Kluwer Competition Law Blog

The scope of judicial review in question

Damien Gerard (College of Europe, Belgium) · Wednesday, September 22nd, 2010

In a speech delivered last week at the IBA annual competition conference, Commissioner Almunia engaged the audience on the sensitive topic of due process and competition enforcement. Among the reasons justifying his overall satisfaction with the current EU enforcement system, he mentioned the review by the European courts, which forms "an integral part of competition cases" and is "very close and very careful". "I certainly believe that it should be so", he added. (see SPEECH/10/449).

The debate on the appropriateness of the standards applied by the EU Courts for the judicial review of Commission's decisions is currently very animated, to say the least (see, e.g., Forrester and Wils). As is well known, the underlying concern is to ensure that proceedings before the Commission comply with Article 6 of the European Convention on Human Rights (ECHR) on the right to a fair trial. In that context, the EU Courts' reliance on the limited review standard of the "manifest error of assessment" is particularly criticized, notably for the tendency to apply it in area beyond the review of "complex economic assessments" and for the difficulty to ascertain its contours. Some commentators argue that the EU Courts ought to give away with it altogether for the "system of enforcement has dramatically evolved" since the days that standard was formulated (see, e.g., Siragusa). Others call primarily for greater clarity as to the substance of that standard while condemning firmly its spillover into so-called "matters of enforcement policy", especially in relation to fines.

It is undeniable that, over the years, the EU Courts have played an important role in framing the development of antitrust enforcement in the European Union. Yet, beyond the above concerns, I am stuck by what I perceive as a growing lack of consistency in relation to "basic" issues pertaining to the scope of judicial review such as the interplay between Articles 263 and 261 TFEU, namely the review of legality and the review of fines, and between the exercise of the unlimited jurisdiction with respect to fines and the principle ne ultra petitum. In a recent short note (here), I argue that the increased flexibility displayed by both the General Court and the Court of Justice in that regard is unfortunate and carries the potential of jeopardizing legal certainty and due process. Hence I wonder: do readers of the blog share the same view and/or have noticed other specific inconsistencies/contradictions in recent case law? Generally, how do you interpret the current situation – does it reveal a greater diversity in the composition of the EU Courts and/or a lack of consensus as to the direction judicial review ought to take while the Union faces the prospect of acceding to the ECHR?

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