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***A Bush in Need of Pruning:  
The Luxuriant Growth of  
Light Judicial Review***

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## A Bush in Need of Pruning: the Luxuriant Growth of “Light Judicial Review”

### Section A: Introduction

European practitioners with even a few grey hairs will remember when a host of agreements were deemed to fall within the prohibition of Article 81. The European Commission had a monopoly on the application of Article 81(3) and applied an extensive interpretation of the scope of Article 81(1). The Commission tended to apply a clause-based analysis. The priests took a textual view of what constituted sin; and they granted blessings only rarely. Competition decisions could be based on concepts, legal principles and significant words in contracts with little necessity to show an anticompetitive effect flowing therefrom.

These gatherings attended by judges, officials, teachers and practitioners in the hills above Florence,<sup>2</sup> and the published annuals which memorialise them, can credibly claim to have helped change EC law from a clause-based to a reality-based competition law regime (1996, 1997, 2000, and 2003<sup>3</sup> being particularly rigorous vintages). Since the laicisation of the enforcement of the competition rules with Regulation 1/2003, the priests in Brussels are no longer the sole trusted guardians of the competition law cult. The “laity” of national courts and competition authorities has been freed to reach intelligent conclusions on the basis of the fair application of the law to accurately evaluated facts. No longer is it sufficient to point to a clause in a contract in order to

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<sup>2</sup> Having learned much from the fourteen sessions of these gatherings, I take the opportunity to honour the contribution of Professor Dr. Claus-Dieter Ehlermann, their progenitor, who shows the merits of lifelong learning, precise criticism and warm encouragement.

<sup>3</sup> Ehlermann and Laudati, eds., *The Robert Schuman Centre Annual on European Competition Law 1996*, Kluwer Law International, 1997; Ehlermann and Laudati, eds., *European Competition Law Annual 1997: Objectives of Competition Policy*, Hart Publishing, 1998; Ehlermann and Atanasiu, eds., *European Competition Law Annual 2000: The Modernization of EC Antitrust Policy*, Hart Publishing, 2001; and Ehlermann and Atanasiu, eds., *European Competition Law Annual 2003: What is an Abuse of a Dominant Position?*, Hart Publishing, 2006.

show that a company has infringed Article 81: the Commission must demonstrate a distortion of competition. Condemnation by categorisation should have disappeared.

Consistent rigour in verifying what happened, why it happened and who suffered as a result, is necessary from the first consideration of the problem, to the formal opening of the case, to the Commission decision, and on to the later stage of the European Courts' review. Factual rigour is especially desirable in light of the unique – and imperfect – procedures by which competition decisions are taken by the European Commission. Though familiar to practitioners by long usage, these are deeply flawed. Specifically, the formal decision concluding a case is taken by a college of twenty-seven political figures; the decision is adopted without there having been any hearing by a decision-maker; and there is no externally-discernable separation of the prosecutorial/investigative function from the decision-making function. These procedural imperfections mean that factual determinations by the Commission services are never publicly tested rigorously, certainly not with the rigour of a criminal trial.

An administration in such circumstances may well reach the right answer, and no doubt it does reach the right result in most cases. But no administrative body can conduct a trial. It can prosecute, and vigorously. It can regulate and administer, and shape policy goals. It may sometimes impose penalties. But there are risks in doing that, unless the penalties are modest reactions to modest errors or infringements. Administrative penalties can be imposed for parking too long, unsanitary restaurant kitchens, environmental nuisances and similar infringements. Grave economic crimes require different treatment.

It is clear that if we were creating afresh the structure of enforcement of the European competition rules we would not start from where we are today. There would be very different processes, giving more rights to the defence and immunising the ultimate decision-making from political lobbying, as befits a quasi-judicial body. In due course – I predict within five years – the Commission's enforcement will be endowed with procedures worthy of its talented, diligent and zealous staff. Until that day dawns, and in any event, it is particularly appropriate to consider the Courts' role. During the preparation of this contribution I concluded that we should reconsider the desirability of the familiar doctrine that in competition cases the Courts will apply only limited scrutiny in cases of complex economic assessments. Hence this paper on how the European Courts in Luxembourg review evidential findings by the European Commission, and the Courts' deference to the Commission in certain circumstances.

Rigorous judicial oversight in turn encourages rigour within the decision-making authority. It is not the case that enhanced procedures weaken the prosecutor. To the contrary: previous negative rulings of the European Courts have given the Commission the impetus to sharpen its own internal decision-making processes. It was the annulment of Commission merger control decisions such

as *Tetra Laval* and *Airtours* that led to the establishment of peer review within the Commission, a process which surely enhances the quality of today's Commission decisions. There is no inconsistency between being opposed to wrong-doing while favouring effective protections for those accused. The purpose of this paper is not to re-argue past substantive debates. We learn from the "war on terror" in my own and others' countries that errors and injustices can occur due to weak forensic procedures, over-enthusiastic prosecutors and over-tolerant juries.

I submit that the phenomenon of "light judicial review" or "marginal review" has expanded unfortunately; that it should be confined to those few cases where it is truly appropriate; that there is little need for judicial deference to Commission fact-finding in competition cases; and that there is even less need of deference as regards the setting of fines.

Since this is a lengthy paper, I begin with a summary. In Section B, I note that competition decisions by the European Commission will always today involve a number of factual determinations of disputed points, and that in 2009 the Commission's role in taking decisions has changed profoundly, for substantive, procedural and constitutional reasons, from its role from 1962 to 2004. It is today a prosecutor in the taking of decisions, not, as it was in the early days, a rule-making authority establishing fundamental enforcement priorities. In Section C, I note that there is no single standard of judicial review by the Community Courts, and that national standards vary considerably. Those differences do not mean that in one regime justice is lax and in another rigorous. The discrepancies in formulation make it all the more important that the Courts act in a manner which is manifestly just. I go on to describe the notions of "unlimited jurisdiction" and "control of legality" as set forth in the Treaties, and then consider the doctrine of deference to the Commission's assessments, which was enunciated in two judgments, *Grundigl/Consten* and *Remia*, in particular and understandable circumstances, and which has burgeoned ever since. Indeed, it seems to have spread to cover not just economic assessments but technical ones as well. By contrast, Section D notes how interventionist and rigorous the Courts have been in certain cases; and Section E notes the Courts' wide powers to gather evidence and how they handle controversies as to evidence, which tends to confirm the propriety of robust judicial enquiry as to factual matters, certainly not deference to Commission conclusions. I offer in Section F a textual analysis of "unlimited jurisdiction" in the binding texts, and submit that in matters of fining unlimited jurisdiction is appropriate, indeed indispensable. Section G sets forth my conclusions.

## Section B: The Role of Facts in Competition Cases

Just the facts, Ma'am:<sup>4</sup> Competition cases are all about facts

Let us begin with that which is obvious but fundamental. Today's EC competition law regime inescapably requires an analysis by the Commission of the real facts, the economic reality of the controversial conduct or proposed merger and its effects, not just the "textual facts". Competition law cases today are truly fact-driven and always should have been. They will generally turn on a handful of questions of fact, some of which may be hotly disputed. Once these points of fact are established to the satisfaction of the Commission, the finding of an infringement may readily flow from them, or they may be elements in constructing a case. *Per se* infringements of competition law have largely disappeared, or at most are confined to a narrow class of so-called "infringements by object", which are the exception to the rule that the Commission must demonstrate anticompetitive effects to prove an infringement. These object infringements have narrowed over time. Today only classic cartel activities are deemed to constitute a breach of the competition rules so plain that there is no need to prove the consequences.

Different types of questions of fact can arise, ranging from the "pure" variety – was Mr X present in the Zurich hotel on the night of the meeting at which prices were allegedly fixed? – to a category of "factual assessments", requiring a greater degree of evaluative judgment.<sup>5</sup> "Pure" factual questions can have very significant legal consequences for a defendant. It may be the case, for example, that Mr X's presence at the hotel in Zurich is the factor that proves the existence of a single, continuous infringement of Article 81 lasting several years, each year resulting in an increase of fine by 100 per cent. The fact of his presence may be the needed link to an earlier period of infringement which would otherwise have been prescribed by lapse of time.

Some examples (each has a basis in a particular case):

- Did Mr Smith attend a meeting in the Grand Hotel after the trade association meeting on January 13, 1999?
- Does the report of Mr Dupont to his boss about a call to Mr Smith prove that both Smith and Smith's company were agreeing prices with Dupont's company?
- Was an infringing clause in a signed agreement ever implemented?
- Were prices and discounts set neutrally on the basis of market forces, or were they intended to achieve an anticompetitive end?
- Were the prices proposed to wholesalers intended to deter exports?

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<sup>4</sup> Phrase attributed to Sergeant Joe Friday, in the US radio programme "Dragnet".

<sup>5</sup> See Paul Craig, *EU Administrative Law*, OUP, 2006, at p. 432.

- Did a pattern of dealing, notorious in the market place, alter the seller’s written terms of contract by including an implied export ban in its standard terms?
- Would a large increase in parallel trade reduce companies’ earnings with a detrimental impact on their research activities?
- Was there a plausible alternative explanation for the observed similarity in terms of price changes?

Facts are facts, whether they are presented in the context of a competition law case or a tax dispute, an argument over land use, free movement of goods, professional negligence or any other contentious issue. Judges of all levels are used to dealing with complex, fact-intensive cases and reaching reasoned opinions. Competition cases should be no different. The Courts were and are perfectly well qualified to assess whether the Commission reached a reliable conclusion on questions such as the ones I have listed.

An EC competition case, especially a big one, will usually involve many factual determinations and controversies. The European Commission is well-equipped to deal with them, its powers having been recently reinforced by Regulation 1/2003. I submit that there is no reason for those determinations individually to be accorded any particular deference by an appellate court. I equally submit that there is no reason to exempt from normally rigorous judicial scrutiny the Commission’s determination of what a mass of facts, taken in their totality, proves. Whether there was or was not an encounter between seven individuals, what they said, whom they told, what they agreed, and what an eighth individual thought or did as a result is a question of fact, and should be as eligible for appellate review as a finding that a co-conspirator was carrying a gun when robbing the bank, and that his possession of a gun was known to the other conspirators.

I shall submit that while rule-making, regulatory choices, and similarly discretion-rich options evidently are most unlikely to be overridden lightly by a court, different considerations apply to the factual determinations of a prosecutor. I suggest that this should be true for merger cases and for antitrust cases applying Articles 81 and 82.

## The Importance of Rigorous Fact Finding

The first and best reason for taking facts seriously is that competition law does not in the abstract mean very much, as there are very few manifestly valid propositions which apply in all competitive circumstances. In former times, words sufficed. Thus, in 1987 the words “export prohibited” on a standard commercial form were enough to deem the existence of a violation of Article 81<sup>6</sup>). Another

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<sup>6</sup> See Commission Decision 87/409 of 13 July 1987, Case No. IV/31.741, *Sandoz*, 1987 OJ L222/28, *upheld*: Case C-277/87, *Sandoz* [1990] ECR I-45.

case in 1991<sup>7</sup> involved an affiliate of a Japan-based multinational. It had reviewed its standard contracts across Europe and eliminated limitations on cross-border sales in about thirty contracts. Two or three contracts left in a drawer were overlooked and never modified; but they were never enforced or referred to by anyone until supplied by the parent company in response to a request for information by the Commission when investigating an (ill-founded) claim by a trader who was seeking to compel deliveries of product to which, as a matter of Community law, the trader was not entitled. A fine of ECU 2,000,000 was imposed.<sup>8</sup>

A second reason for taking a serious interest in rigorous fact finding is the burden imposed by negative Commission decisions. Companies can be severely affected by such acts, which may compel them to undertake wide-ranging actions, such as changing their business model, granting a licence, refraining from exercising an otherwise legal business policy, divesting a business or refraining from carrying out a merger. The phenomenon is even plainer when fines are considered. The last few years have witnessed a remarkable rise. Tens of millions of Euros in fines are regarded as routine; hundreds of millions of Euros are interesting; and the billion Euro mark has now been passed. The sheer magnitude of the consequences demands serious verification of the facts.

Rigorous fact finding is all the more necessary in light of the consequences under national law flowing from a Commission decision, especially in Member States having criminal sanctions for competition infringements (as an increasing number do). Member State courts cannot take a decision running counter to that of the Commission.<sup>9</sup> Putting it crudely, whether the Commission gets the facts right or gets them wrong, its findings of fact are likely to bind or at least be deferred to by national courts in private damages claims and otherwise. So the implications of Commission decisions go beyond the fine or remedy imposed.

In the earliest days of the competition rules, the Commission was a young institution whose powers, rather like the medieval papacy, were far reaching in theory but in practice uncertain, and whose decisions and concerns by no means matched the priorities of national courts or agencies or governments. Its early choices of enforcement priorities, its interpretation of the relevant Treaty articles and its pursuit of certain targets reflected its situation. Individual decisions were ostensibly the addressing of a particular controversy, but were institutionally major pieces of rule-making. Very few exemptions were granted precisely because the Commission wished to be very cautious in relaxing the grip on industry which its broad interpretation of Article 85(1) conferred. Things have changed profoundly.

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<sup>7</sup> Case IV/32.879 – *Vihol/Toshiba*, 1991 OJ L287/39.

<sup>8</sup> See Ian Forrester and Christopher Norall, “Competition Law Survey”, 11 *Oxford Yearbook of European Law* 422 (1991).

<sup>9</sup> Commission Notice on the Cooperation between the Commission and the Courts of the EU Member States (2004/C 101/04), paragraph 13.

The Commission’s original range of evidence-gathering tools has been expanded during this decade. Under Regulation 1/2003, the Commission has the power to launch dawn raids and remove copies of books and business records in any form.<sup>10</sup> Its powers to investigate in this way extend to private homes.<sup>11</sup> The Commission also has the power to interview individuals about suspected competition law infringements.<sup>12</sup> Most commonly, the Commission makes regular and extensive use of so-called “Article 18 requests” to obtain wide-ranging information from parties under investigation and third parties.<sup>13</sup> E-mail messages are nowadays a source of vast amounts of data, which Commission specialists copy for subsequent study when making inspection visits. Dawn raids were mounted to launch the recent pharmaceutical sector inquiry, on the (specious in my view) basis that otherwise evidence might be destroyed.<sup>14</sup> Thus an apparatus of fact-gathering apt to quasi-criminal investigation exists and is regularly used.

Moreover, the Commission does not lack for sources of intelligence about infringements. Its evidence-gathering powers can be viewed as “active” methods to build a case. It also has “passive” resources at its disposal, notably in the form of the leniency programme, which gives companies incentives to bring forward evidence to the Commission of illegal cartel activity.<sup>15</sup> Sometimes the making of a leniency request can principally be a means of harming a competitor. Chiquita was a successful leniency applicant which got immunity from fines for itself while causing damage to its rival Dole, even though the controversial conduct was by no means as troubling as Dole originally had asserted in the leniency application which launched the proceedings. The other major passive source of new cases, especially as to Article 82, is the complaints system, which encourages those affected by alleged competition infringements to bring evidence to the Commission and seek its intervention. Magill TV Guide,<sup>16</sup> NDC,<sup>17</sup> and Sun Microsystems<sup>18</sup> were each complainants (Oscar Bronner went to a national court for relief)<sup>19</sup> in celebrated cases on compulsory duty-to-deal.<sup>20</sup> The Commission is therefore the privileged destinée of important evidence on competition law infringements, more so than is

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<sup>10</sup> Regulation 1/2003, Article 20.

<sup>11</sup> Regulation 1/2003, Article 21.

<sup>12</sup> Regulation 1/2003, Article 19.

<sup>13</sup> Regulation 1/2003, Article 18.

<sup>14</sup> Commissioner Kroes, “Commission launches sector Inquiry into Pharmaceuticals”, SPEECH 08/18, Brussels, 16 January 2008.

<sup>15</sup> Commission Notice on immunity from fines and reduction of fines in cartel cases, 2006 OJ C298/17.

<sup>16</sup> Commission Decision 89/205, *Magill TV Guide/IITP, BBC and RTE*, [1989] 4 CMLR 757.

<sup>17</sup> *NDC Health / IMS Health (interim measures)*, 2002 OJ L59/18, [2002] 4 CMLR 111.

<sup>18</sup> Case T-201/04, *Microsoft v Commission* [2007] ECR II-1491.

<sup>19</sup> Case C-7/97, *Bronner (Oscar) GmbH & Co KG v Mediaprint Zeitungs-und Zeitschriftenverlag GmbH 7 Co KG* [1998] ECR I-7791.

<sup>20</sup> See generally the Commission Notice on handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, 2004 OJ C101/65.

the case in the United States, where the civil courts are the normal venue for the resolution of antitrust disputes. Although the ostensible goal of the intervention is competition as such rather than the interests of specific competitors, the finding of a breach necessarily involves the determination of disputed facts.

In former times, the Commission mainly pursued cases which it selected as good vehicles for advancing the law. This was especially true as to exemptions, where each individual exemption was a flagship piece of rule-making, setting precedent for the future. Today, in most Article 82 cases and in not a few cartel cases, the Commission's function is to resolve disputes between private parties, where one side is arguing that the facts prove an infringement and the other side is arguing that the facts are wholly different and that the law does not support the accusation in any event.

The Commission is guardian of the treaties, has the power to propose regulations, and has a wide range of important political and economic responsibilities. However, when it pursues cases, it is not a regulator of the competition rules, but a prosecutor whose condemnations can have severe consequences. This distinction in function is very relevant to the present study.

## Section C: Standard of Proof and Standard of Review in Competition Cases

### The Standard of Proof Required of the Commission to Prove an Infringement

Standard of *proof* relates to the level of convincingness which the Commission's Decision must satisfy in proving a competition law infringement: must the Commission prove the infringement "beyond reasonable doubt" or on the "balance of probabilities", or to some other standard such as (echoing the civil law notion of "*intime conviction*") to the entire satisfaction of the Commission's services?

Standard of *review* is the nature and extent of the enquiry the Court will undertake when faced with an appeal concerning a Commission decision (will the Court re-assess economic evidence or factual evidence, or confine itself to reviewing whether the proper procedures have been followed in an honest manner?). This paper enquires into whether the Courts consistently use the appropriate standard of review. The unique processes which the Commission's staff are constrained to follow present more risk of errors than if more orthodox procedures applied. This makes the standard of review by the Courts in Luxembourg all the more important.

### *Standard of proof in EC competition law*

Under Regulation 1/2003, Article 2, the burden of proof in competition cases rests on the Commission. However, there is no single and consistent statement of the standard of proof required of the Commission to prove an infringement, either in the Treaty, subordinate legislation or from the Courts, in anti-trust cases.<sup>21</sup>

### *Varying judicial formulations*

The Courts have not consistently adopted the formulation of the requisite standard which the Commission must satisfy: beyond reasonable doubt or balance of probabilities, firm conviction or some other standard. The CFI has referred in one case to the need for “sufficiently precise and consistent evidence to support the firm conviction that the alleged infringement took place”.<sup>22</sup> In other cases the Courts have hinted at a lower standard of proof, referring to the need for evidence to be “convergent and convincing”,<sup>23</sup> or merely “cogent”.<sup>24</sup> Sir Christopher Bellamy, formerly a judge of the CFI, while President of the UK Competition Appeal Tribunal, noted this phenomenon in *NAPP Pharmaceutical*:

“As far as the standard of proof is concerned, the European Courts, faced with the different traditions of the Member States, have simply indicated that the infringement should be demonstrated to the ‘requisite legal standard’ (*à suffisance de droit*), but there is no doubt that, in general, those Courts require convincing proof that the alleged infringements have been committed in the form of a ‘firm, precise and consistent body of evidence’ . . . We have no reason to suppose that the standard of proof we propose to follow is any different from that followed in practice by the courts in Luxembourg.”<sup>25</sup>

Dicta from the Court of First Instance indicate that the Commission may base its case on inferences “. . . from a number of coincidences and indicia,

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<sup>21</sup> A senior official has suggested that in merger cases the relevant standard is balance of probabilities (whether a significant impediment to competition is “more likely than not”), but this should be read in light of the Court’s strictures about speculating too much as to future developments in cases such as *Tetra Laval*, referred to below. See Carles Esteve Mosso, “Non-horizontal Mergers – A European Perspective”, in Barry Hawk, ed., *International Antitrust Law & Policy: Fordham Competition Law 2007*, Juris Publishing, 2008, chapter 3.

<sup>22</sup> Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00, *JFE Engineering a.o. v Commission* [2004] ECR II-2501, para. 179. On convincing evidence, see Case C-12/03, *Commission v Tetra Laval BV* [2005] ECR I-987, paragraph 41.

<sup>23</sup> Case T-314/01, *Avebe v Commission* [2006] ECR II-3085, paragraph 97.

<sup>24</sup> Case T-305/94 et al., *Limburgse Vinyl Maatchappij e.a. v Commission* [1999] ECR II-931, paragraph 644.

<sup>25</sup> *Napp Pharmaceutical Holdings Limited and Subsidiaries v Director General of Fair Trading*, 15/01/2002 [2002] CAT 1, paragraph 112; <http://www.catribunal.org.uk/239-565/1001-1-1-01-Napp-Pharmaceutical-Holdings-Limited-and-Subsidiaries.html>.

which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules”.<sup>26</sup> The quotation may support the view that the standard of proof in competition cases is something akin to a balance of probabilities.

By contrast, in light of the severity of the penalties, the presumption of innocence is to be applied when looking at the evidence. Unless evidence is really convincing (my formulation, deliberately chosen to be neither civil law nor common law), a finding of infringement should not lie:

“Given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, the principle of the presumption of innocence applies in particular to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments.”<sup>27</sup>

The link between severe penalties and the need for respect of the rights of the defence was noted in a famous passage from the opinion of Judge Vesterdorf, acting as Advocate General in an early CFI case:

“. . . (i)n view of the fact . . . that fines may be imposed on undertakings pursuant to Article 15 of Regulation No 17/62 do in fact, notwithstanding what is stated in Article 15(4), have a criminal law character, it is vitally important that the Court should seek to bring about a state of legal affairs not susceptible of any justified criticism with reference to the European Convention for the Protection of Human Rights.”<sup>28</sup>

In at least one case,<sup>29</sup> the CFI has sympathized with the difficulties of proving participation in a secret conspiracy. *BPB*, a company fined for participation in a plasterboard cartel, argued before the Court that the Commission had to prove an infringement beyond reasonable doubt. The Court, however, responded that:

“It is normal, in the context of anti-competitive practices and agreements, for the activities to take place in a clandestine fashion, for meetings to be held in secret, and for the associated documentation to be reduced to a minimum. It follows that, even if the Commission discovers evidence explicitly showing unlawful contact between traders, it will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction. Accordingly, in most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules (*Aalborg Portland and Others v Commission*, paragraphs 55 to 57).

<sup>26</sup> Case C-204/00, *Aalborg Portland* [2004] ECR I-123, paragraph 57.

<sup>27</sup> Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00, *JFE Engineering a.o. v Commission* [2004] ECR II-2501, para. 178.

<sup>28</sup> Case T-1/89, *Rhône Poulenc SA v Commission* [1991] ECR II-867, at p. II-885.

<sup>29</sup> Case T-53/03, *BPB plc v Commission* [2008] ECR II-1333.

It is apparent from that case-law that the Court must reject the applicant’s assertion that the Commission must adduce proof ‘beyond reasonable doubt’ of the existence of the infringement in cases where it imposes heavy fines.”<sup>30</sup>

If this statement means that circumstantial evidence can suffice to prove guilt, I do not dissent. Indeed, criminal convictions can be based on circumstantial evidence. But if it means that imperfectly convincing evidence should be accepted because the struggle against cartels is very important, it cannot be correct. Suggesting that standards of proof and evidentiary rigour need to be waived where the misconduct is performed secretly is, I submit, a deeply unconvincing proposition. Any crime is characterized by the fact that the perpetrators will do their best to cover their tracks; the law does not, however, lighten the standard of proof on prosecutors seeking to punish such behaviour. (In *BPB*, the accused company complained that the Commission’s interest had been triggered by the allegations of an anonymous informant, whose evidence the Commission had said to be convincing when it obtained a search warrant from a UK court but to whom the Commission had promised confidentiality. The Court – reasonably – upheld the Commission’s right to do this, provided that there was adequate evidence (to which the company was given access) upon which the contested decision had been based (see paragraphs 26, 24–38). The outcome is understandable, but the episode is somewhat reminiscent of a criminal case.)

In *BPB*, the question was whether it had been demonstrated with adequate confidence that representatives of *BPB* and its competitor *Knauf* had met in London in 1992 to reach agreement with subsequent information exchanges between the parties and a resultant end to their price war.<sup>31</sup> The Court found the Decision had indeed adequately demonstrated the guilt of *BPB* and *Knauf*.<sup>32</sup> It may be that the guilt was convincingly shown, but the formulation of the criterion seems unfortunate. This verbal mildness must be juxtaposed with the procedures applied by the Commission, which are less rigorous than most national prosecutors would observe.

In the context of leniency applications, parties desiring to confess may feel inclined (or encouraged) to embellish the direness of the behaviour they have witnessed. If they are first to seek leniency, they have the need to give a sufficiently colourful story for the Commission to take them seriously, and a corresponding incentive to make life difficult for their competitors and (alleged) co-conspirators. (Such may have been the case with *Chiquita* and its rival *Dole* referred to earlier). In the context of complaints, there is a risk that a well-advised complainant with an interesting case and well-articulated theories will capture the analytical high ground such that evidence will thereafter be viewed in a manner consistent with the complainant’s view of the case, all the more

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<sup>30</sup> See *ibid.*, paragraphs 63 and 64.

<sup>31</sup> *Ibid.*, paragraphs 65–67.

<sup>32</sup> *Ibid.*, paragraph 94.

so since the procedure is so constructed that the company's defence will be demanded only at a late stage in the proceedings, when official minds are largely made up. The Commission's internal procedures have indeed been reinforced in order to address these phenomena.

*A sample of standards of proof in various European jurisdictions*

European law is young by comparison to the legal systems of the European Member States. Since there is no single textual definition of how definitively facts must be established for Community law purposes, an anecdotal survey of several national jurisdictions<sup>33</sup> was made. It confirmed that there is no easily discernible single test in Europe for determining guilt or innocence in criminal matters, or what burden of proof applies in civil matters.

A common characteristic of Anglo-Saxon court proceedings is that the rules of evidence are detailed and prescriptive, with a view to ensuring that the judge's appreciation of the case is not tainted by irrelevant or inadmissible evidence. In Scotland and in England, criminal guilt must be established "beyond reasonable doubt". It is for the prosecution to prove beyond a reasonable doubt the constituent elements of any crime charged against the defendant and to disprove beyond a reasonable doubt any defence save insanity that the defendant may raise at his trial.<sup>34</sup> It has been stated judicially that the standard does not mean proof beyond a shadow of a doubt, but rather to a high degree of probability.<sup>35</sup> Meanwhile, in civil cases in England and in Scotland, the standard of proof is "balance of probabilities". A leading statement of this standard holds:

"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the Tribunal can say: 'We think it more probable than not', the burden is discharged, but if the probabilities are equal, it is not."<sup>36</sup>

The two jurisdictions have different standards as to corroboration in criminal cases, where Scots law is more demanding. Oral evidence under oath is regularly taken in both civil and criminal cases in the UK and in Ireland. The civil judge will review the evidence and will describe in some detail how the judge reached a conclusion: in a criminal trial with a jury, the judge will review the evidence for the jury and will indicate possible lines of approach to its analysis.

By contrast to these two Anglo-Saxon jurisdictions, civil law practitioners are untroubled by the relaxed rules of evidence, since the judge will know what weight to attach to trivial, irrelevant material or to second-hand testimony. Oral evidence under oath is rarely given in civil proceedings.

<sup>33</sup> Belgium, England, France, Germany, Poland and Scotland.

<sup>34</sup> *Woolmington v. DPP* [1935] AC 462

<sup>35</sup> *Miller v Minister of Pensions* [1947] 2 All ER 372

<sup>36</sup> *Ibid.*

In France, “*intime conviction*” determines whether a judge will find a defendant guilty of a criminal offence. The decision will be based on “*preuve libre*”, which leaves the discretion to the judge to weigh up the probative value of evidence presented.<sup>37</sup>

“*Hors les cas où la loi en dispose autrement, les infractions peuvent être établies par tout mode de preuve et le juge décide d’après son intime conviction.*”<sup>38</sup>

Most lawyers have the tendency chauvinistically to endorse as indispensable that which is familiar, and indeed Anglo-Saxon lawyers are often uneasy in the face of the imprecise standard of judicial review applying in Luxembourg. “*Intime conviction*” sounds too personal, insufficiently detached, not scientific and logical. The absence of rules of evidence which ensure the judicial mind is not polluted by irrelevant or misleading material makes, for the common law lawyer, even worse the risk of error. Red-blooded clients accustomed to very specific legal standards for evidence and burden of proof, for example in the United States, are likely to find such an explanation vague and unconvincing. (I was recently told by an eminent American lawyer that my explanation of the concepts was “mushy”).

The notion of *intime conviction* is necessarily subjective. A definition of the term “*intime conviction*” in a leading French legal dictionary provides that it means an “*opinion profonde que le juge se forge dans son âme et conscience et qui constitue, dans un système de preuves judiciaires, le critère et le fondement du pouvoir d’appréciation souveraine reconnu au juge du fait*”.<sup>39</sup> Thus the personal belief of the judge is determinative rather than a more objective standard, such as “beyond reasonable doubt” (which implies that a reasonable person should be left in no doubt by the evidence presented).<sup>40</sup> An *intime conviction* is required of the decision-maker in French criminal cases, not in civil cases, confirming that a higher standard of proof will be required in the former than the latter. Even if Anglo-Saxon lawyers feel nervous about such a standard, civil lawyers are perfectly confident that the test is adequate and meaningful.

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<sup>37</sup> While in civil proceedings only certain forms of evidence are admitted if their probative value is determined (French Civil Code, Art. 1341 to 1369), the Code of Criminal Procedure establishes in Article 427 the system of freedom of evidence (*preuve libre*). The Criminal Chamber of the French Supreme Court (*Cour de cassation*) has held that evidence may adduced by any means (Cass. crim., 13 October 1986: Bull. Crim. 1986, No. 282). This principle applies not only to evidence of a crime but also to the means of defence (Cass. crim., October 2 1981: JCP G 1981, IV, 389. – Cass. Crim., 12 April 1995: Bull. Crim. 1995, No. 156), or even the age of the accused (Cass. crim., 1 December 1999: Bull. crim. 1999, No. 289)

<sup>38</sup> Article 427 of the French *Code de procédure pénale*.

<sup>39</sup> *Vocabulaire juridique*, G. Cornu (Broché).

<sup>40</sup> The French Supreme Court (Cour de cassation) often reiterates the right given to judges to decide according to their personal belief (Cass. crim., 7 June 1988: Bull. Crim. 1988, No. 259).

In Belgium, as in France, criminal cases are to be decided upon the *intime conviction*,<sup>41</sup> based on the free application of the probative elements led in a case. Generally, the law will attach a higher probative value to written than oral evidence. In certain cases the law will provide for a specific “*preuve légale*”. Thus, if a party seeks to prove the existence of a legal act, such as a will or contract (as opposed to a legal fact, such as a birth or an accident), in a French civil case the law will often set out the type of evidence required and its probative value.

In Germany, the standards of proof in civil and criminal cases are stipulated in the German *Zivilprozessordnung* (ZPO) and the *Strafprozessordnung* (StPO). In criminal cases, all questions that are relevant to the verdict, and especially the legal consequences, have to be proven by *Strengbeweis*, which means the proof by formal evidence which includes proof by witness, by expert, by instrument and by legal inspection. The standard of criminal proof is the court’s firm conviction about the truth (*die Erforschung der Wahrheit*) that leaves the judge beyond doubt about the truth.<sup>42</sup>

<sup>41</sup> See, e.g., Article 342 of the *Code de l’instruction criminelle*:

*Art. 342. Les questions étant posées et remises aux jurés, ils se rendront dans leur chambre pour y délibérer.*

*Leur chef sera le premier juré sorti par le sort, ou celui qui sera désigné par eux et du consentement de ce dernier.*

*Avant de commencer la délibération, le chef des jurés leur fera lecture de l’instruction suivante, qui sera, en outre, affichée en gros caractères dans le lieu le plus apparent de leur chambre; « La loi ne demande pas compte aux jurés des moyens par lesquels ils se sont convaincus; elle ne leur prescrit point de règles desquelles ils doivent faire particulièrement dépendre la plénitude et la suffisance d’une preuve; elle leur prescrit de s’interroger eux-mêmes dans le silence et le recueillement, et de chercher, dans la sincérité de leur conscience, quelle impression ont faite sur leur raison les preuves rapportées contre l’accusé, et les moyens de sa défense. La loi ne leur dit point : « Vous tiendrez pour vrai tout fait attesté par tel ou tel nombre de témoins »; elle ne leur dit pas non plus : « Vous ne regarderez pas comme suffisamment établie toute preuve, qui ne sera pas formée de tel procès-verbal, de telles pièces, de tant de témoins ou de tant d’indices »; elle ne leur fait que cette seule question, qui renferme toute la mesure de leurs devoirs : « Avez-vous une intime conviction . . . » (Alinéa 5 abrogé; L 23-08-1919, art. 4)*

<sup>42</sup> See section 244 of the S+PO:

- (1) *Nach der Vernehmung des Angeklagten folgt die Beweisaufnahme.*
- (2) *Das Gericht hat zur Erforschung der Wahrheit die Beweisaufnahme von Amts wegen auf alle Tatsachen und Beweismittel zu erstrecken, die für die Entscheidung von Bedeutung sind.*
- (3) *Ein Beweis Antrag ist abzulehnen, wenn die Erhebung des Beweises unzulässig ist. Im übrigen darf ein Beweis Antrag nur abgelehnt werden, wenn eine Beweiserhebung wegen Offenkundigkeit überflüssig ist, wenn die Tatsache, die bewiesen werden soll, für die Entscheidung ohne Bedeutung oder schon erwiesen ist, wenn das Beweismittel völlig ungeeignet oder wenn es unerreichbar ist, wenn der Antrag zum Zweck der Prozeßverschleppung gestellt ist oder wenn eine erhebliche Behauptung, die zur Entlastung des Angeklagten bewiesen werden soll, so behandelt werden kann, als wäre die behauptete Tatsache wahr.*
- (4) *Ein Beweis Antrag auf Vernehmung eines Sachverständigen kann, soweit nichts anderes bestimmt ist, auch abgelehnt werden, wenn das Gericht selbst die erforderliche Sachkunde besitzt. Die Anhörung eines weiteren Sachverständigen kann auch dann*

Meanwhile, in German civil cases, the burden is on the parties to put forward all relevant facts. As in other countries, the court in a civil case will not actively investigate to get to the heart of the matter, in contrast to procedure in a criminal case. It is for the claiming party to furnish convincing proof. The standard of proof is lower than that applied in criminal cases.<sup>43</sup>

In Poland, in civil cases a court will assess the reliability and strength of the submitted evidence according to its own conviction, stemming from a comprehensive balancing of all the collected information. Detailed rules on evidence are set out in the Polish Code of Civil Procedure.<sup>44</sup> In Polish criminal cases, courts enjoy a wide discretion on the standard of proof to be applied, including "free assessment of the evidence", subject to the possibility for complete *de novo* review of the case on appeal.<sup>45</sup>

In short, standards of proof are defined differently in different Member States. Criminal cases have to be proved to a higher standard than civil cases. The biggest disparity lies between the Anglo-Saxon model which establishes strict rules of evidence and an articulated standard of proof, and the civilian standard which relies on the judge's level of comfort as to the evidence, and which has few formal obstacles to the consideration of any category of evidence. The standard of proof is either set out by statute or by established case law.

This does not mean that injustice (in the form of a false conviction or a false acquittal) is more likely under one regime, but that the regimes are different in theoretical conception. There is no single, unambiguous judicial statement of the standard of proof in EC competition matters, but that does not mean either that the judges are casual about proof or that they are unaware of the weight to be attached to different categories of evidence.

Equally, there are no formal rules of evidence in the European Courts, as was recognised by Judge Vesterdorf, acting as Advocate General in *Polypropylene*:

"It is important to note that the activity of the ECJ and thus also that of the CFI is governed by the principle of the unfettered evaluation of evidence, unconstrained

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*abgelehnt werden, wenn durch das frühere Gutachten das Gegenteil der behaupteten Tatsache bereits erwiesen ist; dies gilt nicht, wenn die Sachkunde des früheren Gutachters zweifelhaft ist, wenn sein Gutachten von unzutreffenden tatsächlichen Voraussetzungen ausgeht, wenn das Gutachten Widersprüche enthält oder wenn der neue Sachverständige über Forschungsmittel verfügt, die denen eines früheren Gutachters überlegen erscheinen.*

- (5) *Ein Beweisantrag auf Einnahme eines Augenscheins kann abgelehnt werden, wenn der Augenschein nach dem pflichtgemäßen Ermessen des Gerichts zur Erforschung der Wahrheit nicht erforderlich ist. Unter derselben Voraussetzung kann auch ein Beweisantrag auf Vernehmung eines Zeugen abgelehnt werden, dessen Ladung im Ausland zu bewirken wäre.*
- (6) *Die Ablehnung eines Beweisantrages bedarf eines Gerichtsbeschlusses.*

<sup>43</sup> See sections 138 para. 3, and 288 para. 1 Zivilprozessordnung.

<sup>44</sup> *Kodeks Postępowania Cywilnego*, Articles 228 to 233.

<sup>45</sup> *Kodeks Postępowania Karnego*, Articles 7 and 8.

by the various rules laid down in the national legal systems. Apart from the exceptions laid down in the Communities' own legal order, it is only the reliability of the evidence before the Court which is decisive when it comes to evaluation."<sup>46</sup>

## The Standard of Review Applied by the European Courts

It may be helpful to record the order of ideas for the next sections. First, we recall the fundamental EC texts which are the basis for distinguishing between full appellate review and limited judicial review of legality. Then follows a review of the European Courts' repeated endorsements (since the *Remial Nutricia* case in 1984) of the principle that the Courts will generally not interfere with how the Commission has exercised its discretion, while noting that in some cases the Courts have been remarkably interventionist. Thereafter we note that the Courts (like the Commission, *mutatis mutandis*) enjoy significant powers to gather facts and conduct enquiries, powers which seem perfectly consistent with the exercise of unlimited jurisdiction by the Courts. Finally, we reconsider the textual basis for asserting that "unlimited jurisdiction" extends only to penalties.

Articles 229 and 230 EC give the European Courts the legal basis to review decisions of the Community institutions. Article 229 EC (originally Article 172 EEC) states:

"Regulations made by the Council pursuant to the provisions of this Treaty may give the Court of Justice unlimited jurisdiction in regard to the penalties provided for in such regulations."

Article 230 EC gives four grounds of review of legality:

"The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects *vis-à-vis* third parties.

It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission *on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.*" (emphasis added)

The grounds of review under Article 230 EC present a considerable obstacle to an appellant, being based on limited grounds of review of the way in which a decision has been taken (rather than the merits of the decision itself). The

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<sup>46</sup> Case T-7/89, *SA Hercules Chemicals v Commission* [1991] ECR II-1711. See also Christopher Kerse and Nicholas Khan, *EC Antitrust Procedure*, 5th ed., Sweet & Maxwell, 2005, §§ 8-039 and 8-040.

decision-making authority enjoys a wide margin of discretion.<sup>47</sup> Most Brussels practitioners have laboured hard to explain to a sceptical client the meaning of a “review” of “legality” rather than a “normal” “appeal” to an appellate court.

Article 229, on the other hand, contemplates that a Council regulation will grant the Court unlimited jurisdiction. Unlimited jurisdiction (“*une compétence de pleine juridiction*”) is not defined in the Treaty but seems to be an import from French law, under which “*recours de pleine juridiction*” gives a court the power to revise the administrative act that is being challenged and even award damages against the administration being challenged. This can be contrasted with “*recours de la légalité*” which merely seeks annulment of a decision, as does Article 230 EC.<sup>48</sup>

Therefore, under Article 229 EC unlimited jurisdiction connotes the power of the Court to revise the decision of the Commission that is being challenged: the question arises of whether that power to revise applies to the decision imposing fines, or merely to the fines imposed by that decision. I shall contend that it is inappropriate to refrain from looking rigorously at the grounds upon which a decision is taken as well as considering as a matter of unlimited jurisdiction the amount of the fine imposed. As always, these matters become easier to understand when put in historical context.

## Deference to the Commission’s Findings, and Light Judicial Review

The CFI will exercise a “comprehensive review” of a Commission decision when an allegation of error of fact or of procedural impropriety is made,<sup>49</sup> but has developed a practice (not imposed by the Treaty) of according deference to complex economic assessments undertaken by the Commission. This deference contrasts with the principle of unlimited jurisdiction.

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<sup>47</sup> For an English lawyer, this would recall the standards of “Wednesbury unreasonableness” (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1947) 2 All ER 680), where the Master of the Rolls, Lord Greene, stated:

“It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word ‘unreasonable’ in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting ‘unreasonably.’ Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority . . . That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.”

<sup>48</sup> See Paul Lasok, Timothy Millett and Anneli Howard, *Judicial Control in the EU: Procedures and Principles*, OUP, 2004, paragraph 136.

<sup>49</sup> Case T-41/96, *Bayer AG v Commission* [2000] ECR II-3383, paragraphs 67, 69 and 71.

The following passage is one recent example of the terms in which Community judges limit their power to intervene:

“The Community judicature undertakes generally a comprehensive review of the question whether or not the conditions for the application of Article 85(1) of the EC Treaty are met. It is only where it reviews *complex economic appraisals* made by the Commission that the Community judicature confines itself to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or a misuse of powers (Case 42/84 Remia and Others v Commission [1985] ECR 2545, paragraph 34, and Case C-7/95 P John Deere v Commission [1998] ECR I-3111, paragraph 34).”<sup>50</sup>

There are a number of formulations of this principle of deference to the Commission’s assessment set out in judgments going back to 1985.<sup>51</sup> The same deference to complex assessments by the Commission is accorded in other domains, such as trade protection remedies in the form of anti-dumping duties.<sup>52</sup>

The more there is a balancing of closely-analyzed considerations of public policy, the more reluctant an appellate court will be to intervene. Thus, in a case concerning the banning of an antibiotic animal feeding-stuff additive, which had been in use for about thirty years, the CFI upheld the official determination, understandably noting that in matters of public health the Courts will be reluctant to override the public authorities. Member States disagreed, as did technical experts, as to whether there was a danger and as to the urgency of the problem. Of course, in such a case there was no question of imposing

<sup>50</sup> Case T-28/03, *Holcim (Deutschland) v Commission* [2005] ECR II-1357, paragraph 95 (emphasis added).

<sup>51</sup> See, e.g., Joined Cases 142/84 and 156/84, *BAT and Reynolds v Commission* [1987] ECR 4487, paragraph 62:

“It should be recalled that in its judgment of 11 July 1985 in case 42/84 Remia v. Commission (1985) ECR 2566 the Court held that although as a general rule it undertakes a comprehensive review of the question whether or not the conditions for the applications of article 85(1) are met, its review of such [complex economic] appraisals made by the Commission is necessarily limited to verifying whether the relevant rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal, or misuse of powers.”

<sup>52</sup> See Case T-413/03, *Shandong Reipu Biochemicals Co. Ltd v Council of the European Union* [2006] ECR II-2243, paragraphs 61–62:

“It is clear from the case-law that in the sphere of measures to protect trade the *Community institutions enjoy a wide discretion by reason of the complexity of the economic, political and legal situations which they have to examine . . .* [cites omitted].” (emphasis added)

“*Review by the Community Courts of the institutions’ assessments must therefore be limited to verifying whether the relevant procedural rules have been complied with, whether the facts on which the disputed choice is based have been accurately stated and whether there has been a manifest error of appraisal or a misuse of powers . . .* [cites omitted].” (emphasis added)

a fine, although a considerable burden was inflicted on those who made and those who used the product.<sup>53</sup> The Community institutions were required to seek the advice of a committee of scientific experts on animal nutrition, to undertake a scientific risk assessment and to evaluate highly complex scientific and technical facts, so it was not surprising that judicial review of the way in which they did so was limited. Note, however, that the decision was taken by the institutions after receiving advice from scientific advisers: by contrast, in a competition case, the Commission does not rely upon the findings of an expert committee. It acts on its own initiative, gathering its own evidence and pursuing its own policy priorities.

Whether a contested item in a Commission decision is deemed to be a question of “fact” or a “complex economic (or other) appraisal”, will affect how the Court exercises its power of review,<sup>54</sup> making only a limited check of “legality”, often called “light review” or “marginal review”. In the case of merger control, the Court of First Instance has indicated that the EC Merger Regulation confers discretion on the Commission to carry out an economic assessment of the likely effects of a merger, but at the same time it has been very interventionist in examining the Commission’s decisions.<sup>55</sup> In antitrust cases (on breaches of Article 81 or Article 82), by contrast, the Courts have sometimes been quite deferential to the Commission and at other times quite interventionist.<sup>56</sup> It is not always easy to see a clear dividing line to separate cases of rigorous factual review (as in *Woodpulp*) from cases of deference to Commission discretion.

The language of deference has been cited so frequently that it may have become a sort of judicial mantra. The words have appeared in at least fifty competition cases since 1984. There have been many more cases where the Courts have favoured deference than cases where they have exercised their unlimited jurisdiction. I am doubtful if the appraisals of evidence by the Commission deserved judicial deference in every case where the familiar words have been pronounced.

It cannot be the case that all economic appraisals are “complex”. Just because an economic assessment is difficult, for example, should not mean it is deemed to be “complex”. As the Commission has turned towards a more economic approach to antitrust cases, economic analysis will become increasingly central to competition cases. The boundaries of “*complex economic*

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<sup>53</sup> Case T-13/99, *Pfizer Animal Health v Council* [2002] ECR II-3305, paragraphs 167 to 169. See Ian Forrester, “The Dangers of Too Much Precaution”, in Mark Hoskins and William Robinson, eds., *A True European: Essays for Judge David Edward*, Hart Publishing, 2003, chapter 16.

<sup>54</sup> Bo Vesterdorf has written that the exercise of unlimited jurisdiction is, in practice, the very rare exception. See “The Court of Justice and Unlimited Jurisdiction: What Does it Mean in Practice?”, *Global Competition Policy* (June 2009).

<sup>55</sup> See Case T-342 99, *Airtours* [2002] ECR II-2585, paragraph 64.

<sup>56</sup> There is a remarkable contrast between *Woodpulp* and *Microsoft* (both considered below).

*assessments*” have expanded over the years. The Courts’ exercise of unlimited jurisdiction may, in parallel, have been shrinking. It is not easy to understand why the Courts should defer to the Commission’s expertise in a particular technical or economic controversy when the Courts have themselves the power to appoint experts, economic and otherwise. Curiously, however, whereas the consequences of being found to be in the wrong have become more dire, the judicial control of such findings has, at least in appearance, become more deferential.

The *Consten/Grundig*, *Remial/Nutricia* and *Microsoft* cases, and the notion of deference by the European courts to the Commission

Most legal systems provide for discretion to be exercised by certain bodies in given cases. It is reasonable that the exercise of this discretion should not be subject to review in such a manner that a judge substitutes a judicial decision in place of a regulatory or legislative one. In a democracy, the state is trusted to take decisions within the scope of its powers and those of its officials. It is not my contention that the Commission should be second-guessed judicially when it sets enforcement priorities or when it promulgates new competition regulations. I do respectfully contend that light judicial review in competition cases has expanded more than is desirable, and that the Courts should consistently examine the findings of the Commission to ensure that its decisions in competition cases are just. It is interesting to note the doctrine through three cases, *Consten/Grundig*, *Remial/Nutricia* and *Microsoft*.

### *Consten and Grundig: deference to priority-setting*

*Consten and Grundig*<sup>57</sup> is a seminal authority on various doctrines, including how to apply Article 81 and whether to defer to the Commission. In 1957 German Grundig agreed to appoint French Consten for an indefinite period as sole distributor of Grundig products in France. A “free rider” named UNEF bought Grundig appliances from German traders and, notwithstanding a contractual prohibition on exports, sold them to French retailers, undercutting the prices quoted by Consten. The Commission found that Grundig and Consten had violated Article 81 (formerly Article 85 EEC), and refused an exemption.

No less an authority than Advocate General Roemer doubted if the Commission had reached the right conclusion:

“It cannot be sufficiently emphasized that even as regards Article 85 (3) the Commission must play a much more active and positive role, especially when it

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<sup>57</sup> Joined Cases 56 and 58/64, *Etablissements Consten SARL and Grundig-Verkaufs-GmbH v. Commission of the European Economic Community* [1966] ECR 299.

finds that certain agreements result in improvements for the whole economy. In such a case, it has a far-reaching duty to seek clarification: it must raise questions on its own initiative and make conscientious inquiries together with the undertakings concerned. Precisely because we are at the beginning of the development of a new law on cartels, it would be better for the Commission to do too much than too little in this field, so long as there exists no established practice or sufficiently defined principles."<sup>58</sup>

"In this connexion, further examination should be made as to what effects of a nature to promote competition are produced by the sole distributorship agreement on the market, because it is possible that such an agreement may have the effect of lowering the prices of other similar products and it may thus also in that way give consumers a share in the benefit. It is clear that the Commission did not make such examinations, especially as regards the last-mentioned (although in relation Article 85(1) it emphasized that the effects of an agreement which were favourable to competition should be taken into account under Article 85(3))."<sup>59</sup>

"Consequently in the context of the criterion of 'share of the benefit' also it must be stated that the Commission has been guilty of a series of important errors or omissions which must certainly be taken into account in considering the decision in dispute (in so far as anything turns on the application of Article 85(3))."<sup>60</sup>

". . . In consequence Article 3 of the contested decision also discloses defects of form and substance which call for its annulment."<sup>61</sup>

The Court was much less critical. It found that the Commission's evaluation under Article 81(3) necessarily entails complex evaluations on economic matters. It went on to state that "judicial review of complex economic evaluations by the Commission concerning [Article 81(3)] exemptions must take account of their nature by confining itself to an examination of the relevance of the facts and legal circumstances which the Commission deduces therefrom. This review must in the first place be carried out in respect of the reasons given for the decisions which must set out the facts and considerations on which the said evaluations are based".<sup>62</sup> This was, I believe, the first indication that deferential judicial scrutiny would be applied to Commission decision-making.

Now, it is to be noted that in 1966 European competition law was in its infancy. There was a lot of contradictory evidence and assertions and theories about whether territorial exclusivity was good or bad. There are arguments to be made in favour of territorial exclusivity and in favour of cross-border trading as a means of enhancing the goal of market integration. The impact of these regimes on consumers was also debated.

The Commission's refusal to grant an exemption to the controversial clauses plainly involved a degree of political and policy discretion. One can argue

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<sup>58</sup> Advocate General Roemer's Opinion in *Consten and Grundig*, page 370.

<sup>59</sup> *Ibid.*, pages 371–372

<sup>60</sup> *Ibid.*, page 374

<sup>61</sup> *Ibid.*, page 382.

<sup>62</sup> *Consten and Grundig*, page 347, paragraph 3.

about whether pursuing parallel trade should have been such an important goal, but one cannot deny that the *Consten/Grundig* case was the first of a long series of decisions on parallel trade lasting over thirty years. As a constitutional matter, the Commission was entitled to set its own goals, including that of market integration. It is not surprising that the Court deferred to such election of goals. EC competition law would have been very different if the Court had taken a more interventionist line and had followed the Advocate General. The Court did not dissent, and competition law flourished for nearly 20 years without further reference to deference in competition cases.

*Remia/Nutricia: deference as a lightening of Article 81(1)*

The next notable step occurred in 1985, in *Remia/Nutricia*.<sup>63</sup> This case, about what we would now call ancillary restraints, was approached in light of the then prevailing doctrine: the Commission defined the prohibition on ‘restricting’ competition contained in Article 81(1) very broadly, referring parties whose conduct was caught in this wide net to the possibility of obtaining an exemption under Article 81(3). Even if the end result – the conclusion that a given agreement or conduct was acceptable and even desirable from the point of view of competition policy – was clear, the Commission consistently considered it was to be reached, as a theoretical matter, by first condemning it under Article 81(1) and then redeeming it under Article 81(3). Agreements which were caught by Article 81(1) and unexempted were void and unenforceable. Voidness could be cured only by an exemption, only the Commission could issue exemptions, and it did so very rarely.

The *Nutricia* decision was provoked by the notification by Nutricia, a Dutch company specialising in babyfood and health products, of agreements under which it successively sold two subsidiaries, Remia specialising in the manufacture of sauces (to an individual in the Netherlands), and Luycks, a manufacturer of pickles and condiments as well as a few sauces (to a subsidiary in the Netherlands of the Campbell group). The “*Sauce Agreement*”, required Nutricia not to engage in the production or sale of sauces in the Netherlands for ten years; Nutricia was required to ensure that Luycks also complied with this clause. Remia received a two-year non-exclusive licence for the ‘Luycks’ trademark for sale of sauces to the hotel and catering trade. The “*Pickles Agreement*” prohibited Nutricia from engaging in the sale or production of pickles in “European countries” for five years, with an exception for certain bulk sales. The buyer also accepted the restriction on making and selling sauces imposed on Luycks, by virtue of the Sauce Agreement.

Post-sales non-compete clauses represented one of the most paradoxical exceptions to the old general rule. According to the Commission’s theory, such clauses, which in a narrow sense constitute as clear and explicit restrictions of

<sup>63</sup> Case 42/84, *Remia BV v Commission* [1985] ECR 2545.

competition as could be imagined, were held not to be caught by Article 81(1) at all. This solution was achieved by an exercise in definitions. The restriction was "inherent" in the sale of business and thus was not a restriction. The question then became how much such restriction was "inherent": for how many years could the seller be obliged not to compete? Now, was the restrictive period pro-competitive, or irretrievably bad, or was it overlong but curable by shortening? The Commission found the periods of non-competition were excessively long. But it did concede that where the sale of a business covered goodwill and clientele as well as material assets, a non-competition obligation imposed on the seller may be necessary to ensure transfer of "*the full commercial value of the business*". Applying these criteria, the Commission found that four years rather than ten would have been appropriate for the Sauce Agreement; for the Pickles Agreement, it found that two years would be appropriate, and that the geographical scope of the clause should be appropriately limited.<sup>64</sup>

The Commission's approach made good sense to the business community but was legally controversial. Sales of businesses would be impossible without non-compete clauses. Thus they reinforce competition by increasing the number of enterprises on the market. But by arguing that a particular "restriction" is pro-competitive and therefore not caught by Article 81(1), arguments normally reserved for Article 81(3) crept into the analysis under Article 81(1).

Advocate General Lenz spelled out the problem:

"There can be no doubt that a total ban on competition, that is to say an undertaking not to act directly or indirectly on a certain market for a specified period, must be seen as an agreement which has as its object or effect a restriction of competition."<sup>65</sup> (p. 2556, para B.3 (a) ii)

"I now turn to the question whether it is possible for the prohibition in Article 85(1) not to be applied to agreements in restraint of competition which in theory fall within its scope without adopting the exemption procedure under Article 85(3). If the answer to that question is positive it will then remain to be examined what rules of law must apply in the case of such a 'non-application' of Article 85(1) of the EEC Treaty." (p. 2558, para B.4 ii)

"Although the non-application of Article 85(1) finds no immediate support in the Treaty its permissibility is accepted in academic writings, in particular in the case of agreements for the transfer of undertakings." (p. 2558, para B.4 iii)

"In academic writings on Community law it is argued that, taken in the abstract, restrictions on competition agreed in the context of agreements for the transfer of undertakings may in principle be regarded as satisfying the factual criteria contained in Article 85(1) of the EEC Treaty." (p. 2558, para B.4 vii)

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<sup>64</sup> See Commission Decision 83/670 of 12 December 1983, Case Nos. IV 130.389 and IV/30.408, *Nutritionalde Rooij and NutritionalZuid-Hollandse Conservefabriek*, 1983 OJ L376/22.

<sup>65</sup> Opinion of Advocate General Lenz in Case 42/84, *Remia v Commission* [1985] ECR 2545.

“I, too, agree that an exception, to the extent described above, to the prohibition of restrictive agreements laid down in Article 85(1) of the EEC Treaty is both conceivable and practicable.” (p. 2559, para B.4 ix)

So the Advocate General was endorsing the Commission’s approach as sound in principle, even though he noted that academic writing was not unanimous: one of the dissenters was the formidable Norbert Koch of the Commission Legal Service. He then produced another reason to support the Commission:

“If this is right . . . , a further consequence will follow regarding the scope for judicial review of the Commission’s decision. Since the conditions for an exemption are outlined only in a general manner, the Commission enjoys a wide discretion even in the case of a straightforward application of Article 85(3). The Court of Justice has recognized that Article 85(3) necessarily implies complex assessments of economic matters. Similarly, where such assessments are made in the case of prohibitions of competition agreed in connection with transfers of undertakings, the judicial review must take that fact into account and therefore confine itself to determining the correctness of the facts on which the assessments are based and the applicability to those facts of the relevant legal principles. As the Court of Justice has stated, judicial review must in the first place be carried out in respect of the reasons given for the Commission’s decision, which must set out the facts and considerations on which the said assessments are based.”

This was a big legal step in terms of the substantive law (which was recognised with relief by commentators, including myself), and it was a deeply important constitutional initiative (less noticed at the time by commentators).

The Court followed the Advocate General. The Commission was in a sense intelligently finding a middle way to reconcile opposing concerns; navigating between the Scylla and Charybdis of stubborn prohibition and lax toleration. At this moment, the notion of ancillary restraints had not been adopted in EC law. The approach of the Commission was commendably practical (even if the precise number of years could be debated: indeed, whether the correct period should be three, four or five years was a matter of appraisal where reasonable men could reasonably differ). As regards the duration of the non-compete clause, the Court endorsed the Commission’s findings that the ten years agreed by the parties was too much, and that four years was sufficient.

In upholding the Commission’s decision, the Court of Justice noted, echoing Advocate General Lenz, that “. . . although as a general rule the Court undertakes a comprehensive review of the question whether or not the conditions for the application of article 85(1) are met, it is clear that in determining the permissible duration of a non-competition clause incorporated in an agreement for the transfer of an undertaking, the Commission has to appraise complex economic matters”. It then added that consequently “. . . the court must limit its review of such an appraisal to verifying whether the relevant procedural rules have been complied with, whether the statement of reasons

for the decision is adequate, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of powers”.<sup>66</sup>

*Nutricia* fertilised the small plant of judicial deference in competition matters. The bush subsequently burgeoned, being cited in dozens of subsequent competition judgments.<sup>67</sup> But the original seed was intended to commend the Commission’s creativity in pragmatically solving a problem of principle. It was not meant, I submit, to be a shifting of primacy in the balance between the administration/prosecution and the judiciary.

### *The Microsoft case: deference to technical and economic assessments*

The *Microsoft* case involved numerous hotly-debated factual matters concerning the design of computer operating systems, how software functions, the role of directories in networks of servers, and other topics. While these matters were assuredly technical and complex, the issues at stake were set forth with limpid clarity in the admirably accurate Report for the Hearing. The judges of the Court of First Instance were evidently able to decide on the merits of the case, as they had accurately identified the issues in dispute. However, in the *Microsoft* judgment in 2007, the formulation of light judicial review was extended to technical matters, not merely complex economic assessments:

“The Court observes that it follows from consistent case-law that, although as a general rule the Community Courts undertake a comprehensive review of the question as to whether or not the conditions for the application of the competition rules are met, *their review of complex economic appraisals made by the Commission is necessarily limited to checking whether the relevant rules on procedure and on stating reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers* . . . [citations omitted].

Likewise, in so far as the Commission’s decision is the result of complex technical appraisals, those appraisals are in principle subject to only limited review by the Court, which means that the Community Courts cannot substitute their own assessment of matters of fact for the Commission’s (see, as regards a decision adopted following complex appraisals in the medico-pharmacological sphere, order of the President of the Court of Justice in Case C-459/00 P(R) *Commission v Trenker* [2001] ECR I-2823, paragraphs 82 and 83 . . . [citations omitted]).

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<sup>66</sup> Case 42/84, *Remia v Commission* [1985] ECR 2545, paragraph 34.

<sup>67</sup> See, e.g., Case 142/84, *BAT and Reynolds v Commission* [1987] ECR 4487, para 62; Case T-44/90, *La Cinq SA v Commission* [1992] ECR II-1, para 85; Joined Cases T-39/92 and T-40/92, *Groupement des Cartes Bancaires “CB” and Europay International SA v Commission* [1994] ECR II-49, para 109; Case T-17/93, *Matra Hachette SA v Commission* [1994] ECR II-595, para 104; Case T-471/93, *Tiercé Ladbroke SA v Commission* [1995] ECR II-2537, para 55.

However, while the Community Courts recognise that the Commission has a margin of appreciation in economic or technical matters, that does not mean that they must decline to review the Commission's interpretation of economic or technical data. The Community Courts must not only establish whether the evidence put forward is factually accurate, reliable and consistent but must also determine whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it (see, to that effect, concerning merger control, Case C-12/03 P *Commission v Tetra Laval* [2005] ECR I-987, paragraph 39).<sup>68</sup>

These paragraphs expanded the Courts' deference to complex *technical* appraisals as well as to complex economic ones. The familiar standard was set forth accurately in paragraph 87 referring to "complex economic appraisals" where the review is "necessarily limited to checking whether the relevant rules . . . have been complied with, whether the facts have been accurately stated and whether there has been a manifest error of appraisal." The CFI's enunciation of a different standard of review in paragraph 88 is striking. Its reference to cases "in the medico-pharmacological sphere" to present this new standard applicable to "complex technical appraisals" seems unfortunate. In any competition case, the Commission is not assisted by a special agency entrusted with elucidating scientific controversies and making recommendations for action. I respectfully submit that the CFI should have determined the standard of review applicable to the Commission as a competition authority, which makes independent determinations and reaches conclusions based thereon.

Thus the doctrine of deference has expanded considerably from where it stood in 1965 at the time of *Consten and Grundig*. It has moved from the refusing of an exemption in light of overriding concerns relating to Community policy to reach very specific cases on very specific findings relevant to whether Articles 81 or 82 have been infringed. The deference shown to "complex economic assessments" has spread, and has been referred to in scores of judgments, including some which I submit did not involve a complex regulatory exercise. If the *Microsoft* ruling is followed in future, deference (by which I mean either reciting the language of deference or genuinely according actual deference) now encompasses "complex technical appraisals" as well as economic ones, and does not distinguish between where the Commission is advised by technical regulatory experts and where the Commission decides a competition case itself with no such expert guidance. Among the "technical matters" could be a range of factual disputes, the determination of which connotes guilt or innocence of a competition law offence.

The phenomenon of deference has indeed spread to appeals about the level of fines, in that the Courts sometimes review in a "deferential" manner how the Commission exercised its fining discretion. A judgment issued by the CFI in 2009 demonstrates this trend:

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<sup>68</sup> Case T-201/04, *Microsoft v Commission* [2007] ECR II-1491, paragraphs 87–89 (emphasis added).

It is therefore for the Court to verify, when reviewing the legality of the fines imposed by the contested decision, *whether the Commission exercised its discretion in accordance with the method set out in the Guidelines* and, should it be found to have departed from that method, to verify whether that departure is justified and supported by sufficient legal reasoning. In that regard, it should be noted that *the Court of Justice has confirmed the validity, first, of the very principle of the Guidelines, and, secondly, the method which is there indicated* (Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others v Commission* [2005] ECR I-5425, paragraphs 252 to 255, 266, 267, 312 and 313).

The self-limitation on the Commission’s discretion arising from the adoption of the Guidelines is not incompatible with *the Commission’s maintaining a substantial margin of discretion. The Guidelines display flexibility in a number of ways, enabling the Commission to exercise its discretion in accordance with the provisions of Regulation No 17*, as interpreted by the Court of Justice (*Dansk Rørindustri*, paragraph 267).<sup>69</sup>

It is striking that the CFI refers to the Commission’s discretion in setting fines. If any part of a Commission decision should be beyond deference-worthy discretion, it is the setting of the fine, which is explicitly subject to the unlimited jurisdiction of the European Courts. I question whether such an approach is consistent with a proper exercise of the Court’s unlimited jurisdiction. The expansive interpretation of the term today has led one former judge to comment that:

“In view of the ever increasing fines imposed by the Commission, fines which now may amount to more than one billion Euros on a single undertaking and who knows how much more next time, it is my humble submission that it is now much more necessary that the Community Courts fully exercise their unlimited jurisdiction and not just verify if the (Fining) Guidelines have been followed correctly by the Commission.”<sup>70</sup>

## Section D: Examples of judicial rigour in past competition cases

Despite the pronouncements concerning deference to the Commission, the European Courts have in some cases questioned, and even overturned, what appear to be complex analyses undertaken by the European Commission. This is encouraging, but the fact that it has happened in certain cases underlines the ambiguity of the definition of “*complex analysis*” in the Courts’ judgments. This is the topic of the present section.

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<sup>69</sup> Case T-116/04, *Wieland-Werke v Commission* [2009] ECR II-1087, paragraphs 30–31 (emphasis added).

<sup>70</sup> See Vesterdorf, cited above note 54.

Rigorous cross-examination of a complex assessment was made in *Woodpulp*,<sup>71</sup> where the Court of Justice commissioned two independent economic reports in order to assess whether the Commission's economic analysis of parallel behaviour was correct.<sup>72</sup> It was largely on the basis of these two independent reports that the Court found the Commission decision had not established concertation regarding announced prices. The Court never classified the Commission's own economic analysis as "complex" and made no reference to the dicta on the limited scope of review to be accorded to complex economic assessments, even though the principle had been recognized judicially in *Remial/Nutricia* and subsequent cases.<sup>73</sup> The economic analysis concerned the novel theory of tacit collusion as proof of a cartel. After not classifying the Commission's economic findings as "complex economic analysis", the Court carried out an in-depth review of those findings.

The Court ordered an expert report on parallelism of prices, and took around four months to appoint the experts to carry out the analysis. They were given the specific task of assessing whether the documents used by the Commission justified the conclusion of parallelism of prices. The experts took a year to report to the Court with their findings.<sup>74</sup> This was not a light undertaking either for the Court or the independent economists.

After reviewing their report, the Court decided to commission a second report on the functioning of the market during the period covered by the infringement decision, analyzing the natural characteristics of the market and whether these might have led to a uniform price structure. The experts were asked to contrast this with the functioning of the market in the period prior to that covered by the Commission decision. The appointment of the experts took some five months and, again, the report took a year to produce and submit to the Court.<sup>75</sup>

Thus the Court took over two-and-a-half years to commission and review the economic evidence of expert economists. This was a substantial investment of time and resources on the part of the Court and led to a rigorous analysis of the Commission's economic evidence. The Court's experts viewed the normal operation of the market as a more plausible explanation for the uniformity of prices than the alleged concertation.<sup>76</sup> They noted shifts in market share and considered the Commission was wrong to contend that pulp producers should have exploited differences in price-elasticity in different member states.<sup>77</sup> Difficult to deny that this was a complex economic analysis! Certainly it directly contradicted the Commission's findings. The Court of Justice plainly was doing what the Courts have chosen to eschew in other cases: taking the initiative to verify whether the Commission's complex eco-

<sup>71</sup> Joined Cases C-89/85 etc., *Ahlström Oy and Others v Commission* [1993] ECR I-1307.

<sup>72</sup> *Ibid.*

<sup>73</sup> See, e.g., *BAT and Reynolds v Commission* [1987] ECR 4487, paragraph 62.

<sup>74</sup> *Ibid.* paragraph 31.

<sup>75</sup> *Ibid.* paragraph 32.

<sup>76</sup> *Ibid.* paragraphs 101 and 109.

<sup>77</sup> *Ibid.* paragraphs 119 and 120.

conomic conclusions were correct.<sup>78</sup> The cost of the experts was declared by the Court to be attributable to the Commission since it concerned infringements declared void in the judgment.<sup>79</sup>

The Court went further in *Woodpulp* than it appears to have been prepared to go in most antitrust cases since then. The Court was willing to “roll up its sleeves” at considerable expense, time and effort, and take to pieces the Commission’s economic analysis. It was a novel case. It confirmed that mere parallelism is not evidence of an Article 81 infringement. It is interesting that factual findings in a number of other cases – particularly in the domain of Article 82 – were submitted to only limited judicial review.

*Geitling v High Authority*, one of the earliest judgments of the Court of Justice, rendered in July 1960, is another interesting example of interventionist rigour. *Geitling*<sup>80</sup> involved a challenge to how the Coal and Steel High Authority (an ancestor of today’s Commission) had organized the selling of coal in the Ruhr. The essence of the case was whether the High Authority had correctly reduced to 20 000 tons and 6 000 tons the thresholds at which coal could be traded by certain resellers. The Court plunged into the figures, the background, the economy of coal-trading in the Ruhr, put questions to the parties, and concluded that the High Authority had gone wrong. The Court began by confirming that the High Authority had the power under the ECSC Treaty to authorize “specialization agreements or joint – buying or joint selling agreements” (ancestors of exemptions under Article 81(3) EC) provided it made a finding that certain conditions were met.

The Court began its annulment respectfully:

“That finding, by its very nature, comprises an assessment of the situation created by the economic facts or circumstances and, accordingly, is partially outside the jurisdiction of the Court.”<sup>81</sup>

But then it struck, relying on the need to give good reasoning.

“In effect, the authorized agreements tend, through the mechanism of the 20 000 metric tons clause, to favour in general, or at least in fact, purchases of coal from the Ruhr, because if a trader does not purchase the 20 000 metric tons from one agency, while wishing to continue to purchase the minimum of 6 000 metric tons so as to remain eligible for acceptance by that agency, he is forced, in most cases, to purchase the remainder of 14 000 metric tons from the other agencies.”

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<sup>78</sup> The power to order such an expert’s report, as well as oral testimony, production of documents and a range of other preliminary measures of inquiry are always available to the ECJ under its internal rules, paragraph 45.

<sup>79</sup> *Woodpulp*, cited above note 71, paragraph 203.

<sup>80</sup> Joined Cases 36, 37, 38 and 40/59, *Geitling RuhrkohlenVerkaufsgesellschaft mbH and others v High Authority* [1960] ECR 423. (I am indebted to Michel Waelbroeck for drawing this case to my attention.)

<sup>81</sup> The Court thus respected Article 33 of the ECSC Treaty, which required a certain level of deference (no re-examination of “the evaluation of the situation, resulting from economic facts and circumstances, in the light of which the High Authority took its decisions”) except in the case of misuse of power or manifest breach of the law.

Therefore:

“The statement of reasons does not include any worthwhile information on this point. It results from the foregoing that the maintenance of the criterion of 30 000 (20 000) metric tons is not supported by sufficient reasons at law.

... as the Court has found above that insufficient reasons have been given for the authorization of the criterion of ‘Community coal’, the aforementioned insufficient reasons do not render it any the more possible to assess the question whether the High Authority was justified and within its rights in reducing that criterion from 30 000 to 20 000 metric tons.”

Thus, we can see that the earliest members of the ECJ were not afraid to get into details of a legal and factual controversy. Although the Court acknowledges the primacy of the Authority in assessing “economic facts or circumstances”, it then took to pieces the Authority’s determination, using the administrative law ground of defective reasoning.

### *The European Courts’ practice in merger control cases*

The practice of the European Courts in merger control appeals suggests the Courts are more prepared to carry out a comprehensive review of the economic analysis of the Commission in that context than in antitrust cases. The cases of *Airtours*, *Tetra Laval*, *Schneider/Legrand* and *Sony/BMG* proved that complex merger decisions involving in-depth economic analysis could be re-assessed by the European Courts, both where the Commission had blocked and had cleared a merger.

In the case of *Tetra Laval*,<sup>82</sup> the Court of First Instance was faced with a complex analysis of conglomerate effects that were forecast to flow from the proposed merger. It worked through the Commission’s economic analysis in great detail to conclude that neither horizontal, vertical, nor conglomerate effects flowing from the merger could be expected to lead to the acquisition of a dominant position. Some of its conclusions were framed as manifest errors of assessment on the part of the Commission, such as the conclusions on possible horizontal and vertical effects of the merger on the creation of a dominant position.<sup>83</sup> Others were framed as the Commission not having met the requisite standard of proof.<sup>84</sup>

“140 Consequently, it has not been shown that the modified merger would result in sizeable or, at the very least, significant vertical effects on the relevant market for PET packaging equipment. In those circumstances, the Court finds that the Commission made a manifest error of assessment in so far as it relied on the vertical effects of the modified merger to support its finding that a dominant position on those PET markets would be created for the merged entity through leveraging.

<sup>82</sup> Case T- 5/02, *Tetra Laval BV v Commission* [2002] ECR II-4381.

<sup>83</sup> *Ibid.*, paragraphs 140 to 141.

<sup>84</sup> See, e.g., *ibid.*, paragraphs 235, 251, 254–256.

...

254 It is clear from the foregoing that the contested decision does not provide sufficiently convincing evidence to show that leveraging from the aseptic carton market would enable a dominant position to be created for the new entity by 2005 on the markets for barrier technology, aseptic and non-aseptic filling machines, plastic bottle closure systems and auxiliary equipment.

255 At the hearing, the Commission placed particular emphasis on how the strengthening of the merged entity’s position on the PET equipment markets would be the result of a cascade effect from the position acquired on those SBM machine markets. It should be noted, however, that this analysis does not appear explicitly in the contested decision and has not therefore been proved to the requisite legal standard. In any event, the merged entity’s foreseeable position on the markets for PET equipment other than SBM machines, as found above, is sufficiently weak that, even if such a cascade effect were foreseeable, it would not have a fundamental effect on that position.

256 In the absence of convincing evidence, it must be concluded that the first condition under Article 2(3) of the Regulation is not met as regards the abovementioned PET equipment markets.”<sup>85</sup>

The Commission appealed the ruling to the ECJ, arguing that the CFI had gone beyond its role by substituting its own assessment for that of the Commission on several key points, rather than merely reviewing the Commission’s decision. However, the ECJ upheld the CFI’s judgment, holding that:

“Whilst the Court recognises that the Commission has a margin of discretion with regard to economic matters, that does not mean that the Community Courts must refrain from reviewing the Commission’s interpretation of information of an economic nature. Not only must the Community Courts, *inter alia*, establish 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. Such a review is all the more necessary in the case of a prospective analysis required when examining a planned merger with conglomerate effect.”

The Courts have warned of the need for prudence in predicting the future.

“A prospective analysis of the kind necessary in merger control must be carried out with great care since it does not entail the examination of past events – for which often many items of evidence are available which make it possible to understand the causes – or of current events, but rather a prediction of events which are more or less likely to occur in future if a decision prohibiting the planned concentration or laying down the conditions for it is not adopted.”<sup>86</sup>

I would submit that if the Court is willing to be robust in the field of reviewing whether decisions about mergers were well-founded, it should be even

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<sup>85</sup> Case T- 5/02, *Tetra Laval BV v Commission* [2002] ECR II- 4381.

<sup>86</sup> Case C-12/03, *Commission v Tetra Laval BV* [2005] ECR I-987, paragraphs 39 and 42.

more ready to intervene when considering cases of guilt or innocence, *a fortiori* when penalties have been imposed.

## Section E: Evidence Gathering by the European Courts

In the following section, I will consider how the Court can get access to evidence on its own account, and how it has elaborated rules for weighing different categories of evidence.

### Methods of Evidence Gathering Available to the European Courts

As well as having access (if it wishes) to the Commission's case file, each Community Court has its own resources to examine the facts. Under their powers of measures of inquiry, the Court of First Instance and European Court of Justice are each able to require the personal appearance of the parties, request information and production of documents, request oral testimony, commission expert reports and inspect any place or thing that is in question.<sup>87</sup> In each competition case before the European Court of First Instance, the court will therefore have access to the factual findings of the Commission, as well as having the ability to gather further evidence for itself. Documentation is today much more voluminous than in former times, so it is rare for the court to embark on its own fact-gathering. Nevertheless, at oral hearings in open court, the judges can and do put questions, through counsel, to the experts or employees of the parties.

### *Oral testimony before the European Courts*

The European Courts have the power to order oral testimony, and indeed have stated that this could be a means by which an applicant's burden of proof is satisfied.<sup>88</sup> On the rare occasions where a case hinges on the truth of one contested factual element, there might be a formal hearing of a witness, but judges prefer documentary evidence. In modern practice, the submission of oral *evidence*, in the sense of oral testimony by witnesses, is quite rare. Indeed, there have been few formal hearings of the testimony of witnesses in the history of

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<sup>87</sup> Rules of Procedure of Court of First Instance, 1991 OJ L136/1, as last amended on 16 July 2009 (2009 OJ L184/10), Article 65. Rules of Procedure of the Court of Justice, 1991 OJ L176/7, as last amended on 28 January 2009 (2005 OJ L24/8), Article 45(2).

<sup>88</sup> Case T-7/89, *SA Hercules Chemicals v Commission* [1991] ECR II-1711, paragraph 44; ECJ rules Article 47 and CFI rules, Article 68.

the European Courts. In staff cases, doctors have been heard, and in competition cases, economists have been heard.<sup>89</sup> However, the submission of what is in effect technical advocacy by non-lawyer experts, such as economists, is an alternative way of making technical points effectively. In *Pfizer Animal Health*, evidence in the form of expert advocacy was presented from professors of medicine specialised in hospital-borne infections, and teachers of animal husbandry.<sup>90</sup> Judges accept the offering of expert advocacy by non-lawyers as part of what would otherwise, in the common law tradition, be part of counsel’s pleading.

European Judges from both the common and civil law traditions informally state that they consider the benefits of speed and informality to exceed the benefits of a more rigorous laying of a foundation for testimony in the common law tradition.

### *Use of expert witnesses*

Expert witnesses are not commonly appointed by the European Courts. *Woodpulp* was a notable exception. I suspect that many practitioners would prefer to rely on experts whom they choose, brief and present themselves, rather than having a single neutral court-appointed expert. The submissions of technical experts in areas of complexity or scientific dispute can obviously be very helpful. I have suggested<sup>91</sup> that it would be desirable for opposing experts to be instructed to prepare a summary of points as to which they agreed and disagreed, with a view to focussing the issues and discarding superfluous or rhetorical material. Such a practice could help avoid distortions attributable to one expert’s verbal fluency and confident manner, as opposed to the other’s diffidence and prudent manner. The former is not more likely to be right than the latter. I may add that it is unlikely we would require in Luxembourg the *Daubert* motion, where the trial judge in the US may consider refusing to allow testimony from an expert whom the judge thinks may confuse or mislead the jury by describing doctrines in the realm of “junk science” (doctrines which are not rooted in sober science or as to which the witness may not be a genuine authority).<sup>92</sup> That said, there has been an occasion where an expert who was disallowed from testifying before a US court on “*Daubert*” grounds was nonetheless found credible enough for his ideas to be accepted by the European Commission.

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<sup>89</sup> The CFI employed an economist for six years in the 1990s to help the judges understand economic debates in competition appeals. See Ilene Knable Gotts et al., “Nature vs. Nurture and Reaching the Age of Reason: The U.S./E.U. Treatment of Transatlantic Mergers”, 61 *New York University Annual Survey of American Law* 453, 498 (2005).

<sup>90</sup> Case T-13/99, *Pfizer Animal Health v Council* [2002] ECR II-3305.

<sup>91</sup> Ian Forrester, “The Judicial Function in European Law and Pleading in the European Courts”, 81 *Tulane Law Review* 647 (2006).

<sup>92</sup> See *Daubert v Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

One final point about the practice of the European Courts in reviewing competition decisions is that the scope and utility of the Report for the Hearing can vary. Where the report shows that the *Juge Rapporteur* has understood the crucial points of the case, counsel are reassured that their efforts to explain have succeeded, and can hope that their efforts to convince may also succeed. By contrast, where the issues are merely faithfully repeated, without a *triage*, counsel may fear they have failed as to the first and may be uneasy as to the second. A report that merely repeats the submissions of each side faithfully in intellectual chronological order and without ranking them, will maybe not tempt the busy judge to get to grips with an interesting case. A report for the Court containing a well-summarised, distilled account of the arguments put forward by the opposing sides will help the judges hearing a case to focus on the important details in advance of the hearing and to test the parties' arguments effectively. For example, the Report for the Hearing in the *Microsoft* case was, in the view of several practitioners including myself, the best they had seen in their career.

### *Use of evidence obtained in other investigations*

It has been held that in a competition case the Commission may rely upon evidence obtained in other, unrelated cases. In *Dalmine*, the Italian authorities had transmitted to the Commission various pieces of evidence obtained in a separate criminal case against the company, which the Commission then used in its competition law case. The Court of First Instance ruled that the question of whether such information could be transmitted legally was one for national law, not Community law, the implication being that any evidence that arrives at the offices of the Competition Directorate in Brussels, by whatever means lawful, may be validly used as evidence.<sup>93</sup>

### *Inspection of places and things*

The power to inspect places and things can be an important fact-gathering tool, although it appears that the use of these powers is rather unusual. In the *Microsoft* case, the Grand Chamber was equipped with a considerable volume of technical equipment to allow the playing of video clips, demonstrations of how software works, as well as text and diagrams. In other cases, objects submitted to the Courts have included a packet of miniature ball bearings,<sup>94</sup> filter masks, a carved statue of a lion,<sup>95</sup> a plastic basin,<sup>96</sup> adult dolls<sup>97</sup> whose

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<sup>93</sup> Case C-407/04, *Dalmine v Commission* [2007] ECR I-829, paragraph 86.

<sup>94</sup> Case C-188/88, *NMB (Deutschland) GmbH and others v Commission* [1992] ECR I-1689.

<sup>95</sup> Case T-113/00, *DuPont Teijin Films Luxembourg SA and others v Commission* [2002] ECR II-3681.

<sup>96</sup> *Ibid.*

<sup>97</sup> Case 121/85, *Conegate Limited v HM Customs & Excise* [1986] ECR 1007.

customs classification was disputed, and other miscellaneous. Counsel have brought to Court, though not formally lodged, sundry items such as video-games, tubes of toothpaste, a medicine for epilepsy and of course a multitude of documents.

The next section will summarize how the Courts approach the assessment of evidence in competition cases.

## An Attempt to Discern Guidance From European Court Cases on a Hierarchy of Evidence

The system of pleading in the European Courts is closer to the civil than the common law tradition: combinations of legal and factual assertions are put to the Courts principally in the form of written pleadings rather than in oral argument and through the use of witnesses. Language constraints of course reinforce the appropriateness of a written procedure.

Certain commentators have tried to discern what types of proof will be considered especially persuasive by the European Courts, notably Kerse and Khan in their book on EC antitrust procedure.<sup>98</sup> They cite contemporaneous written documents as being the traditional form of proof relied upon by the Commission, and the authors consider that the Courts will generally find this the most convincing since it was drafted *in tempore non suspecto*. However, the European Courts in recent years have become accustomed to considering oral statements in the form of leniency statements. The acceptance by the European Courts of such testimony reflects the diversity of the Commission’s fact-finding process, and flexibility in the face of changing Commission policy (oral declarations are today widely used as a means of avoiding discovery entanglements). The Court of First Instance will consider the body of evidence as a whole and not individual pieces in isolation.<sup>99</sup> This position has been supported by the Court of Justice.<sup>100</sup>

In the following pages, I summarise some of the judicial and academic pronouncements on probative evidence before the European Courts, beginning with an extreme example. More than one member of the Community Courts have told me that judges are guided by their nose: if something smells peculiar, they will enquire further into the source of the odour. A celebrated example of that phenomenon was the case of Italian Flat Glass. In *Italian Flat Glass*,<sup>101</sup>

<sup>98</sup> See Kerse and Khan, cited above note 46, §§ 8-039 et seq.

<sup>99</sup> See Case T-56/99, *Marlines v Commission* [2003] ECR II-5225, paragraph 28; *appeal dismissed*: C-112/04, Order of the Court of 15 September 2005 (unpublished). See also Case 48/69, *ICI v Commission* [1972] ECR 619, paragraph 68; Case T-141/94, *Thyssen Stahl v Commission* [1999] ECR II-347, paragraph 175.

<sup>100</sup> Joined Cases C-238/99 P etc., *PVC II* [2002] ECR I-8375, paragraphs 513 to 523.

<sup>101</sup> Cases T-68/89, T-77/89 and T-78/89, *Società Italiana Vetro SpA and others v Commission* ECR [1992] II-1403.

one of the earliest cases considered by the CFI, the judges examined afresh evidence relied on by the Commission in its decision. The case concerned alleged cartel activity between Italian glass producers. The oral hearing was notably tense. The CFI demanded the physical production of original documents from the Commission. The hearing was adjourned to allow the bringing to Luxembourg of the original documents as seized by the Commission staff. There followed lengthy consideration by the CFI of the evidence described in the contested decision. It noted that:

“... it is incumbent upon [the court] . . . to check meticulously the nature and import of the evidence taken into consideration by the Commission in the decision.”<sup>102</sup>

The court observed serious flaws in the Commission’s case, and even evidence of manipulation of handwritten notes by the authority. Questioning by the bench was particularly severe, a severity reflected in the judgment:

“The Court considers that it is self-evident and indisputable that the tenor of the note is changed completely by the omission of those nine words. With those nine words the note could be taken as clear evidence of a competitive struggle between SIV and FP on the one hand and VP on the other. At the hearing, the Commission tried in vain to supply an objectively justifiable reason for the deletion of those words.”<sup>103</sup>

No doubt it would not be suggested that this was improper interference in the determination of a complex technical matter.

### *The value of contemporaneous documentation*

The fact that a document was drafted at the time of the alleged infringement before the prospect of an investigation has been cited by the CFI as being a source of particular credibility:

“The Court considers that it is not credible that that letter, written in tempore non suspecto, does not reflect the true situation, namely that Mr Giordano (VP) did not attend the meeting held on 7 November 1984 and that VP did not wish to participate in such meetings, still less initiate them.”<sup>104</sup>

In *Italian Flat Glass*, the CFI carefully worked through the documentary evidence relied upon by the Commission to prove an infringement and drew different conclusions to those of the Commission, largely attributing less probative value to the evidence in the case file than the Commission had. It found, for example, that the Commission had “cut and paste” a table of customer classification from a document received from one of the parties, on the one hand, and the Commission’s own reconstruction of customer classification in the case, on

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<sup>102</sup> *Ibid.*, paragraph 95 (emphasis added).

<sup>103</sup> *Ibid.*, paragraph 93.

<sup>104</sup> *Ibid.*, paragraph 238.

the other.<sup>105</sup> It further found that the Commission had inferred proof of an infringement for a longer duration than it logically should have from a handwritten note of 12 July 1983: while the note could evidence collusion prior to that date, it could not evidence collusion going forward.<sup>106</sup> Lastly, it found that while two contemporaneous notes could evidence a concerted practice, or at least detailed discussion between two parties, they did not on their own demonstrate participation in an earlier agreement, as the Commission had inferred.<sup>107</sup>

While the CFI did not prescribe criteria as such, it did strongly imply that contemporaneous documents are of a highly probative nature, but that the conclusions to be drawn from them must not go beyond what logic permits.

In *Hercules Chemicals*, the Court of First Instance dealt with an argument by the applicant, ICI, that the Commission had dealt with certain evidence in a one-sided and unfair way. The evidence in question was a series of ICI reports of meetings with competitors. The CFI found that the Commission could reasonably take the view that the meeting notes found at ICI’s premises reflected the discussions with competitors, first because they were corroborated by various other documents, second because the identity of most of the individual authors within ICI was known to the company, and third because the meetings were chaired by different people within ICI and the reports therefore served to spread knowledge in the organisation of the outcome of previous meetings.<sup>108</sup> In such circumstances, the CFI deemed the burden to be on the applicant to provide a different explanation of what happened in the meetings, by “. . . advancing exact information, such as the notes taken by its employee during the meetings in which it took part or the testimony of members of staff who attended the meetings”.<sup>109</sup> The applicant did not advance any such evidence and the CFI therefore found in favour of the Commission on this point.

In *JFE Engineering*, the CFI went into some detail in assessing the probative value of various pieces of written evidence as well as statements. The principal piece of evidence in the case was a statement from Mr Verluca, an employee of one of the alleged cartelists, Vallourec. A number of documents were relied upon to corroborate that statement. Among these, the Commission found “particularly probative” a document that had been jointly drawn up by Mannesman and Corus – two of the alleged participants in the cartel – since this was deemed to contain their collective analysis.<sup>110</sup>

On the other hand, a contradiction between another piece of documentary evidence – a “sharing key document” – and Mr Verluca’s statements was

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<sup>105</sup> *Ibid.*, paragraph 205.

<sup>106</sup> *Ibid.*, paragraph 213.

<sup>107</sup> *Ibid.*, paragraph 219.

<sup>108</sup> Case T-7/89, *SA Hercules Chemicals v Commission* [1991] ECR II-1711, paragraphs 40 to 43.

<sup>109</sup> *Ibid.* paragraph 44.

<sup>110</sup> Case T-67/00, *JFE Engineering v Commission* [2004] ECR II-2501, paragraph 257; *appeals dismissed*: Cases C-403/04 P and C-405/04 P, *Sumitomo Metal Industries v Commission* [2007] ECR I-729.

considered to weaken the probative value of both pieces of evidence, but not to a significant extent. This was because the contradiction was deemed to relate to a peripheral element of the cartel only.<sup>111</sup> The CFI therefore concluded that the document “retained some probative value such as to corroborate, in the context of a consistent body of evidence used by the Commission, certain of the essential assertions contained in Mr Verluca’s statements . . .”.<sup>112</sup> The CFI continued: “It is sufficient for a document to evidence significant elements of the agreement described by Mr Verluca to have some corroborative value in the context of the body of inculpatory evidence”.<sup>113</sup>

The conclusion appears to be that the European Courts are willing to accept some internal contradictions between pieces of evidence provided that the body of evidence is corroborative of the story put forward in the contested decision: a national criminal court would likely do the same.

Written documents may constitute either direct evidence or indirect evidence; the former will be considered most probative since they directly demonstrate the relevant fact, while the latter generally proves a fact that is linked to that relevant fact. Indirect documentary evidence will therefore generally serve as corroboration.<sup>114</sup>

### *The value of statements provided to the Commission*

As noted, the *JFE Engineering* case rested in large part on the statement by an employee of another member of the alleged cartel, about the cartel and JFE’s participation therein. The CFI went into some detail about the elements of that statement that it found probative, notwithstanding that it sought corroboration in other documentary evidence.

First, the CFI attributed weight to the fact that Mr Verluca’s statement was made on behalf of his company, Vallourec, and not in a personal capacity. “Answers given on behalf of an undertaking as such carry more weight than that of an employee of the undertaking, whatever his individual experience or opinion”.<sup>115</sup> This is because Mr Verluca was under a professional obligation to act in the interests of the company at the time he gave the statement and the CFI found nothing on file to suggest he had failed to fulfil that obligation.

Second, the CFI found probative value in the fact that Mr Verluca was a direct witness of the circumstances which he described, having actually taken part in cartel meetings. This finding of fact by the CFI was made in part because it was not contradicted by the parties.<sup>116</sup>

<sup>111</sup> *Ibid.*, paragraphs 281 to 283.

<sup>112</sup> *Ibid.*, paragraph 288.

<sup>113</sup> *Ibid.*, paragraph 323.

<sup>114</sup> Direct documentary evidence was discussed by the Court of Justice in Case C-204/00 P, *Aalborg Portland v Commission* [2004] ECR I-123, paragraphs 236 *et seq.*

<sup>115</sup> *JFE Engineering v Commission*, cited above note 110, at paragraph 205.

<sup>116</sup> *Ibid.*, paragraph 207.

Third, Mr Verluca had had time to reflect on the reply he would give to the Commission if questioned since he had known for over 18 months that the Commission had documents sent from him to competitors. He had also had time to prepare written answers to the questions that were eventually put to him. It was therefore found by the CFI that he had had time to make his statements “deliberately and after mature reflection”.<sup>117</sup>

Finally, the CFI found the Commission was correct to point out that the statement was particularly probative since it ran counter to the interests of the declarant.<sup>118</sup>

The other alleged participants in the cartel contested the value of Mr Verluca’s statement and the CFI highlighted that in such a case a statement could not be regarded as constituting adequate proof of an infringement committed by those contesting the accuracy of the statement. However, the CFI did hold that in light of the high probative value of the statement of Mr Verluca, the degree of corroboration required would be less than would be the case if the statement had been found not credible.<sup>119</sup>

Interestingly, in *JFE* the Commission also relied on a deposition by a Mr Biasizzo, a former employee of another company alleged to be in the cartel, to a public prosecutor in Palermo, in connection with a corruption investigation. In his deposition, he provided details about the cartel. The applicants challenged the probative value of the deposition.

That the deposition was made to a public prosecutor reinforced its probative value, particularly because of the potential consequences of perjury, although such a statement made to a public prosecutor could not be given the same value as one made under oath to a court.<sup>120</sup>

Insofar as the CFI found contradictions between the deposition and Mr Verluca’s statement, it dealt with this in the same way as the documentary inconsistencies, finding that it reduced to a limited extent the probative value of the evidence only to a limited extent, in view of the fact that the statement corroborated so many other elements.<sup>121</sup> Again, the CFI was applying the concept of the body of evidence.

The Commission’s reliance on statements from leniency applicants is well known. Indeed, the majority of cartels are uncovered through leniency applications nowadays.<sup>122</sup> Under the system of “*preuve libre*”, it appears conceivable that even a single piece of evidence may be sufficient to prove an infringement if “its evidential value is undoubted and . . . the evidence itself definitely attests to the existence of the infringement in question”.<sup>123</sup> In fact,

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<sup>117</sup> *Ibid.*, paragraph 208 to 210.

<sup>118</sup> *Ibid.*, paragraph 211.

<sup>119</sup> *Ibid.*, paragraphs 219 and 220.

<sup>120</sup> *Ibid.*, paragraph 312.

<sup>121</sup> *Ibid.*, paragraph 317.

<sup>122</sup> Kerse and Khan, cited above note 46, at § 8-040.

<sup>123</sup> Case T-25/95, *Cimenteries CBR v Commission* [2000] ECR II-491, paragraph 1838.

in contrast to the *JFE* dicta above, there is judicial authority to the effect that only limited corroboration is needed where a single statement by a “particularly credible” leniency applicant has been provided to the Commission.

*“There is no principle of Community law which precludes the Commission from relying on a single document in order to conclude that Article 85(1) of the Treaty (now Article 81(1) EC) has been infringed, provided that its evidential value is undoubted and that the document by itself definitely attests to the existence of the infringement in question. In order to assess the evidential value of a document, regard should be had first and foremost to the credibility of the account it contains. Regard should be had in particular to the person from whom the document originates, the circumstances in which it came into being, the person to whom it was addressed and whether, on its face, the document appears sound and reliable.”*<sup>124</sup>

This contrasts with the approach in certain Member States where detailed rules of evidence appear more conservative.

### *The probative value of anonymous statements*

Anonymous evidence will be accepted in competition cases, meaning not only that the identity of the person giving the evidence cannot be verified (this can clearly have a bearing on the weight that should be given to that evidence), but also that the defendant cannot have the opportunity to test the evidence through cross-examination. The jurisprudence on this point states that the Commission is not obliged to cast out evidence from its file where it comes from a confidential informant, but the fact the identity of the provider is unknown can be taken into account by the Court in assessing the probative value of that evidence.<sup>125</sup> It seems that the Courts accept that it is sometimes necessary to protect the identity of a complainant in a competition case as a matter of public policy.

### *Finally . . .*

Why are these well-recognised practices as to the powers of the Courts to look at evidence and how they weigh such evidence relevant? Because their availability confirms the Courts’ capacity to get to the heart of factual controversies. Some cases are purely legal; but most competition appeals will in large measure be fact-dominated. Judicial review thereof is the unavoidable duty of the Community Courts. This brings us to the constitutional texts.

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<sup>124</sup> *Ibid.* (emphasis added)

<sup>125</sup> Case T-50/00, *Dalmine v Commission* [2004] ECR II-2395, paragraphs 72 and 73.

## Section F: Must unlimited jurisdiction be limited?

The scope of the unlimited jurisdiction granted to the Courts is set forth in Article 31 of Regulation 1/2003, pursuant to Article 229 EC. Article 31 states:

“The Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed.”

Does the unlimited jurisdiction apply only to that portion of the decision which imposes a fine, or does it apply to the decision as a whole?

The first sentence suggests a power of unlimited jurisdiction to review any part of any decision of the Commission in which a fine or periodic penalty payment is set. The second sentence might however be read as narrowing the unlimited jurisdiction, by providing that the Courts may only cancel, reduce or increase the fine or periodic penalty payment imposed. Is the second sentence to be read as qualifying the first, meaning that the unlimited jurisdiction may be exercised only to achieve one of these three outcomes? Or is the second sentence to be read as an illustrative confirmation, namely that as to fines, the Court can increase, decrease or cancel the fine, but leaving open the Court’s power to look critically at the decision as a whole?

The second view, that the Commission’s unlimited jurisdiction under Article 31 of Regulation 1/2003 applies in relation to the whole fining decision, is supported by the preamble to the Regulation itself, which states:

“(33) Since all decisions taken by the Commission under this Regulation are subject to review by the Court of Justice in accordance with the Treaty, the Court of Justice should, in accordance with Article 229 thereof be given unlimited jurisdiction in respect of decisions by which the Commission imposes fines or periodic penalty payments.”

The drafters apparently intended by using “in respect of” that the European Courts should be granted unlimited jurisdiction over decisions imposing fines or periodic penalty payments, not merely over the level of these fines and penalty payments.<sup>126</sup> On previous occasions, I have found it interesting to review the archives of the negotiations between representatives of the founding Member States in 1956 and 1957,<sup>127</sup> which revealed interesting debates between alternative views of the competition rules when drafting what are now Articles 81 and 82. Sadly, there is nothing in the Council archives on

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<sup>126</sup> The European Court of Justice has recognised the importance of the preamble to Regulations in interpreting the substantive provisions in a number of cases, including Case C-112/99, *Toshiba Europe GmbH v Katun Germany GmbH* [2001] ECR I-7945, para 36.

<sup>127</sup> See Ian Forrester, “The Modernisation of EC Antitrust Policy: Compatibility, Efficiency, Legal Security”, in Claus-Dieter Ehlermann and Isabela Atanasiu, eds., *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy*, Hart Publishing, 2001, pp. 75 et seq.

Article 229. The preparatory documents relating to Regulation 1/2003 are not much more helpful. The European Council Working Party on Competition that met on 13 and 14 November 2000 discussed Article 31 (or 32 as it was planned to be at that time) briefly, and without much attention.

“The Commission representative noted that this article was not new, and that it was necessary to give the Court of Justice unlimited jurisdiction in line with Article 229 of the Treaty. There were no comments from delegations.”<sup>128</sup>

It is interesting to compare Article 31 of Regulation 1/2003 with its predecessor, Article 17 of Regulation 17/62. While both provisions might appear to be the same, there is a tiny difference of punctuation.

Article 17 of Regulation 17/62 provided, under the heading “Review by the Court of Justice”, that:

“The Court of Justice shall have unlimited jurisdiction within the meaning of Article 172 of the Treaty to review decisions whereby the Commission has fixed a fine or periodic penalty payment; it may cancel, reduce or increase the fine or periodic penalty payment imposed.”

Under the same heading, Article 31 of Regulation 1/2003 states:

“The Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed.”

A pedant would note that in Article 17 of Regulation 17/62 the semi-colon adds a pause, while the sentence continues. Its meaning stems from the statement as a whole. Thus, using the canon of statutory interpretation *expressio unius est exclusio alterius*, the language of Article 17 can be read as merely allowing for cancellation, reduction, or increase of the fine. On this basis, what is not included in the list of the Court’s options is excluded.

However, under Article 31, the listed examples of how the Court may exercise its jurisdiction form a second and independent statement. The list comes after a more general prescription, and arguably does not stem from that prescription. Had the drafters of Regulation 1/2003 really aimed to limit the scope of that provision they would not have replaced the semi-colon with a full stop. Pursuing this grammarian line, the second part of Article 31 ought to be read as an illustration and not as a constraint upon the Court’s unlimited jurisdiction over the decisions.

I suggest that it is too cautious to hold that the European Courts have unlimited jurisdiction only over the level of the fine in antitrust cases. The CFI has, should have, and should exercise, the broadest possible scope of judicial review under Article 229 EC in antitrust cases. Unfortunately, however, in a number of cases the European Courts have adopted a restricted view of their

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<sup>128</sup> Paper from the European Council Working Party on Competition meeting on 13 and 14 November 2000, printed 17 November 2000, 13385/00 RC 19.

power of judicial review. In particular, this has come about through an expansive interpretation of the degree of discretion left to the Commission to carry out “complex assessments”, which in turn entails “light judicial review” by the European Courts.

The setting of the fine in contemporary practice is largely driven by current conventions and Commission guidelines. These contemplate the infliction of immensely severe penalties. In a cartel case, the relevant turnover of the offending company found guilty in the last fiscal year is taken as the point of departure. A tariff of 19% will be applied to that turnover in case of an offence of normal gravity. To that number is added an “entry fee” of the same amount; and the figure is multiplied by the number of years the infringement lasted. These “neutral” factors are then adapted to reflect aggravating and mitigating circumstances. The calculation is meant to get away from the accusation of arbitrary caprice in the setting of fines. One effect is that those who were lightly involved risk being treated in the same basic way as those who were heavily involved. The principle of presumption of innocence ought to imply that there would be a careful consideration of the underlying evidence to see whether it was indeed solid enough to convict the accused company, as well as whether the amount of the fine was in all the circumstances just. I submit that deference to the public authority’s fine-setting discretion in such a context is not desirable.

Over the past twenty years, the Commission has produced a number of guidelines about fining which have had the effect of making the fine-setting process appear less arbitrary. It is of course proper for the Courts to verify whether the fine imposed was consistent with the applicable guidelines. But that should be the beginning of the enquiry, not its end. Unlimited jurisdiction connotes consideration of the question of whether the sum actually imposed as a fine is fair, proportionate and, in short, just. The Court accepts that the Commission can depart from its guidelines as long as it explains with good reasons why it has done so. This is perfectly just. But, conversely, if the Commission shows on the other hand that it has followed its own guidelines, this should by no means imply that the result is immune from judicial scrutiny. Guidelines which are neither binding nor imposed by secondary legislation cannot change the principle that the Courts have to exercise unlimited jurisdiction over decisions imposing fines.

According to the case law of the European Court of Human Rights, courts should be afforded full power of judicial review over criminal cases. This means that the court should have the power to rehear the evidence or to substitute its own findings of fact to replace the findings of the administrative authority. In *Schmautzer* the ECtHR stated that there should in principle be no limit to the jurisdiction of the court which must scrutinise an administrative decision imposing a criminal sanction.<sup>129</sup> This implies a fresh review of

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<sup>129</sup> *Schmautzer v Austria* appeal no. 15523/89 [1996] 21 EHRR 51, para 36.

any facts and evidence produced before a court as part of a criminal appeal, and the capacity to make new findings of fact or to reach a completely fresh outcome.

I take the liberty of invoking a celebrated dissent by a celebrated member of the House of Lords in a constitutional case, *Liversidge v Anderson*.<sup>130</sup> Mr. Liversidge was arrested during wartime, on 29 May 1940, on the grounds that the Secretary of State had reasonable cause to believe that he was of “hostile origin or association”. The Minister declined to describe his grounds for ordering the arrest, saying that he need merely assert that he had reasonable cause. Mr. Liversidge, a volunteer RAF officer who had Russian relatives (he had changed his name from Persweig) and had had some German business connections, brought an action for false imprisonment after he had been released from custody. Probably there was some embarrassment on the official side: someone had blundered or been over-zealous. He lost at first instance, and appealed unsuccessfully up the English court hierarchy to the House of Lords where Lord Atkin spoke memorably on the topic of deference to the determination of the Minister. The core question was whether the Minister had to justify the fact that he had “reasonable cause to believe”, or was his mere assertion of being satisfied enough? Four Law Lords supported the Minister: times were grave, there was an emergency, this was no time to relax vigilance, and the Minister had in good faith exercised a not unlawful discretion (and indeed, plenty of supreme court judges would have been tempted to do the same – see *Korematsu v United States*<sup>131</sup>). But Lord Atkin dissented in terms which caused a stir:

“‘Reasonable cause’ for an action or a belief is just as much a positive fact capable of determination by a third party as is a broken ankle or a legal right.”

“In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom . . . that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law.”

The speech of Lord Atkin, as we now see it, was on the right side of the slope of history.<sup>132</sup> Evidently decisions in the context of wartime emergencies cannot be compared to determining whether in peace time a company must pay a fine, divest a business or deal against its will. But it remains a vivid and (nowadays) much admired example of the timelessness of the proposition that judges are meant to disagree with the public authority for the benefit of all.

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<sup>130</sup> *Liversidge v Anderson* [1942] AC 206.

<sup>131</sup> *Korematsu v United States*, 323 U.S. 214 (1944).

<sup>132</sup> In another, less sensitive case, *Eleko v Officer of Government of Nigeria*, [1931] AC 662 at 670 (Privy Council), he had said that “judges should not shrink from deciding such issues in the face of the Executive”.

## Section G: Conclusions

This contribution has shown how the concept of deference to the Commission’s “complex economic analysis” and the “light judicial review” that accompanies it has expanded through the jurisprudence of the Courts. The European Courts are granted unlimited jurisdiction to review antitrust decisions under which fines are imposed, yet they have often appeared cautious in using this power. Separately, but in parallel, the Courts have frequently invoked the doctrine of deference to the Commission in matters of complex economic analysis, and since 2007 in matters of complex technical analysis. The level of judicial intervention from case to case varies. In some notable cases, however, the Courts have chosen to analyse in great detail even complex economic assessments made by the Commission.

The Courts should adopt a broad rather than a narrow interpretation of the scope of unlimited jurisdiction. Deference has no place in the determination of fines, or in deciding whether the evidence demonstrated that there was an infringement in the form of a cartel involving the appellant company. It might be argued that an assessment is involved in the question of whether a refusal to deal threatened the elimination of the complainant or whether access to the asset was truly indispensable, not convenient. But even there I submit that the Courts ought not to be inhibited from examining the sufficiency of the proof.

Every day, national judges have to decide cases of medical negligence, architects’ liability, construction law, tax law and criminal law, many of them of great difficulty. They are not inhibited in discharging their duty by any special notion of deference in favour of the determination of the prosecutor or public authority. Similarly, Community judges sitting in Luxembourg should not feel constrained, by reference to the doctrine of light judicial review, from rigorously investigating whether errors were made.

That general call for unlimited jurisdiction to be applied broadly is not at all inconsistent with commending deference when rulemaking is involved. Regulatory or legislative choices lie within the remit of public authorities, which are entitled to a wide discretion as to the methods of addressing a problem. No judge is likely to interfere readily with how the public authority regulates tariffs, sets pollution standards, or negotiates the terms of accession of a new Member State. Indeed, in the context of competition law it was reasonable for deference to apply to how competition legislation was framed, such as block exemptions or enforcement policy priorities. In the early days, each exemption decision was a piece of rule-making, chosen to advance the law rather than the response of an agency to a request for approval. Today the situation is different.

The fact that a task may be voluminous, time-consuming or difficult does not mean, or does not necessarily mean, that discharging it involves supervising an administrative discretion. If there is a truly complex economic assessment to be

made (“the Commission considers that on balance and taking all factors into account, telecoms operators should not be allowed to engage in a specified practice”) then few judges will be minded to reverse that assessment, unless something was plainly outrageous in how the decision was taken. But if the question is whether Mr. Shulz having met Mr. Garcia and Mr. Garcia having reported to his boss, and other specified alleged events having occurred, there was a single and continuous infringement of Article 81 from June 1998 to November 2007, I submit that judges should not be tempted to abstain from examining whether such a decision is, on the merits, well-founded. I respectfully submit that deference language appears too frequently in judgments of the Community Courts, in matters not calling for deference.

The debate reinforces the importance of an upstream problem, namely the inadequacies of due process within the Commission when it investigates and decides competition cases. Punitive law requires procedural safeguards at every stage of the process. Current European Commission practice simply does not deliver this, a topic beyond the scope of the present paper.

It would be a pity if the notion of light judicial review were to excuse imperfect or abbreviated judicial review. It is not easy to predict whether the Courts will roll up their sleeves and get into the heart of the controversy or whether they will instead declare that the Commission has exercised a complex economic assessment which will be only lightly reviewed on the merits. I respectfully submit that it cannot be right for complex economic assessments to be immune from judicial scrutiny. Indeed, there is uneasiness among practitioners who regularly conduct appeals in Luxembourg that the wording of the judgments sometimes suggests that the Court has not brought enough critical analysis to bear on the Commission’s findings. Judgments which invoke the familiar “light review” doctrine of not looking behind how a lawful discretion was exercised are often disappointing to the advocates. They suggest, indeed they assert, that the Court has elected not to be very rigorous in examining how the Commission has performed its task. I submit that too frequent invocation of the familiar phrase should be avoided, not because it is an inaccurate description of the legal scope of the Court’s powers, but because at worst it could convey that the Court had ceded its responsibilities to control the public authority.