HOW EFFECTIVE IS JUDICIAL REVIEW IN EU COMPETITION LAW? A QUANTITATIVE AND QUALITATIVE ASSESSMENT

Introduction

With the rise of behavioral economics, it is no longer taboo to question the psychological mindset of established social institutions, such as politicians, policemen, regulators, and even famous Italian-American mobsters.

Given this, and the topic of this roundtable, why not focus for a minute on our judges' state of mind when it comes to competition cases?

Well let me tell you ladies and gentlemen: our EU judges have been quite acting strangely in recent years. In 2005, a member of the General Court literally freaked out in a raging editorial, calling his young colleagues "*Ayatollahs*" of free enterprise. Three years later, another eminent judge surprised the competition community in voicing frustration, repents over the outcome of his own court's ruling in the *Microsoft* case.

Those puzzling, unprecedented statements have a common origin: the effectiveness of judicial review in competition cases. Over the last decade, judges, but also competition law practitioners, scholars have come to passionate divides on this issue.

To date, most of those debates have revolved around bold assertions, based on unverifiable information and subjective personal experiences. In addition, very often, the discussion slipped to the distinct, yet related issue of the standard of judicial review. Finally, the literature does not draw distinctions amongst the various areas of EU competition law.

This is why my colleague Prof. Geradin of the University of Tilburg and I have tried to explore this issue with a new pair of glasses. Our ambition has been to objectively measure the performance of the General Court's scrutiny in competition cases. To this end, we have followed a two stages approach. We have first sought to clarify the goals of judicial review. Then, we have tested statistically the GC's performance in relation to each of those goals.

I. The Functions of Judicial Review

But let me start with a common sense point: any measure of effectiveness, or performance, must be made in relation to a goal, or some goals.

Now, when turning first to the question of the goals of judicial review, European law scholars often tersely say that judicial review seeks to protect the "*rule of law*". This concept is, however, very abstract and multi-faceted. It lends itself poorly to measurement.

A more accurate definition of the function(s) of judicial review is thus needed. Our review of the literature indicates that lawyers, economists and political scientists assign three distinct functions to judicial review.

For lawyers first, judicial review discharges a "*rights-based function*". It is a means to safeguard *non majoritarian* values. Those values cover substantive and procedural principles, which should be secluded from the influence of cyclical political changes. Think for instance to the right to free speech, the general principle of proportionality, or core substantive competition principles, such as the hardcore nature of market partitioning agreements.

In contrast to the "*rights-based*" approach of lawyers, economists take an "*outcome-based*" perspective on judicial review. In their view, it serves primarily to promote economic welfare through the elimination of decisional errors, in particular type I errors, which have adverse effects on society. In turn, judicial review is an incentives device. It induces regulators to craft welfare-enhancing decisions, for fear of having these decisions subsequently struck down.

Finally, political scientists perceive judicial review as an instrument of "*good governance*". The delegation of regulatory powers, from the government to independent agencies generates a risk of "*moral hazard*". In the presence of informational asymmetries, agencies may act in their own interest, and undermine the purpose of the delegation. This is because agencies are exposed to capture (from the private sector), subject to biases, and so on.

Now a key tenet of Principal-Agent theory is that moral hazard can be limited through "*accountability*" mechanisms. Judicial review is one of them. To draw an illustration from competition law, DG COMP's internal reforms of 2004 – which followed a string of annulment judgments – give an illustration of the accountability dimension of judicial review.

II. Quantitative Assessment of the GC's Judicial Review

So much for the theory. Now that the goals of judicial review are clearer, it is time to see how it has performed in practice. To avoid the uncertainties that have contaminated past debates, we have used first-hand empirical data, namely a dataset of 207 competition judgments

delivered by the GC 2000 and 2010. On the slide, you can see an overview of this dataset, broken down per provision. The sample does not cover State aid.

Table I – Overview of the Dataset									
Provision	**Article 101**			**Article 102**			**EUMR**		
Source	Total	Orders	Judgments	Total	Orders	Judgments	Total	Orders	Judgments
Total	**148**	18	130	**39**	7	32	**30**	8	22

With this data, we have measured the performance of judicial review in relation to its two first functions. In the interest of time, I'll be quick on the first function. We have counted notably the number of quotes of the ECHR and general principles in the case law. If our results say one thing, it is that the case-law of the GC is thus not ineffective in fulfilling the "*rights-based*" function of judicial review. However, the dataset also shows that a vast majority of cases – around 2/3 of them – involve essentially standard, technical competition law discussions. This indicates that the "*rights-based*" function of judicial review is not the Court's primary function.

Let me now turn to the performance of the GC in relation to the second goal of judicial review, i.e. the elimination of decisional errors. In a seminal paper, a Harvard Law School Professor, Steven Shavell explained that rational applicants only start annulment proceedings against unlawful decisions. Hence, an effective judicial review system – one which removes all decisional errors – should annul all challenged decisions. Shavell's point is however wholly unrealistic. An optimal 100% annulment rate cannot be observed simply because annulment applicants often erroneously challenge lawful decisions. That said, Shavell's article is nonetheless useful: it suggests that an effective, welfare-enhancing system of judicial review will at least quash a minimum number of negative decisions.

With this background, our research shows that the EU judicial review system fulfills, at least to a certain extent, its economic function. In the field of merger control, we find 4 annulments out of 7 incompatibility decisions; under Article 101 TFEU, we find 31 annulments out of 117 infringement decisions.

Table IX – Number of Annulment Judgments on Incompatibility/Infringement Decisions

Provision	EUMR	Article 101	Article 102
Total	4/7 (57.1%) (full:4)	31/ 117 (26.5%) (partial: 23) (full: 8)	4/14 (partial: 4) (full: 0)

However, the conclusion is different in relation to Article 102 TFEU. In this field, no infringement decision was ever annulled in full. The few annulled decisions were only partially quashed. In those cases, the Court upheld the decision's main substantive findings.

This odd finding of Commission relative immunity in Article 102 TFEU cases is confirmed by other indicators. The GC often reduces the fines imposed for infringements of Article 101 TFEU, with almost 45% of applications leading to a fine reduction. In contrast, under Article 102 TFEU, only 2 out of 11 cases have given rise to a reduction of the fine.

Table X – Number and Rate of Revised Fines on article 261 Applications (on fines grounds only)		
Provision	Article 101	Article 102
Total	38/87 (43.7%)	2/11 (18.2%)

This trivial rate of annulment judgments casts doubt on the effectiveness of judicial review in abuse cases. Of course, the Commission may well have been right in all cases appealed to the GC (or the appealing lawyers very bad). But, in my opinion, this "*success story*" does not fly. It is contradicted by the existence of many annulment judgments in the other areas of competition law, and, in particular in areas where (i) negative decisions are less frequent; and (ii) the Court recognizes a larger margin of maneuver to the Commission.

There is another plausible explanation to the quasi-immunity of Commission decisions in Article 102 TFEU. It has to do with the Court's observance of forms-based legal appraisal standards, and its reluctance to endorse a more – not a full – modern economic approach. As a

result, the Commission's Article 102 TFEU decisions would systematically avoid annulment in Luxembourg.

We tried to test this explanation with two sets of parameters. First, we have measured the degree of reliance of the GC on old precedents in abuse cases. This has produced interesting results. For instance, the most popular judgment in the case-law of the Court's is *Michelin II*. Yet, this judgment is almost unanimously described as a striking piece of formalism.

Second, we measured the Court's openness to general economic concepts in Article 102 TFEU cases. We have selected 14 conventional economic terms from the *OECD Glossary of Industrial Organisation Economics and Competition Law*. In turn, we searched those concepts in the text of the 30 abuse of dominance judgments handed down by the GC.

Table XII – Mainstream Economic Concepts in Article 102 TFEU Judgments	
Market power	7/30 (23.3%)
Collusion	3/30 (10%)
Economies of scale (economy of scale)	8/30 (26.7%)
Oligopoly	5/30 (16.7%)
Allocative efficiency	0/30 (0%)
Profit-maximization	2/30 (6.7%)
Consumer welfare	0/30 (0%)
Elasticity (of demand)	2/30 (6.7%)
Efficiency	12/30 (40%)
Market failure	1/30 (3.3%)
Rent	0/30 (0%)
Transaction cost(s)	0/30 (0%)
Opportunity cost(s)	1/30 (3.3%)
Herfindahl-Hirschmann Index (HHI)	1/30 (3.3%)
SSNIP test	0/30 (0%)

Our review suggests that the GC does not accommodate mainstream economic concepts within the realm of its Article 102 TFEU case-law. For instance, the concept of "*consumer welfare*", which has been elevated as the alpha and omega of competition policy in Europe and in the US, is not even cited once in the case-law of the GC. Same story for the SSNIP test, or to a lesser extent for the HHI Index, which constitute standard instruments for the assessment of dominant positions.

The data thus tends to confirm the hypothesis that the GC is reluctant to embrace a more economic approach in the area of abuse of dominance.

Interestingly, finally, the fact that applicants often lose before the GC is not due to the fact that the Court would apply weaker standards of review to abuse of dominance cases.

Judgments such as *Microsoft*, or more recently *Tomra*, review in great details the challenged Commission decision.

Conclusion

It is now time to conclude. One of our interesting findings is that the case-law exhibits a sense of schizophrenia, with respect to the "*promotion of welfare*". The Court struck down several Article 101 and merger control decisions. In contrast, the Court's review has been much less effective in Article 102 cases.

A tentative explanation for this may be in the numbers. After all, there's not that many abuse cases, as compared to other areas. But numbers are also low in the merger area, and annulments there are more frequent.

In reality, the legal tests developed by the Court in abuse cases are sometimes so strict that they can accommodate any Commission decision even if incongruent with elementary economics or common sense. In other words, the problem is not one of judicial deference in abuse cases, but one of defective rule-making. The situation is different in Article 101 and merger cases. Here, the GC has been keen to define, and refine, legal standards in light of modern advances in economic theory: think of *Airtours*.

To improve the effectiveness of his judicial review, the Court could modernize the legal standards applied to dominant firm conduct. The Commission has given it a blueprint, with the release of a Guidance Communication on Exclusionary Abuses. Maybe time is ripe for the judges to use it and enforce it?

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