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JUDICIAL PERSPECTIVES ON COMPETITION LAW

Contribution by BIAC

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Judicial Perspectives on Competition Law

-- BIAC --

1. Introduction

1. BIAC welcomes the opportunity to contribute to the Global Forum's Roundtable on *Judicial Perspective on Competition Law* which is designed to elicit the main challenges that judges face when applying competition law, and find ways to address them. BIAC is highly supportive of attempts to assist courts in effectively applying competition law and reviewing the acts of administrative authorities on competition law matters.

2. The Roundtable is to cover three areas: evidentiary matters (including burden of proof and economic evidence); the interaction between courts and competition authorities; and the use of generalist and specialized competition courts. BIAC will address these in this order. However, in order to frame BIAC's contribution, BIAC wishes to restate some general principles regarding judicial review without which the credibility of the antitrust system globally would be undermined.

2. General Principles

3. BIAC's view is that the judicial review of competition decision is essential to ensuring equitable and correct application of competition law, thereby promoting economic welfare for society as a whole. As noted in the OECD's 2016 paper '*The resolution of competition cases by specialised and generalist courts: Stocktaking of international experiences'*:

> *"The role of courts is crucial for creating an environment of certainty and predictability in market economies. Well-functioning courts guarantee the security of property rights and enforcement of contracts. Security of property rights strengthens incentives to save and invest, by protecting the returns from these activities. A proper enforcement of contracts induces market participants to enter into economic relationships, by discouraging opportunistic behaviour and decreasing transaction costs. This has a positive impact on markets and economic growth: it promotes competition, fosters innovation, contributes to the development of financial and credit markets and facilitates firm growth.*
>
> *Furthermore, the independent review carried out by courts of the competition authorities' decisions is necessary for the efficient operation of markets. Through this review, courts are uniquely positioned to assure for parties, the authorities and the public at large that the competition law is being implemented appropriately and in accordance with the legal framework (OECD, 1996)."*

4. On a micro-level, the effective judicial review provides an opportunity to revisit decisions made by the competition authority that may be erroneous, thereby ensuring the protection of the parties' individual rights and the application of the rule of law. By providing for a purely judicial review of competition law decisions, a legal system can

effectively separate the investigatory/prosecutorial role from judicial authority, thereby safeguarding due process rights and providing for appropriate checks and balances.

5. An accessible, effective and credible judicial review process must provide a meaningful opportunity to challenge and correct errors in authority decisions, including the adjustment of any unjust penalties. By providing that the competition authority will be held accountable to an independent judiciary, legal systems further encourage rigour within the authority's proceedings. A review procedure that does not provide a practical opportunity to challenge authority decisions, or under which the authority never loses an appeal, does not promote the reputation of the authority or the credibility of the law, any more than one under which the authority always loses. A well-balanced review underlines the legitimacy of authority decisions and, as a public process, enhances the overall standing and respect for enforcement efforts.[1]

6. BIAC would therefore respectfully submit that every jurisdiction should have an independent court system that can effectively review competition decisions, as well as adjudicate competition law disputes between private parties. To be effective, the relevant procedures must provide parties with a meaningful opportunity to obtain judicial review. As competition law issues often arise in time-sensitive matters, for example when relating to the review of transactions, judicial procedures must provide for a sufficiently speedy process to ensure that those parties that seek to challenge an authority's decision are able to do so practically. An effective review also requires a full review on the merits by a court with full, unlimited jurisdiction to assess the correctness of the authority's decisions (not just its legality) and with the resources to independently review and test the evidence to the fullest extent provided for by national rules by procedure, for example by calling witnesses to be subject to examination and cross-examination before the court comes to its own conclusions. BIAC submits that these principles for effective judicial review need to be the backdrop to the Roundtable discussions.

7. The need for full and effective judicial review is particularly acute in jurisdictions that have adopted an administrative competition enforcement system. In such systems, a full appeal on the facts and law to an independent judiciary is crucial, as "*[c]ombining the function of investigation and decision in a single institution can save costs but can also dampen internal critique.*"[2]

8. In addition, effective judicial review is essential to protect due process rights of defence, especially where sanctions are quasi-criminal in nature; the European Court of Human Rights, that adjudicates fundamental rights rules within the 47 member states of the Council of Europe, has established that "*Article 6(1) ECHR* [that protects the right to a fair trial] *requires that subsequent control of a criminal sanction imposed by an administrative body must be undertaken by a judicial body that has full jurisdiction. Thus, the Court must be able to quash in all respects, on questions of fact and of law, the challenged decision*."[3]

[1] See BIAC's Contribution to Working Party No. 3 Roundtable on Institutional and Procedural aspects of the relationship between competition authorities and courts and update on developments in procedural fairness and transparency (October 18, 2011), available at http://www.oecd.org/daf/competition/ProceduralFairnessCompetition%20AuthoritiesCourtsandRecentDevelopments2011.pdf

[2] See 'OECD Country Studies – Competition Law and Policy in the European Union' (2005), p. 62, available at www.oecd.org/daf/competition/prosecutionandlawenforcement/35908641.pdf.

[3] *A. Menarini Diagnostics S.R.L. v. Italy*, no. 43509/08, 27 September 2011.

3. Evidentiary matters

9. BIAC would submit that it is critical that courts, when examining competition matters, should base their decisions on a sound factual and economic analysis. On the one hand, this means that courts should be able to perform a full reassessment of all relevant facts and evidence on which the findings of fact are based. Courts should have all the facts available to them, including the authority's full record with exculpatory as well as inculpatory evidence, and should allow the parties to challenge the evidence relied on, with witnesses where needed.

10. This approach was most recently supported in Intel v. European Commission where the European Court of Justice held that its lower court should have taken into account arguments seeking to expose alleged errors committed by the Commission in applying the relevant test.[4] The European Court of Justice sought to ensure that the lower court not only had full jurisdiction but should be able to review the full record created by the authority.

11. On the other hand, a sound analysis means approaching economic analysis from a pragmatic perspective; the purpose of economics in competition law should be to develop a framework within which to examine facts, not to substitute theory for these facts. Thus, while BIAC wholeheartedly endorses the further advancement of economic techniques and the presentation of economic evidence to courts, it notes that economic theory and the application of quantitative techniques, are not a substitute for sound factual analysis

12. In BIAC's submission, an understanding of the economic underpinnings of competition law is vital for an effective judicial review. Courts needs to have sufficient expertise to evaluate the competing economic theories and expert opinions which are of ever-increasing importance in competition cases and training in competition law should be a requirement for all judges involved in hearing and deciding competition cases.[5]

13. This does not, however, in BIAC's view, mean that judges need to be experts in economic theory to undertake a rigorous and thorough assessment of a competition matter. More important for effective judicial review is the experience of reviewing regulatory decisions and an independent mindset, not to give undue deference to regulatory decisions. In particular, it should be noted that:

- Competition cases are not inherently more complex than other types of law. Judges are able to grapple with complex facts in new and unfamiliar areas. In clinical negligence, for example, a judge may need to choose between two competing bodies of medical expertise[6]. Judges are familiar with doing this despite not having medical training.
- Even a well-trained and experienced judiciary may need to call upon effective support, including court-appointed experts in economics as well as industry

[4] Intel Corp. v. European Commission, Case C-413/14P, 6 September 2017.

[5] See BIAC's Discussion Points presented to the OECD Competition Committee Working Party 3 Roundtable on Techniques for Presenting Complex Economic Theories to Judges (February 19, 2008). See also BIAC's Discussion Points Presented to the OECD Competition Committee Working Party No. 3 on Managing Complex Merger Cases: How Agencies Deal with Complex Data Analysis, Surveys and Market Studies, and Obtain the Necessary Expertise for Complex Substantive Issues (e.g. IPRs, Technology Markets, etc.), October 16, 2007.

[6] Bolitho v. City and Hackney Health Authority [1996] 4 All ER 771

experts, where the issues at stake in the appeal go beyond the court's own knowledge and experience. The resources available to the court should include access to such support.

- There are ways to help judges better grapple with complex economic issues. In the UK *Streetmap* case[7] the judge (for the first time in a UK competition case) asked economic experts to give joint evidence in a so-called "hot-tub". The judge found that this process led "*to a constructive exchange which considerably shortened the time taken by the economic evidence at trial*." The judge proceeded to perform a thorough and detailed analysis of the economic evidence – including experiments and traffic data – in reaching his conclusions.
- By the time trial is reached, disagreement on economic issues has often narrowed to a debate on a small number of core issues (*see, e.g.*, in *Streetmap*, where the judge found that the hot-tub process "*led to a significant measure of agreement that was helpful*"). It is not usually the case that judges need to 'crunch data', but rather their role is to resolve more basic and fundamental principles.

4. Interaction between courts and competition authorities

14. As regards the interaction between courts and competition authorities, the correct balance between the margin of discretion accorded to authorities and the need for effective judicial review must be struck by the courts. The greater the sanctions that authorities can impose, the greater the need for effective judicial review. It is critical that there be no perception that authorities receive preferential treatment and that courts evaluate equally the arguments of private parties and authorities, applying the *equality of arms* principle. Therefore, interactions between authorities and courts should not engender a culture of undue deference that might affect a court's ability to fully assess an authority's decision and make up its own mind about challenges to the legality of that decision. This principle is especially important in those jurisdictions where, contrary to BIAC's preferred approach, courts have a more limited mandate to review competition decisions.

15. As relates to the interaction between courts and competition authorities outside the courtroom, BIAC appreciates and supports the need for judges to have training on new and areas of law such as competition law. However, while it may seem natural that competition authorities, which are most concerned that courts give due regard to competition law, might offer such training, as part of their role in competition policy advocacy and enforcement, BIAC would suggest that competition authorities should be very cautious in their engagement with the judiciary, given that the authorities will often be one party before the court, and most often as the defendant. It would be wrong for the authority to be seen to have a privileged channel to the court, compared to the party appealing the authority's decision. Competition authorities should not to in a position where they could be perceived as engaging with courts in a manner that might be seen as creating undue influence.

16. In order to maintain an appropriate separation of roles, where courts institute training programmes[8], BIAC would suggest that these not be conducted by the

[7] Streetmap.eu v. Google [2016] EWHC 253 (Ch)

[8] The UK Enterprise Act 2002, Sch 2, para 8, imposed an obligation on the President of the Competition Appeal Tribunal to arrange training for the Tribunal's members.

competition authority but by a third party, such as an academic institution, the Ministry of Justice or associations of judges such as the Association of European Competition Law Judges. International organizations including the OECD might usefully promote the development of appropriate judicial expertise by sponsoring training programmes and opportunities for judicial exchange.

5. Generalist and specialized competition courts

17. BIAC has no set preference as to whether generalist or specialized tribunals are the most efficient means of reviewing competition authority decisions; either system will be capable of administering justice in a competition law context provided that the tribunal has unchallenged independence, reasonable training, sufficient resources and full jurisdiction.

18. Having said that, BIAC would like to offer the following considerations. While specialist courts are certainly not necessary, they can help more efficiently enforce competition rules because of the judges' day-to-day familiarity with competition law theories. On the other hand, competition law issues often find themselves within a broader sectoral, commercial or contractual context and generalist courts may be better attuned to these cases. However, generalist courts may be more tempted to give excessive deference to the competition authority in matters such as the review of complex economic appraisals[9] and may unfortunately be disinclined to challenge the core of the authority's competition analysis.[10]

19. Taking account of the advantages and concerns outlined, BIAC concludes and submits that specialist panels or tribunals are not essential, provided the quality of judicial expertise on competition matters is ensured (though sufficient investment in judicial training); that the court is fully independent, has adequate resources and full jurisdiction to review authority decisions.

20. There may be an opposite lesson to be drawn from the debate within Europe as to whether there should be a specialist tribunal established under the aegis of the European General Court, with the jurisdiction to hear appeals on competition decisions of the European Commission. After such debate, this has not occurred, partly in order to maintain the cohesion of the General Court and, importantly, to ensure that the chambers of judges retain a broad appreciation and knowledge of European law, including the general principles which apply equally to competition cases. However, the General Court (and to an extent the Court of Justice) has ensured that certain chambers of judges do build a corpus of expertise in the field of competition law, which appears to be an effective 'compromise'.

[9] Cf. Case C-194/99 P, Thyssen Stahl v Commission [2003] ECR I-10821, para 78.

[10] Nils Wahl, General Court Luxembourg, Standard of Review – Comprehensive or Limited?, 2009 http://www.eui.eu/Documents/RSCAS/Research/Competition/2009/2009-COMPETITION-Wahl.pdf.