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MY PLEA FOR AN EU COMPETITION COURT

The scope of this contribution is to argue that the enforcement of the European Union competition rules requires a significant overhaul with respect to the judicial phase of this process.

Since the first years of the European Communities the enforcement of the competition rules has been entrusted to the European Commission, an administrative body with a variety of attributions in the construction of the common market and later the internal market of what is today the European Union. At that time the competition rules were regarded as an instrument for eliminating the barriers among the member states that were hindering the free flow of goods and services in the common/internal market^[1].

Time went on and while the strengthening of the internal market is still work-in-progress, the role played by the competition rules in this process seems to be less important than before. Instead, other goals take pre-eminence, this time not based on a certain process but rather on certain industries or other goals. Nowadays the EU competition enforcement is called to respond to new challenges and chief among these is the concern regarding the increasing market power of the large technology companies. Accordingly, a large part of the resources at DG Competition is now reserved to handling matters in this part of the economy. The new focus on the situation in the technology industry has been officially assumed in 2019, when the Competition Commissioner received additional attributions as "Executive Vice-President for a Europe Fit for the Digital Age" from the President of the European Commission, Mrs. Ursula von der Leyen^[2]. The shift towards the scrutiny of large companies has been accompanied by a shift towards the investigation of abuses of dominant position, which are more complicated cases, compared to the anticompetitive agreements and practices.

In parallel with these changes, the last decade witnessed jurisprudential developments that can be summed-up as raising the bar regarding the right of defence and the due process in the enforcement of the competition rules. Due to the importance of competition and the high level of the fines for infringing the competition rules, this area of the law, which was already next to the criminal law, is now considered to be already with one foot in the criminal law. These considerations stem from the ruling of the European Court of Human Rights ("ECtHR"), which acknowledged that the standard of evidence for demonstrating competition law infringements is similar to that applicable for the most serious wrongdoings, the crimes. In its jurisprudence, ECtHR stopped short from considering that the current administrative (prosecutorial) system is not complying with the requirements of article 6 (1) of the European Convention on Human Rights, insofar as a further analysis of the administrative decision by the courts is subject to a full review.

Today it is highly questionable if the required standard stated by ECtHR is truly met in the proceedings of most courts in the EU member states or even at ECJ, given the "asymmetry" these courts are facing when dealing with complex cases, documented by competition authorities which are for sure savvier than the judges in the assessment of the infringements of the competition rules. Against this background, a full review of an administrative decision in competition matters by the judges at the Court of Justice of the European Union requires that the competent court includes judges with a specific legal background in this area.

It is important to underline that the number of competition-related cases brought before the Court of Justice of the European Union is on the rise, alongside an increased activity of the European Commission and more references for a preliminary ruling from the national courts.

In this ambit it would be appropriate and to the benefit of the EU competition enforcement that the sanctions for infringement of the EU competition rules are adopted by a specialized court, established in the frame of the Court of Justice of the European Union.

How such a court could be established?

Article 19 of the Treaty on the European Union (TEU)

1. *The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.*

Article 257 of the Treaty on the Functioning of the European Union

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish specialised courts attached to the General Court to hear and determine at first instance certain classes of action or proceeding brought in specific areas. The European Parliament and the Council shall act by means of regulations either on a proposal from the Commission after consultation of the Court of Justice or at the request of the Court of Justice after consultation of the Commission.

The regulation establishing a specialised court shall lay down the rules on the organisation of the court and the extent of the jurisdiction conferred upon it.

Decisions given by specialised courts may be subject to a right of appeal on points of law only or, when provided for in the regulation establishing the specialised court, a right of appeal also on matters of fact, before the General Court.

The members of the specialised courts shall be chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to judicial office. They shall be appointed by the Council, acting unanimously.

The specialised courts shall establish their Rules of Procedure in agreement with the Court of Justice. Those Rules shall require the approval of the Council.

Unless the regulation establishing the specialised court provides otherwise, the provisions of the Treaties relating to the Court of Justice of the European Union and the provisions of the Statute of the Court of Justice of the European Union shall apply to the specialised courts. Title I of the Statute and Article 64 thereof shall in any case apply to the specialised courts.

Based on the above, we advocate for the establishment of a specialised court, attached to the General Court, which should decide on the vast array of competition and competition-related matters.

Valentin Mircea

^[1] Roger Van den Berh and Peter D. Camesasca, "European Competition Law and Policy, A Comparative Perspective", Sweet & Maxwell, 2006, pag.16-38.

^[2] https://ec.europa.eu/commission/commissioners/sites/default/files/commissioner_mission_letters/mission-letter-margrethe-vestager_2019_en.pdf



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