

CONCENTRATION OF PRELIMINARY REFERENCES AT THE ECJ OR TRANSFER TO THE HIGH COURT/CFI: SOME REMARKS ON COMPETITION LAW

by
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A. General

Article 225 paragraph 3 EC Treaty states: “(1) The Court of First Instance shall have jurisdiction to hear and determine questions referred for a preliminary ruling under Article 234 EC, in specific areas laid down by the statute. (2) Where the Court of First Instance considers that the case requires a decision of principle likely to affect the unity or consistency of Community law, it may refer the case to the Court of Justice for a ruling. (3) Decisions given by the Court of First Instance on questions referred for a preliminary ruling may exceptionally be subject to review by the Court of Justice, under the conditions and within the limits laid down by the Statute, where there is a serious risk of the unity or consistency of Community law being affected.” The papers presented at this conference dealing with the issue seem to agree that the goal must be to allow the ECJ to focus on its tasks as a constitutional court, and on its role as a guardian of the unity and the consistency of Community law. There is, however, no unanimity with regard to the question of which areas could or should be transferred to the CFI. CFI President *Bo Vesterdorf* mentions that according to several commentators the specific areas envisioned by Article 225(3) EC could be competition law, intellectual property law, customs law or judicial cooperation in civil matters. CFI Judge *Josef Azizi* suggests that, to start with, specific areas could be chosen that are of a rather technical nature such as the assignment of goods to position numbers of the Common Customs Tariff. And from a viewpoint of using synergies, he argues that the field of trade mark law would seem to be particularly appropriate for a transfer. ECJ Judge *Koen Lenaerts* concedes that eventually customs and trade mark (or even IP) cases could be dealt with by the CFI. But he rejects the idea that competition law could be such an area.

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The following brief remarks will focus on competition law, in particular in the light of the fact that, as far as enforcement is concerned, there will be a major shift from the direct action to the preliminary ruling procedure as a consequence of modernization. At least in the long run, the decision whether the competence to hear references under the Article 234 EC procedure should be transferred to the CFI can in this writer's view not solely or predominantly be based on institutional considerations.

B. Modernization of EC competition law and its consequences

I. Decentralization of enforcement

Modernization of EC competition policy has led to decentralization with regard to enforcement. The Commission is now sharing its former monopoly to apply Article 81(3) EC with the national competition authorities and the national courts¹. On top of this, the Commission wants to strengthen private enforcement, and has in December 2005 published a Green Paper on Damages Actions for Breach of the EC Antitrust Rules².

II. Centralization of competition law in substance

The new orientation of European competition policy is, however, not only a procedural reform. While decentralizing enforcement, it has led at the same time to centralization in substance. The Commission, the driving force behind modernization, has been successful in concentrating its resources on the big and beautiful cases and at the same time keeping control over the decentralized application³. National courts and competition authorities are expected to interpret Articles 81 and 82 EC the way the Commission wants them to. Under Article 11(6) of Regulation 1/2003, the Commission may at any time initiate proceedings and thereby relieve the national competition authorities of their competence to apply Articles 81 and 82 EC. According to Article 15 of that Regulation, the Commission, acting on its own initiative, may submit written observations to national courts and, with the permission of the court in question, also make oral observations where the coherent application of Article 81 or 82 EC so requires. Under Article 16, national courts applying Articles 81 or 82 EC cannot give rulings running counter to a decision already adopted by

1 See with regard to modernization Mario Monti, Challenges for European Competition Law, in: Carl Baudenbacher, ed., *Neueste Entwicklungen im Europäischen und Internationalen Kartellrecht*, Zehntes St. Galler Internationales Kartellrechtsforum, Basle/Geneva/Munich 2003, 3 ff., 5 ff.

2 COM(2005) 672.

3 See Andreas Fuchs, *Kontrollierte Dezentralisierung der europäischen Wettbewerbsaufsicht*, EUR-Beiheft 2/2005, 77, 87.

the Commission and must avoid giving rulings which would conflict with a decision adopted by the Commission.

III. Changes of competition law in substance

Modernization has also significantly changed competition law in substance. Firstly, it is said that Article 81(3) EC must now be interpreted in a strictly competition-oriented way. Unlike the Commission in the past, the national courts and competition authorities should refrain from relying on considerations such as environmental protection, industrial policy or social policy, just to give some examples. Secondly, the Commission's modernization package is clearly based on a more economic approach which focuses on efficiencies⁴. An economic approach is needed not only in the interpretation of Article 81(3), but already when assessing whether there is a restriction of competition under Article 81(1) EC. It will therefore no longer be sufficient to establish that there is a formal restriction of relevant parameters of action. Article 81(1) EC will only be deemed to be violated if negative effects on the market are to be feared (with the exception of horizontal price fixing). The more economic approach will in all probability also be extended to the application of Article 82 EC⁵.

IV. Changes with regard to the judicial enforcement of competition law

In the past, the Commission handled the vast majority of all competition law cases. Its decisions were subject to judicial review by the CFI and the ECJ. Since national competition authorities are now dealing with a large part of the Article 81 and 82 EC cases, it is for the national (administrative) courts to hear actions against their decisions. The only way leading to the Community courts in such cases is the preliminary ruling procedure pursuant to Article 234 EC.

There are, from a point of view of protection of individual rights, significant differences between the action for nullity on the one hand and the preliminary ruling procedure on the other. I just mention the following features: (1) The decision to make a reference under Article 234 EC is not with the parties to the proceedings before the national court, but with the court itself. The formulation of the questions limits the scope of the ECJ's judgment. (2) Only national courts of last resort are obliged to make a reference, and breaches of that obligation are hardly being sanctioned. (3) If the national court decides to make a reference, it nevertheless remains the master of the facts and will finally decide the case. The ECJ is prevented from

⁴ See in particular the Commission's Guidelines on the application of Article 81(3) of the Treaty, 2004/C 101/08, point 3.2.

⁵ See DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, Brussels December 2005.

looking into the evidence. (4) Whereas under the old rules there was a two-tier system with the CFI as a court of fact and of law and the ECJ as a court of law, after decentralization only one Community court is available⁶. On balance, modernization has therefore weakened to a certain extent judicial review of EC competition policy enforcement by administrative bodies. Access to the Community courts has been diminished, and, as a consequence, individual rights and the judicial defense of those rights are reduced.

An increasing number of requests for preliminary rulings is also expected from national civil courts. In that regard, it suffices to point again to the Commission's plans to strengthen private enforcement and damages claims in particular. Provided that the EC legislature will enact a piece of law dealing with private enforcement issues such as damages, the ECJ would have jurisdiction to interpret them under the Article 234 EC procedure. Even in the absence of such legislation, proactive decisions of the ECJ based on "effet utile" considerations would not be excluded. The *Courage* judgment, in which the ECJ held that the full effectiveness of Article 81 EC would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition, is proof enough⁷. In the context of awarding damages to a private plaintiff, it would be important for the ECJ to give some guidance as to how to quantify damages. The line between law and facts is of course a fine one, but the choice of the quantification method is definitely to be considered a point of law.

C. Giving the CFI the power to hear preliminary ruling cases in competition law?

One may ask whether the weakening of judicial review in public enforcement cases could at least partly be remedied by giving the CFI the power to hear preliminary ruling cases. In this context, it cannot be overlooked that at least certain competition law matters imply constitutional issues. Here in Berlin one will remember that the German school of ordoliberalism, whose influence has been crucial in the creation of Articles 81 and 82 EC, has developed the concept of economic constitution (*Wirtschaftsverfassung*)⁸. Competition policy lies at the core of the economic con-

6 See Bo Vesterdorf, in Carl Baudenbacher, ed., *Neueste Entwicklungen im Europäischen und Internationalen Kartellrecht*, Aches St. Galler Internationales Kartellrechtsforum, Basle/Geneva/Munich 2001, 242; Carl Baudenbacher, *Judicialization of European Competition Policy*, Annual Proceedings of the Fordham Corporate Law Institute International Antitrust Law & Policy, Barry Hawk, ed., 2003, 353 ff., 359 ff.; Joachim Bornkamm, *Judicial Control and Review of Antitrust Administrative Authorities*, Annual Proceedings of the Fordham Corporate Law Institute International Antitrust Law & Policy, Barry Hawk, ed., 2003, 369, 377

7 Case C-453/99 *Courage Ltd. v. Bernard Crehan*, 2001 ECR I.

8 See, for instance, Walter Eucken, *Grundsätze der Wirtschaftspolitik*, 5. Aufl., Tübingen 1975, 254 f., 379 f.

stitution. But it will not be easy to find whole areas of the law in which any constitutional law implications are *a priori* excluded.

In preliminary ruling cases it is for the national court to define the factual circumstances on which the questions it is asking are based. The ECJ has held that this is “of particular importance in the field of competition, which is characterized by complex factual and legal situations”⁹. In fact, a lack of sufficient description of the facts has in several cases prompted the ECJ to conclude that a reference was inadmissible¹⁰. To give an example, in the second *Viacom* case the ECJ held that an answer to the question of whether there has been an abuse of a dominant position presupposes the determination of the relevant market by the national court as well as the calculation of the market shares held by the various undertakings operating on that market¹¹. A transfer of the competence to hear preliminary ruling cases to the CFI would not change this difficulty which is inherent to the Article 234 EC procedure. One could, however, imagine that the CFI would make more frequent use of the request for clarification if, for instance, it would have to carry out an evaluation of Article 81(3) EC and the facts have not been established in a sufficiently clear manner by the referring national court.

But there are other reasons why giving the CFI the power to hear references for preliminary ruling in competition law should be examined carefully. Transferring the power to hear preliminary rulings to the CFI would enable the ECJ to concentrate on the big issues without having to care about whether the facts of the case have been sufficiently established. In major competition law cases, a “fresh view” could be desirable. The ECJ has, under the Article 234 EC procedure, given judgments of great importance for the development of competition law (in particular in cases *Delimitis*, *Courage*, *Eco Swiss*, *Masterfoods*, *Roquette Frères*, *IMS Health*¹²). The CFI for its part has, in the fifteen years of its existence, become a competition law court with a high degree of experience and special knowledge. It is used to concentrating on the facts and to dealing with complex factual situations, with questions of proof and of burden of proof and with assessing complex economic issues. One can say that the CFI has developed a respective culture. The CFI has even been one of the driving forces behind the development of EC competition law which has ultimately lead to a more economic, i.e. an efficiency-based approach. The question arises whether the respective synergies could be used. One may furthermore assume that in view of the new approach in competition law, cooperation with national courts must be intensified. National courts dealing with damage claims will need some sort of assistance

9 ECJ, Joined cases C-320/90, C-321/90 und C-322/90, 1993 ECR, I-393 – *Telemarsicabruzzo*, para. 6.

10 ECJ, Joined cases C-320/90, C-321/90 und C-322/90, 1993 ECR, I-393 – *Telemarsicabruzzo*, para. 6; C-134/03 – *Viacom II* – judgment of 17. February 2005.

11 EuGH, C-134/03, Urteil vom 17. Februar 2005 – *Viacom II* – RdNr. 28.

12 Cases C-234/89, 1991 ECR, I-935 – *Delimitis*; C-453/99, 2001 ECR, I-6297 – *Courage*; C-126/97, 1999 ECR, 3055 – *Eco Swiss China Time/Benetton*; C-344/98, 2000 ECR, I-11369 – *Masterfoods*; C-418/01, 2004 ECR, I-5039 – *IMS Health*; C-94/00, 2002 ECR, I-9011 – *Roquette Frères*.

by the European judiciary. Again, the question should be examined whether the CFI could provide such help.

The character of the preliminary ruling procedure would most probably change in the hands of the CFI, in the light of that court's own experience and practice. One may expect that there would be a strong focus on the protection of individuals, and on competition as a system. This may lead to greater generosity in defining whether an entity constitutes a court entitled to make a reference, by including, for instance, arbitration tribunals¹³. If the CFI were to be given jurisdiction to hear preliminary ruling cases in the area of competition law, it would probably also develop its own judicial style. Safeguarding legal unity would become a second task of equal importance besides resolving a particular case. This would have to be taken into account by the style of reasoning. Issues such as general applicability, readability, transparency, open-mindedness towards developments in national and international legal orders, and citation practice may be mentioned in that respect.

D. Conclusions

These brief remarks aim at identifying problems and discussing possible solutions. In this writer's view there has not been sufficient focus in the discussion on the changes in judicial protection that have come along with the modernization of competition policy. An appropriate solution may be found by way of a trial and error procedure. *Friedrich August von Hayek* has described competition as a discovery procedure¹⁴. The same will most probably apply to the implementation of a new judicial architecture in the European Union.

The experience of the application and interpretation of the law in the European Economic Area by two courts leads this writer to conclude that there would be no reason for distrust if the power to hear preliminary ruling cases in any area were to be given to the CFI. The dialogue between the ECJ and the EFTA Court has worked well in practice. There has not been an open judicial conflict in spite of the fact that there are only weak mechanisms guaranteeing a homogeneous development of the case law¹⁵. The safeguards enshrined in Art. 225(3) EC and in the ECJ's statute are much stronger. Most importantly, the ECJ would, in deciding whether there is "a serious risk of the unity or consistency of Community law" within the meaning of Article 225 paragraph 3 subparagraph 3 EC Treaty still have the final word.

13 See Carl Baudenbacher/Imelda Higgins, Decentralization of EC Competition Law: Enforcement and Arbitration, *Columbia Journal of European Law* 2002, 1 ff.

14 Competition as a Discovery Procedure, published in *New Studies in Philosophy, Politics, Economics and the History of Ideas*, Chicago, University of Chicago Press, 1968.

15 See Vassilios Skouris, The ECJ and the EFTA Court under the EEA Agreement: a paradigm for the international cooperation of judicial institutions, in: Baudenbacher/Tresselt/Örlygsson, Editors, *The EFTA Court Ten Years On*, Oxford and Portland Oregon 2005, 123 ff.