Judicial Review in EC and U.S. Antitrust Law

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The first two articles of this issue are based on presentations for the inaugural edition of the University College London Antitrust Forum held on March 3, 2005. Sir Christopher Bellamy, President of the U.K. Competition Appeal Tribunal, chaired the event. Bo Vesterdorf, President of the European Court of First Instance (CFI), and Douglas H. Ginsburg, Chief Judge of the U.S. Court of Appeals for the DC Circuit, were the speakers.

President Vesterdorf described the role of the European Court of Justice (ECJ) and CFI in enforcing EC competition law. His remarks excluded private damage actions, of which few have been brought in the courts of EC member states, but over which the CFI has no jurisdiction. He explained the judicial review of administrative action which, unlike U.S. appeals from lower court decisions, goes into the merits of the agencies' cases. The President was content that the European Commission should have wide discretion in appraising complex economic situations, provided that they were subject to scrutiny, not only internally within the Competition Directorate General, but also by an independent court.

The CFI has established full and close review over decisions of the Commission, but has no jurisdiction to decide the issues on the merits. Under Article 230 EC, it has power only to see that the rights of the defence have been respected, that there is sufficient reasoning in the decision, and that the Commission has not committed a manifest error of appraisal. He did not consider how close the court sometimes gets to the merits by deciding that the Commission's reasons were insufficient.

President Vesterdorf ended by considering ways in which the powers of the court might be improved and, in particular, whether it could be helped to speed up the process. Would it be desirable to implement the Treaty of Nice and

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create a subordinate court to consider competition cases with an appeal on point of law to the CFI? Or would it be better to relieve the CFI of its work on trademarks so that it has more time to consider competition cases and speed them up? In his paper, President Vesterdorf provides these answers.

Judge Ginsburg (based on joint work with Leah Brannon) removed widespread misconceptions about the number of private damage actions for antitrust infringements in the United States and the reasons for their occurrence. Some commentators believed that the large number was due to procedural advantages enjoyed by antitrust plaintiffs and, in particular, the amount of damages obtainable and that the decrease in the late 1970s was due to the lack of standing for indirect purchasers.

Judge Ginsburg took advantage of empirical studies performed at Georgetown University and observed that the number of U.S. private actions has fluctuated with the state of the law and with the number and kind of U.S. government filings (on the backs of which private plaintiffs may piggyback).

In the 1960s and early 1970s, when much conduct—including non-price vertical restrictions—was held to constitute per se offences, a plaintiff in the United States only had to prove what the defendant had done. As a result, private litigation increased and many actions were brought by competitors. This continued until *Sylvania*,[1] when the U.S. Supreme Court ruled that vertical restraints could be justified under the rule of reason and shifted the burden of showing that the conduct was restrictive to the plaintiff.

The decrease in U.S. private damage actions in the late 1970s and 1980s did not correlate well with the U.S. Supreme Court's refusal to allow standing to indirect purchasers in *Illinois Brick*.[2] Many U.S. states enacted laws allowing action by indirect purchasers soon after the judgment of the U.S. Supreme Court and only one piggyback action was brought in that decade in the U.S. courts studied in the Georgetown paper. The decrease of private litigation when the U.S. government was prosecuting many cartels could be explained by the fact that the main damage suffered was in public procurement. State buyers could use the threat to debar the guilty from public procurement and did not need to sue.

These thoughtful papers were written by individuals who bring a unique combination of scholarly and practical insight to important questions of U.S. and EC judicial practice. The editors of *Competition Policy International* are delighted to have the opportunity to publish them.

1 Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

2 Illinois Brick v. Illinois, 431 U.S. 720 (1977).