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Merger Decisions and the Rules of Procedure of the European Community Courts

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G. Cumming Of the Inner Temple, Barrister

Introduction

1. SUMMARY OF OBJECTIVES OF THE ANALYSIS

The essential focus of this book is to examine the restricted discretion which the Community Courts[1] exercise as distinct from the statutory context in which they operate. The problem in brief is whether the Courts in exercising this limited discretion in a strictly procedural context ought to do so in a more or less active fashion as regards notably in investigating facts and in carrying out economic assessment: in short, active or less active case management. This exercise of the discretion in the context of active or less active case management is in turn examined in relation to the Article 6(1) European Convention of Human Right (ECHR)[2] and two principles: the EU principle of effective judicial protection[3] and

1. The Court of Justice of the European Union (CJEU) is one of the Union's seven principal institutions (Art. 13, Treaty on the European Union (TEU)). Its role is to 'ensure that in the interpretation and application of the Treaties the law is observed' (Art. 19(1) TEU). The CJEU is the collective term for the European Union's judicial arm (Art. 19 TEU), but the single institution consists of three separate courts each enjoying its own specific jurisdiction. Forming the upper tier is the Court of Justice (CJ) which was formerly known as the European Court of Justice (ECJ); beneath the CJ is the General Court (GC) which was formerly known as the Court of First Instance (CFI); and the third tier consists of the Civil Service Tribunal (CS). The rules governing all aspects of the CJEU are set out in the EU's two treaties: the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). Further detail is provided by the State of the Court of Justice of t he European Union and the ECJEU's rules of procedure. The expression 'the Court' used herein refers to both the CJ and the GC. For temporary convenience however, the expression ECJ will be used to refer to the CJ in order to facilitate quotations from earlier texts.
2. See footnote as regards accession of the EU to the ECHR in Ch. 1 herein.
3. Case C-432/05, *UNIBET* (2007) ECR I-2271 at para. 37.

Bentham's principle of rectitude of decision.[4] That being said it is necessary to look at some of the other dimensions which affect the operation of the Community Courts in anti-trust enforcement in order to better focus upon discretion which it exercises in the application of the Merger Control Regulation.[5] It is here that the role of the European Commission is crucial. Pursuant to this Regulation, in conjunction with Articles 101 and 102 TFEU, the European Commission deals with infringement of the rules of competition law. Such enforcement concerns the examination of both events in the past as well as current or ongoing events. This process requires evidence of past or current events. By contrast, in the application of the Merger Control Regulation the Commission considers a hypothetical situation in the future in the event of the proposed merger being carried out. In contrast to the application of Articles 101 and 102 TFEU, the application of the Merger Control Regulation requires consideration of what might be termed informed speculation.

In short it is necessary to distinguish the procedure adopted by the Commission in relation to its performance of each of these roles. In the first case, this may (but does not necessarily) involve the imposition of penalties and, therefore to that extent only, the exercise of a criminal or quasi-criminal jurisdiction. In the second case, the Commission's decision may have financial and other adverse consequences. However, the jurisdiction is not in any sense a criminal jurisdiction. The distinction between investigation, prosecution and judgment is relevant to the first type of investigation but not to the second or at least not in the same way as in the first. It is only the second role, namely, that which involves the Commission in the application of Merger Control Regulation[6] and assessments based upon informed speculation that concerns this analysis.

Further, generally, the structural relationship between the Commission and the Community Courts is established clearly by the Treaties, the Statute of the Court and the Rules of Procedure none of which are within the control of either the Court or the Commission. In this regard, the Court's jurisdiction is essentially, in English terms, one of judicial review. However, the rules and the procedures of the Competition Appeal Tribunal (CAT) illustrate how this role and its exercise may vary depending on the subject matter and whether the Court has an appellate role in relation to facts. By contrast, the role of the Court in relation to non-contractual liability which is the context in which the Court's procedural discretion is examined in this book is quite different. The action is a self-standing action governed by its own procedural rules and

4. A. Zuckerman, *Civil Procedure*, 2nd edn (Oxford, OUP, 2006), 7 at note 17.
5. Merger Control Directives Council Directive (EC) 139/2004 (on the control of concentrations between undertakings (OJ L 24, 29.1. 2004)).
6. Merger Control Directives Council Directive (EC) 139/2004 (on the control of concentrations between undertakings (OJ L 24, 29.1. 2004).

applies principles of an autonomous 'Community' form of tort law.[7] It is not a form of judicial review. The role of the Court there is strictly to determine whether the applicants have proved the case which they have set out to prove. Success depends on the applicants demonstrating that there has been a 'violation suffisamment caractérisée'. According to Edward[8] 'the scope for "case management" is strictly limited'. Continental judges insist in this context on the 'passivité du juge'. This particular stance constitutes what might be termed a pierre d'achoppement. This is so insofar as the concept of the passivité du juge, that is, non-active case management, when coupled with the application of opaquely drafted rules of pleading and the restrictive appointment of experts may lead to information or evidentiary deficits. As a result, the claim for compensation pursuant to Article 340 TFEU is struck out by reason of the basic elements of the cause of action not be established to a minimal level.

The striking out by reason of information deficiencies engendered by the rules of procedure applied by the Court, according to the analysis herein, contravene Article 6(1) ECHR as well as the principles of effective judicial protection and rectitude of decision. Taking into consideration the inability to modify its own rules of procedure,[9] it is clear nevertheless that the major source for the responsibility for this situation is that of the Court and the manner in which it has interpreted its rules and particularly the use of its concept of non-active case management.[10] Because at this point in time the number of actions brought pursuant to Article 340 TFEU for damages against the Commission following an adjudged erroneous decision pursuant Merger Control Regulation[11] is still relatively small, examples of the operations of the Court rules of procedure have been taken from other areas of enforcement. It remains, however, that the essential focus is the use of Article 340 TFEU as a method of compensation for victims of the Commissions errors in first instance and

7. P. Lasok, T. Millett & A. Howard, *Judicial Control in the EU* (Richmond, Richmond Law & Tax, 2004), 79: 'It is clear from the terms "in accordance with the general principles common to the laws of the Members States" (Art. 340 TFEU) that no specific rule of national law is to govern non-contractual liability of the Community. This provision gives the Court a mandate to decide what it considers to be the "general principles" common to the laws of the different Member States and thus develop a body of Community rules governing the matter.'
8. Private email dated 18 June 2011. See also: A. Jolowicz, *On Civil Procedure* (Cambridge, CUP, 2000), 86.
9. Article 204 TFEU provides that the Court shall adopt its own rules of procedure which require the unanimous approval of the Council.
10. See the difficulties of expanding the case management in such as the system in A. Jolowicz, *On Civil Procedure* (Cambridge, CUP, 2000), p. 86.
11. Merger Control Directives Council Directive (EC) 139/2004 (on the control of concentrations between undertakings (OJ L 24, 29.1.2004).

in second instance, as a more general control of the Commission along side judicial review.[12]

12. It would appear that the action for non-contractual liability may serve as a substitute in some cases for judicial review: P. Lasok, T. Millett & A. Howard, *Judicial Control in the EU* (Richmond, Richmond Law & Tax, 2004), observe at p. 82:

> The establishment of the independent nature of the action for damages founded upon non-contractual liability is no mere procedural point. Had it been held that an action for annulment or an action for failure to act was a prerequisite of an action for damages the action for damages would thereby have become subject to the stringent time limits and locus standi requirement which restrict the right to bring the other actions. The Court however established that the action founded on non-contractual liability is an independent remedy and it follows form this that it obeys its own rules in particular as regards locus standi. It is also clear from the rulings in which the Court has established the independent nature of the action founded on non-contractual liability that the Court accepts that such an action may at least as regards the particular applicant lead to a result similar to that of an action for annulment or an action for failure to act. Hence the action founded on non-contractual liability is available as an indirect means of challenging the legality of Community acts or inactivity either outside the short time limits or at the suit of persons who did not fulfil the stringent locus standi requirements laid down for the action for annulment and the action for failure to act (Cases 9, 12/60 *Société Commerciale Q Vloeberghs SQ v. High Authority* (1961) ECR 197).

Summary of Contents

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Chapter 1
Summary of Objectives of the Analysis

1. SUMMARY OF OBJECTIVES OF THE ANALYSIS

In the course of the analysis presented in the following chapters, an attempt will be made to ascertain to what extent certain rules of civil procedure[1] used both by the

1. According to the website, <www.curia.europa.eu> 'The General Court has its own Rules of Procedure. In general the proceedings include a written phase and an oral phase.' The legislative instruments which provide for the procedure are as follows: 'Protocol (No 3) Statute of the Court: On the Statute of the Court of Justice of the European Union: Art. 21 "A case shall be brought before the Court of Justice by a written application addressed to the Registrar. The application shall contain the applicant's name and the permanent address and the description of the signatory, the name of the party or names of the parties against whom the application is made, the subject-matter of the dispute, the form of order sought and a brief statement of the please in law on which the application is based." Notices from the European Union Institutes, Bodies, Offices and Agencies: General Court: Consolidated Version of the Rules of Procedure of the General Court (2010/C 177/02) Court of Justice, Consolidated Version of the Rules of Procedure of the Court of Justice (2010/C 177/01) Art. 44 (CFI) Art. 38 (ECJ) 1.' An application of the kind referred to in Art. 21 of the Statute shall state: '(c) the subject-matter of the proceedings and a summary of the please in law on which the application is based. "Practice Directions to Parties: (Consolidated Version) Art. 15." Legal arguments should be set forth and grouped by reference to the particular please in law to which they relate and ideally each argument or group of arguments should be preceded by a summary statement of the relevant plea. In addition, pleas in law put forward should be ideally each be given a heading to enable them to be identified easily. 16. The precise wording or the form of order sought by the applicant must be stated either at the beginning or at the end of the application.' Art. 64 (CFI) 'Section 1 Measures of organisation of procedure: Article 64: 1. The purposes of measures of organisation of procedure shall be to ensure that cases are prepared for hearing, procedures carried out and disputes resolved under the best possible conditions. They shall be prescribed by the General Court after hearing the Advocate General. 2. Measures of organisation of procedure shall in particular, have as their purpose: (b) to determine the points on which the parties must present further argument or which

General Court (GC) (formerly, the Court of First Instance (CFI))[2] and the European Court of Justice (ECJ) may lead to violations of Article 6(1) ECHR as well as the principles of effective judicial protection and rectitude of decision. Their application will be analysed in the context of direct actions for non-contractual liability, pursuant to Article 340(2) TFEU (ex Article 288). This particular cause of action may be used to recover damages for errors caused by the European Commission in the application of the Merger Control Regulation.[3] However, the real focus of the

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call for measures of inquiry; (c) to clarify the forms of order sought by the parties, their pleas in law and arguments and the points at issues between them.' Section 2 Measures of Inquiry: Art. 65 (Art. 45 ECJ Rules of Procedure of the Court of Justice 2010/C 177/01) 'Without prejudice to Articles 24 and 25 of the Statute the following measures of inquiry may be adopted: (d) the commission of an expert's report'; R. Plender, *European Courts Practice and Precedents* (London, Sweet & Maxwell, 1997), at 3 observes: 'The European Court of Justice (ECJ) is the judicial institution of the European Communities. It was created by the treaty that established the European Coal and Steel Community (ECSC) of April 18, 1951.' At p. 5 'The common origin of the ECJ, EFTA (European Free Trade Association) Court is more evident. The rules of the ECJ and the EFTA Court are clearly based on the model of the rules of procedure of the International Court of Justice of May 6 1946 .... The rules of procedure of the CFI were adopted on 2 May 1991 (1991) OJ L 136/1) and after a corrigendum (1991) OJ L 317/34) they were amended in 1994 consequent upon the extension of that court's jurisdiction (1994) OJ L 249/17) and further amended in 1995 following the further enlargement of the jurisdiction of that court to encompass intellectual property matters (1995) OJ L172/3.' Further, R. Plender, *European Courts Practice and Precedents* (London, Sweet & Maxwell, 1997), at p. 24, observes: 'The provisions governing the existence of Community courts, the actions which may be brought before them and the procedures to be applied are contained in various instruments of differing legal character which again poses problems in relation to the division between them and their inter-relationship.' Art. 254 TFEU, provides: 'The General Court shall establish its Rules of Procedure in agreement with the Court of Justice. Those Rules shall require the approval of the Council. Unless the Statute of the Court of Justice of the European Union provides otherwise the provisions of the Treaties relating to the Court of Justice shall apply to the General Court.' Accordingly, the Courts do not have the power to modify propio motu. As a result of the adoption of the Treaty of Lisbon in 2010 the approval of the Court's Rules of Procedure by the Council is now done by a qualified majority.

2. However, it is also necessary to take into account the interpretation of the rules by the ECJ (CJ) particularly, for the period prior to the establishment of the General Court) or simply GC established 1 January 1989–30 November 2009.
3. After many years of deliberation, a Community merger regime was introduced in December 1989 with the adoption of Council Regulation 4064/89 (OJ L 395/1, 1989 corrected by OJ 1990 L 257/13) which was replaced by Council Regulation 139/2004 which is now the main instrument for the control of mergers, acquisitions and other concentrations under EC competition law: Merger Control Directives Council Directive (EC) 139/2004 (on the control of concentrations between undertakings (OJ L 24, 29.1.2004); Commission Regulation (EC) 802/2004 (implementing Council Regulation (EC) 139/2004 on the control of concentrations between undertakings (OJ L 133, 30.4.2004). According to P. Lasok, *European Court of Justice: Practise and Procedure*, 2nd edn (London, Butterworths, 1994), at 36 'In direct actions the importance of evidence depends on the provision giving the Court jurisdiction. Broadly speaking these fall into three categories: (1) those which set a specific limitation to its jurisdiction over the facts; those which set no specific limitation (e.g. EC Art. 173) (now Art. 190 TFEU) and (3) those which provide that the Court has "unlimited jurisdiction" (e.g. EC Art. 172) (now Art. 188 TFEU).' According to P. Lasok QC and T. Millett, *Judicial Control in the EU* (London, Richmond, 2004), at p. 80, ex Art. 288 now Art. 340 TFEU constitutes an example of unlimited jurisdiction: 'In actions founded on non-contractual liability the Court has "unlimited jurisdiction." This means that