court should not substitute other words for those used by Parliament nor paraphrase or gloss them.

That is excellent first principle and text book analysis. The problem is that in the area of competition law things aren't as simple as in other statutes where the test may, for instance, be one of whether behaviour can be regarded as 'insulting'<sup>11</sup> or indeed, closer to home, whether a person is acting dishonestly in respect of a cartel offence.<sup>12</sup> Undertakings affected by EU competition rules want to know what the *ordinary meaning* is. So, the Court of Appeal itself acknowledged the difficulty and tried to help by using the ominous word 'Nevertheless'.

They said

Nevertheless in view of the evident importance of the test and the range of meaning the word 'may' can connote it may help to explain the statutory test by reference to a series of propositions.

They took four points.

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<sup>10</sup>A decision of Hoffmann, J, later Hoffmann confirming earlier Hoffmann with the backing of the House of Lords, all of whom agreed with Lord Hoffmann without writing separate judgments. *Moyna* also clarifies the judgement of the House of Lords in *Brutus v Cozens* [1973] AC 854, 861 on the role of the courts in considering appeals on points of law where the words in a statute have their ordinary meaning.

<sup>11</sup>The expression at issue in *Brutus* (see footnote 10).

<sup>12</sup>See section 188 of the EA 2002 and the *Ghosh* case.

### ***First point: meaning of belief***

First, the statute required that the OFT had to have a *belief* that something, namely an SLC, may be expected to result. The court held that Parliament had made a clear distinction between a 'belief' and a 'suspicion'. The OED is brought into play: a suspicion is but a 'slight belief'. So the OFT must have a 'belief' that something may be the case: that involves some form of 'mental assent'. I like the idea of serious not just slight beliefs at the OFT. But we move beyond linguistics to substance of the belief in the second proposition.

### ***Second point: belief must be reasonable and objectively justified***

Second, linked with the first, the belief has to be *reasonable and objectively justified*: at this point we move from the dictionary meaning as a guide to statutory interpretation to judicial policy—for the well known passage in the speech of Lord Wilberforce in the *Tameside* case is cited. Because this case, together with *Padfield*,<sup>13</sup> is so important in the development of the rules of judicial review in all cases, not limited to competition law the passage is worth citing in full:

In **Education Secretary v Tameside BC** [ 1977 ] AC 1014 the question was whether the Secretary of State is "satisfied". At p.1047 Lord Wilberforce pointed out that

This form of section is quite well known and at first sight might seem to exclude judicial review. Sections in this form may, no doubt, exclude judicial review on what is or has become a matter of pure judgment. But I do not think that they go further than that. If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the court must inquire whether those facts exist, and have been taken into account, whether the judgment has been made upon a proper self-direction as to those facts, whether the judgment has not been made upon other facts which ought not to have been taken into account.

Reference to 'proper self-direction as to the facts' and the 'other facts which ought not to have been taken into account' is the clearest possible indication that, in that case, the Executive is being told by the court that it must act within the scope and purposes of the relevant legislation, the court, and not the Executive, having the constitutional responsibility for the determination of the meaning of that legislation, whether by its natural meaning or more generally having regard to the context of the legislation and its purpose. At the same time the Executive is being assured by the court that it will not interfere with the judgment of the Executive where the issue is one of judgment. That is the principle of judicial balance, which runs like a golden thread through the jurisprudence.

### ***Third point: meaning of may be expected***

Returning to the language of Section 33 of the Enterprise Act the next issue related to the meaning of the words 'may be expected to result': the Court found, not surprisingly, that the words 'involve a degree of likelihood amounting to an expectation'. The CAT thought that expectation was more than a 50 per cent chance: the court preferred not to engage in quantitative assessment; whatever the test, it is common ground that the words exclude mere possibilities.

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<sup>13</sup>1968 [AC] 997.

***Fourth point: OFT should not put a gloss on the statute and it wrongly assumed that its belief had to relate to a probability***

But there was a fourth issue on the meaning of the Act: the Court held that, as a screening authority, the OFT should have given more weight to what was referred to as the 'double may be' test: at the screening level they had to use their judgment or their belief at a level of probability somewhere between the speculative and the greater than 50 per cent: the OFT guidelines needed to be rewritten accordingly. Apart from that minor blemish in their desire to be helpful the guidelines received considerable approval from the Court: this was far from a stuffy reaction to the question of the meaning of the law, the court giving considerable weight to the views of those called on to interpret and apply the law.

They cited the well known passage in the speech of Lord Mustill in the *South Yorkshire Transport* case, that:

The Courts have repeatedly warned against the dangers of taking an inherently imprecise word, and by redefining it thrusting on it a spurious degree of precision.

Thus the OFT, when considering what may be expected to happen, has a wide margin in which it is required to exercise its judgment and should not shackle itself by finding some mathematical formula: so long as it lies between the fanciful and a degree of likelihood less than 50 per cent. The Court of Appeal took account of many earlier decisions relating to the application of principles of judicial review: perhaps the most significant in this context is one based on competition between bus operators, a notoriously sensitive issue in the area of transport regulation.

### **Part III: Hard-edged and soft-edged issues**

#### ***The relevance of South Yorkshire Transport***

The *South Yorkshire Transport* decision is a landmark case, bringing together the issues of misdirection and factual analysis and reasoning, and, in the House of Lords, affirming the correctness of the decision of the MMC in its own analysis of the law and the facts. The case, as is well known, turned on the meaning of the words 'a substantial part of the United Kingdom' for the purposes of determining whether an anti-competitive merger between bus companies operating in South Yorkshire and other areas delineated by the Secretary of State fell within the jurisdiction of the Commission.

Lord Mustill first said that:

the interpretation of section 64(3) [ the section of the Fair Trading Act relating to the jurisdiction to examine mergers ] must proceed by two stages. First, a general appreciation of what "substantial" means in its present context. Second, a consideration of the elements to be taken into account when deciding whether the requirements of the word, so understood, are satisfied in the individual case.

He concluded, while adhering to his view that the courts should not seek to render precise that which is left imprecise, that the part must be 'of such size, character and importance as to make it worth consideration for the purposes of the Act'. He was satisfied that, having regard to the reasoning of the Commission, there had been no misdirection on that issue. It should be noted that the judge essentially accepted the meaning expressed by Nourse LJ in his dissenting judgment in the Court of Appeal in that case.

The second test was whether the decision could be overturned on the facts. South Yorkshire, as respondents, having won at first instance and in the Court of Appeal, had argued that section 64(3) had a correct meaning, and one meaning alone: and that once this had been ascertained a correct application of it to the facts of the case would always yield the same answer; that if the Commission had reached a different answer it was wrong and the court could and must intervene. Jurisdiction was thus a hard-edged question—may be difficult to answer but only yielding one meaning.

Lord Mustill dealt with this argument as follows. This is the *locus classicus* and has to be cited in full:

I agree with this argument in part, but only in part. Once the criterion for a judgment has been properly understood, the fact that it was formerly part of a range of possible criteria from which it was difficult to choose and on which opinions might legitimately differ becomes a matter of history. The judgment now proceeds unequivocally on the basis of the criterion as ascertained. So far, no room for controversy. But this clear-cut approach cannot be applied to every case, for the criterion itself may be so imprecise that different decision-makers, each acting rationally, might reach different conclusions when applying it to the facts of a given case. In such a case the court is entitled to substitute its own opinion for that of the person to whom the decision has been entrusted only if the decision is so aberrant that it cannot be classed as rational: *Edwards v. Bairstow* [1956 ] AC 14. The present is such a case. Even after eliminating inappropriate senses of “substantial” one is still left with a meaning broad enough to call for the exercise of judgment rather than exact quantitative measurement. Approaching the matter in this light I am quite satisfied that there is no ground for interference by the court, since the conclusion at which the commission arrived was well within the permissible field of judgment. Indeed I would go further and say that in my opinion it was right.

The other members of the House of Lords, Lords Templeman, Goff, Lowry and Slynn agreed with that speech.

### ***Hard-edged or protean***

More recently, that reasoning was followed by Moses J in the *Calls to Mobiles* case<sup>14</sup> where the court was asked to rule on the meaning of the words ‘all reasonable demands’ in the (now repealed relevant section of the ) Telecommunications Act of 1984. After citing part of the judgment of Lightman J in the *Cellcom* case<sup>15</sup> to the effect that Section 3 [the relevant section] recognizes that there is a public interest in reasonable demands for telecommunication services being met and that the court was the guardian of the public interest Moses J went on:

The question whether a demand is reasonable depends, as it seems to me, on many factors. I reject the notion that it has one particular meaning, namely to maximise economic efficiency. In particular I reject the notion that the question as to whether a demand is reasonable can be answered by the application of a definition applicable in every case. In short, the question is not “hard-edged”. It seems to me that there is a “range of possible criteria” about which opinions might legitimately differ in deciding whether a demand is reasonable. The statutory criterion is not clear-cut and is sufficiently broad to

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<sup>14</sup>*T-Mobile and Others v Competition Commission and DG Telecommunications* [2003] EWHC 1566.

<sup>15</sup>*R v Director General Telecommunications ex p Cellcom* [1999] ECC 314.

allow of different conclusions by different decision-makers, each acting rationally.

Even if the criterion were confined to maximizing economic efficiency the judge found that the expression itself was protean, agreeing with the (now) Chairman of the Commission that there was no unique definition and no necessary dichotomy between efficiency and the principles of equity. However, it is plain from that judgment that had there been a misdirection the court would have intervened. Indeed, despite referring to the range of possible criteria the judge made it clear that the Act did require the Commission and the regulator to 'look at all the circumstances in determining whether a demand was reasonable'.

### ***The language of the Enterprise Act: mergers and market investigations***

Now let us look at the language of the Enterprise Act in relation to mergers and market investigations. Whether one considers the mergers test—a substantial lessening of competition—or the market investigation test—features of the market that prevent, restrict or distort competition, it is clear that we are into a very well ploughed area of legal and economic principle, in which it is difficult to claim that there is one criterion, which, when fixed, will lead to only one answer. Equally clearly, from the case law, there is room for misdirection if the regulatory authorities seek to reinterpret that wording in a particular way which either widens or narrows the application of those words in a manner that defeats the purposes of the legislation.

There is warning enough in the case law that the Commission should not make precise where imprecision is the rule: yet the Commission are under a duty under that Act to explain the criteria they will use. Therefore the criteria are themselves legally justiciable. It remains to be seen how far they will be tested, but in the case law established so far under the mergers provisions no challenges have been made either on misdirection or judgment on factual analysis.

Even though the *Safeway* merger references were made under the old law it is worthy of note that no challenge was made by way of judicial review to the Commission's adoption of the tacit collusion test as a determinant of the public interest or its application to the mergers involving three of the leading supermarkets.

## **Part IV: Judicial review of the substance of a decision**

### ***Issues of fact: beyond the bounds of reasonable judgment: Lord Radcliffe sets the balance right***

The judgment of the House of Lords in *Edwards v Bairstow*,<sup>16</sup> and the reasoning of Lord Radcliffe, resonates throughout the recent jurisprudence: see in particular Lord Mustill in *South Yorkshire*; Lord Hoffmann in *Moyna*; the Court of Appeal in the *Hospital Software* case, in particular the judgment of Carnwath LJ. Indeed Carnwath LJ noted that the concluding remarks of Lord Radcliffe's speech are often overlooked. They are as follows:

As I see it, the reasons why the courts do not interfere with the Commissioners' findings or determinations when they really do involve nothing but questions of fact is not any supposed advantage in the Commissioners of greater experience in the matters of business or any other matters. The reason is simply that by the system that has been set up the Commissioners are the first tribunal to try an appeal, and in the interest of the efficient administration of justice their decisions can only be upset on appeal if they have been positively wrong in law. The Court is not a second opinion

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<sup>16</sup>[1956] AC 14.

where there is a reasonable ground for the first. But there is no reason to make a mystery about the subjects that Commissioners deal with or to invite the courts to impose any exceptional restraint on themselves because they are dealing with cases that arise out of facts found by the Commissioners. *Their duty is no more than to examine those facts with a decent respect for the tribunal appealed from and if they think that the only reasonable conclusion on the facts found is inconsistent with the determination come to, to say so without more ado.*<sup>17</sup>

That is a classic statement of the approach of the courts on appeals of law—again striking the appropriate balance between judicial control and regulatory autonomy, the decision-maker in that case being the Commissioners of the Inland Revenue charged with deciding whether on the facts a particular transaction qualified as an adventure in the way of trade. Whether an adventure in the way of trade is regarded as a factual inference or a conclusion of law is immaterial: in the same way as a conclusion by the Commission that a merger may be expected substantially to limit competition without compensating benefits is a conclusion on the facts that has legal consequences in that the merger may be blocked on those grounds.

There is no scope for *Wednesbury* unreasonableness in such an assessment. No one would be suggesting that the Commission had acted outrageously, in the *Wednesbury* sense, yet if there is significant error in their appreciation and analysis of the facts or the law or both the decision may be quashed. Either the decision is beyond the bounds of reasonable judgment—in which case you do not need *Wednesbury* to quash it; or it is within reasonable bounds in which case *Wednesbury* does not apply.

### ***Correctness and rationality***

I believe that the emphasis given to that decision and that judgment by the courts is that judicial control *is* concerned with the substance of the decision—at least in those cases where a court can properly adjudicate. Otherwise, there is a serious imbalance, where the judicial controls are exercised only in areas of ‘misdirection’, the hard-edged rule, or *Wednesbury* unreasonableness. But that does not mean that the court will rehear—as Lord Radcliffe said ‘the court is not a second opinion where there is a reasonable ground for the first’.

### ***The maturity of regulatory decision-making: duty to make reports and give reasons, facilitating the balance of judicial control and regulatory autonomy***

It is a matter of great satisfaction that regulators and this Commission are required to give reasons for their decisions: the *Hospital Software* case is a good illustration. Maybe it is apocryphal but the great Lord Mansfield CJ, when congratulating a judge on his appointment of Chief Justice of the Bahamas, instructed him never to give reasons: ‘for your judgment will almost certainly be right and your reasons almost certainly wrong’. No such refuge for the agencies responsible for competition decisions.

There is a debate as to whether judicial control should be concerned with correctness—is the decision right—or with rationality—does it fall within an area properly assigned to the decision maker, but I think that the UK position is clear enough. Indeed I think we are close to the *Chevron*<sup>18</sup> principles in the USA, where the statute is construed in accordance with the clear intent of Congress where that intent is evident and, where not, allowing the agencies to interpret and apply in accordance with their judgment, that is to say assuming that there are a range of criteria and they have not acted unreasonably in their approach.

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<sup>17</sup>ibid at pp38-39, the last sentence being emphasized in the judgment of Carnwath LJ.

<sup>18</sup>There is a helpful analysis in Craig, cited above.

## ***Farewell to Wednesbury in competition law decisions***

I think, as I have said, that we have banished *Wednesbury* from the judicial canon in competition cases—leaving the test to be applied to issues of Government policy and administration, including local authority decisions, where the courts will not interfere save in exceptional circumstances, such as ‘the extremes of bad faith, improper motive or manifest absurdity’<sup>19</sup> or the ‘outrageous’ decision, verging on absurdity.<sup>20</sup>

### **Part V: Intensity of review**

Once accepted that a decision of a regulatory authority can be quashed if there has been misdirection or the decision falls outside the bounds of reasonable judgment it is questionable whether there is any room left for a third criterion, such as the intensity of the level of review. There is no doubt that the CAT applied an intensive review to the decision of the OFT in the *Hospital Software* case: but that can be explained by the dissatisfaction that the CAT and the Court of Appeal clearly felt at the inadequacy of the reasons in the decision *not* to refer when the same agency had provided apparently convincing reasons why it *should* refer. When an agency has made a strong and compelling case for X it is inevitable that in terms of judicial control that agency has to provide an equally credible case why X no longer applies. In the *Interbrew* case Moses J asked himself whether the reasoning of the MMC ‘stacked up’.

Thus although it is conventional to talk in terms of a low intensity of review in cases ‘depending essentially on political judgment’<sup>21</sup> it is plain that competition law case decisions do not fall within that category. At the other end of the spectrum are decisions infringing fundamental human rights where review is stricter and the *Brind* principle is applied namely ‘whether a reasonable Secretary of State, on the material before him, could conclude that interference with freedom of expression was justifiable’.<sup>22</sup> But again, we are not concerned with the exercise of executive discretion but with complex fact finding, inferences from those facts and conclusions relating to the lessening of competition in markets. The matter is *sui generis* and therefore requires a policy decision as to the appropriate level of review.

The main point I would make is this. Intensity of review depends on the context and is recognized as part of the principles of judicial review that permit flexibility. But even though competition law is based on economic principles and policy (see the White Papers preceding the Competition Act and the Enterprise Act) and even though a specialist tribunal has been established to review the decisions of autonomous regulators there is no reason why the intensity of review should not be in essence proportionate to the importance of the decisions to the national economy. The exercise leading to the decision is essentially one of fact finding and then drawing conclusions by reference to established and evolving principles. An established specialist tribunal should neither back away from that area, on the ground that Parliament has left it to the judgment of the regulators, nor enter with ferocious zeal and its own agenda so as to undermine rather than hold the regulators to account.

### **Part VI: politics and proportionality**

If we bear in mind, among all the relevant principles,<sup>23</sup> that the two of direct relevance in competition law cases are (i) misdirection on the meaning and purposes of the controlling legislation and (ii) findings of fact that fail the appropriate legal test, whether it is called irrationality or beyond the bounds of reasonable judgment or a decision so inadequately reasoned that it fails the test of objective justification, then is there some other principle that

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<sup>19</sup>See *R v Secretary of State ex p Hammersmith and Fulham LBC* [1991] 1AC 521,596-7 per Lord Bridge.

<sup>20</sup>See for instance *R v Hillingdon ex p. Puhlhofer* [ 1986 ] AC 485, per Lord Brightman.

<sup>21</sup>De Smith para 13-056-7, cited with approval by Carnwath LJ at para 91 of his judgment.

<sup>22</sup>De Smith at paragraph 13-060.

<sup>23</sup>See for example De Smith’s Conclusions at the end of his chapter on The Unreasonable Exercise of Power.

further this balance between judicial control and agency autonomy and which the judges must formulate and develop?

### ***The politics of competition law: need for judicial checks***

In my view there are two and they are quite distinct. The first is that the courts must, in some way, take into account the *new* politics of competition law, which is that the agencies are now not simply independent but autonomous: they are creatures of statute but they are not answerable to the Executive or to Parliament. They are truly determinative bodies, whose decisions can have and indeed are intended to have a profound and lasting effect on the manner in which the UK economy operates. To the extent that they are engaged in the formulation of new principles, which may be called policy decisions by agencies, the courts cannot disengage from that process: for the legitimacy of those principles depends on their forming part of the legal as well as the economic principles by which undertakings are governed in this country. There is no route from the agency to the electorate that enables a court to determine that such policy decisions can be left to the ballot box and are not the business of the courts.

In *South Yorkshire*, in *Calls to Mobiles* and in *Hospital Software* the judges went further than to say that the decisions impugned fell within or outside the bounds of reasonable judgment. In the first two, they expressed the view that the tribunal was correct in its appreciation of the legislation and had properly reasoned their conclusions—or at the very least were satisfied that they were entitled to form that view: in the second, there is no doubt that the Court of Appeal thought that the OFT had failed the test and that the CAT, maybe by a different route, had properly concluded that the OFT decision was just ‘wrong’. So, it is precisely because Parliament has decided to confer powers not reviewable by the Executive in an area where decision making affects the body politic, that it is not in my view an answer for the agency to say that it is engaged in policy and therefore there should be a low intensity of review. I think it goes the other way if the democratic deficit is not to be created.

Now whether the courts would take that view I do not know. So much depends on the case brought before them. I have an idea that the CAT, despite the gentle mauling it got from the Court of Appeal on its approach, would opt for the more rather than the less intensive: but if they do, and they wish to avoid being successfully appealed, I would advise them to show a measure of respect to those bodies in the exercise of what are difficult tasks. What is absolutely plain is that the CAT must not act in any way other than that to be expected of a High Court judge. What I am also certain of is that where there is a risk, even a likelihood, that agency autonomy *is* going to be tested more vigorously by the CAT in terms of the rationality and correctness of the decision, it is incumbent on the OFT and in particular the Commission, as the determining body, to explain with absolute clarity why it is taking a particular decision and why that decision falls within the four corners of its decision making role under the statute in question.

If the response is that that is their job and they are aware of it, I simply ask them to recognize that they must take the CAT and courts with them, because the courts and the agencies now share democratic responsibility for hugely important decisions in our economy, based on clear and accepted legal and economic principles: yes, more important than The Bank of England on interest rates.

In brief, those responsible for the decisions and for review must recognize that in the new politics of competition law and utility regulation the legislative agenda has been completed; Government has limited powers of intervention and the business of securing that regulatory decisions are made in accordance with the rule of law is assigned to regulators and courts. In particular the Competition Commission must ensure that in its decision making it clarifies that those decisions are in accordance with legal and economic principles: the matters are

not at large. The less that it brings itself within those legal principles the more likely it is that there will be intervention.

### ***The justiciable principle of proportionality as a guide to deciding the bounds of reasonable judgment***

The second point is that the criteria taken into account by the agencies must be in tune with and reflect not simply the meaning of UK statutes but also the principles of law that have direct effect in the UK through our membership of the European Union. In essence I am talking about proportionality. Whether it is considered in jurisprudential terms as an aspect of misdirection or whether it is considered as a perverse finding of fact the principle must play a role in determining this balance.

### **Part VII: concluding remarks: accountability and the rule of law**

I therefore think that in the ten years since *South Yorkshire* the balance is moving much more toward agency *accountability* to the courts. It may be that Mr Justice Lightman is correct when he distinguishes *means* from *ends* in the exercise of regulatory functions and that the court will be reluctant to intervene in the matter of the means by which the public interest is to be achieved if the regulator is convinced that his way is right: he is charged with the promotion of the public interest, not the court. However, as Moses J observed in *Mobile Phones*, matters may not be so clear-cut as to give the judges the sole responsibility for the ends and the regulators the means: certainly in the area of competition law we must have a system in which regulators can have the room to make their decisions without constantly second guessing what another regulator might have done—that way simply leads to low or no risk regulation: on the other hand we must ensure that judicial control lies at all levels and depths of an investigation: once we move to a position in which the issues appear just too difficult to be justiciable we are danger of losing lawful decision making to the equivalent of ‘the man from Whitehall knows best’, where decisions are based on untried economic modelling or the most purist of economic theories where empirical evidence on how a market is working well can be turned into proof that the market is working badly, on the simple ground that economic theory would suggest that undertakings would serve the market better if they conformed with economic theory rather than the somewhat rough conditions that competition tends to create. That serves the public interest very badly. Thus, the legal and economic principles have to be accessible.

So, the more that these regulatory bodies move into taking decisions of vital importance to the economy the more that the courts have to be seen to be competent and concerned with those outcomes. They must be prepared for it, including the function of hearing appeals from the CAT. There is every reason to believe that they will not permit either a democratic deficit, in the sense of a lack of agency accountability for the development and application of the principles underlying the Enterprise Act 2002, or the usurpation of the role of the OFT or Commission as autonomous agencies by the CAT, substituting rather than holding accountable according to principles set by the common law. We will see. A lot hangs on the outcome. It depends on judicial policy to determine where the balance best lies: but it is for the autonomous regulators to prove that they have the right to the latitude they claim and that their decisions have a positive effect on pursuing the goals set by Parliament.

Thank you

JAS 21 September 2004