Law, Policy, Expertise: Judicial Review in EU Competition Law

Pablo Ibáñez Colomo
London School of Economics and College of Europe

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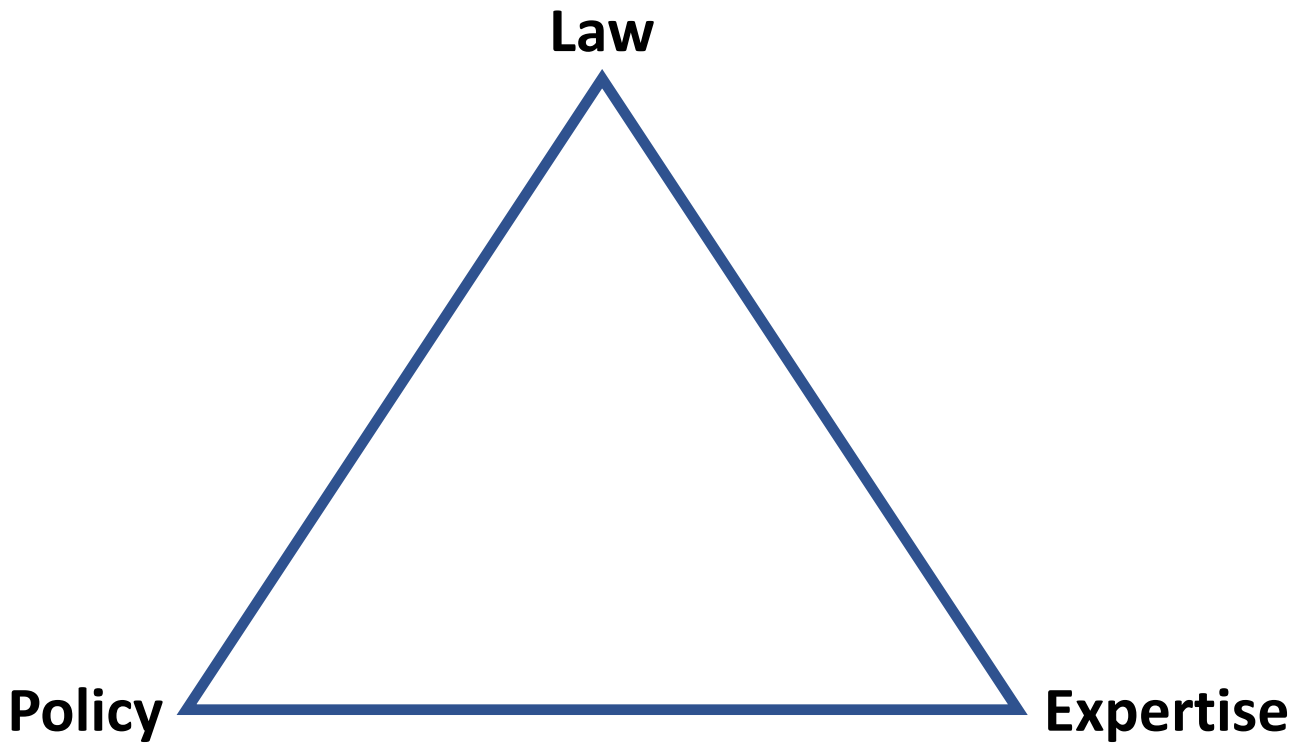
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- By definition, issues of law and of policy are intertwined in EU competition law:
  - The European Commission enjoys discretion to define its policy priorities, and thus how it makes use of its limited resources
  - Policy choices, however, are implemented through law, and have to remain within the boundaries of what the law allows
  - Law constrains policy-making and policy choices as a result:
    - For instance, the need to establish dominance when conduct is unilateral
    - For instance, the need to identify an agreement or a concerted practice in the context of Article 101 TFEU

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- The relationship between law and policy is a challenge, in particular, in the context of judicial review
  - Issues of law are subject to ***full judicial review***:
    - It is for the Court of Justice to state what the law is
    - It is not enough that the authority's interpretation of the law is reasonable
    - Full judicial review is all the more important in light of the institutional setup and the nature of the fines imposed
  - Issues of policy are subject, if at all, to ***marginal review***: the Commission enjoys discretion to define its policy priorities

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- It may be difficult, in practice, to distinguish between issues of law and of policy
  - To the extent that policy is implemented through law, the annulment of a decision may amount to questioning a policy choice
  - By the same token, some deference on issues of law may occasionally seem inevitable to avoid interfering with a policy choice

→How can judicial review remain and be seen as effective without questioning policy choices?

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- The case law provides some hallmarks of effective judicial review, including the following:
  1. Policy must be implemented through clear legal criteria that can be anticipated and subject to judicial review
  2. Policy must be grounded on the expert consensus
  3. Policy-making must be consistent with prior commitments
  4. The relevant economic and legal realities must be considered
  5. Consistency within and across provisions

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- Policy must be implemented through clear legal criteria that can be anticipated and subject to judicial review
  - Unstructured legal tests that revolve around the authority's assessment are unlikely to survive judicial review
  - Such tests amount in practice to giving de facto discretion to the administrative authority

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‘173. The approach taken by the Commission in the contested decision amounts in practice to confusing three concepts, namely the concept of a “significant impediment to effective competition”, which is the legal criterion referred to in Article 2(3) of Regulation No 139/2004, the concept of “elimination of [an] important competitive [constraint]”, referred to in recital 25 of that regulation, and the concept of elimination of an “important competitive force”, used in the contested decision and based on the Guidelines. ***By confusing those concepts***, the Commission considerably broadens the scope of Article 2(3) of Regulation No 139/2004, since ***any elimination of an important competitive force would amount to the elimination of an important competitive constraint*** which, in turn, would justify a finding of a significant impediment to effective competition’

Case T-399/16, *CK Telecoms*

SIEC test under Regulation 139/2004	**Conditions**
Single dominance (non-coordinated effects)	Dominant position as defined in *Hoffmann-La Roche*
Collective dominance (coordinated effects)	(i) ability to monitor rivals' behaviour; *and*
	(ii) availability of deterrence mechanisms; *and*
	(iii) outsiders' reaction unable to jeopardise common course of action
'Gap' cases (non-coordinated effects)	(i) elimination of important competitive constraints between the parties; *and*
	(ii) reduction of competitive pressure on remaining competitors

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- Policy must be grounded on the expert consensus:
  - The authority's discretion does not extend to the choice of the expertise on which it relies
  - If the authority's discretion were extended to the nature of the expertise, it would be able to choose the most accommodating framework
  - For the same reason, it would have a significant impact on the intensity of judicial review

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‘71. In determining the probative value of those different factors, it must be noted that ***parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct***. It is necessary to bear in mind that, although Article [101] of the Treaty prohibits any form of collusion which distorts competition, it does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors’

Joined Cases C-89/85 and others, *Wood Pulp II*

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- Policy-making must be consistent with prior commitments
  - The EU courts expect that commitments to exercise discretion in a particular manner will be honoured by the Commission
  - If the Commission wishes to depart from a prior commitment, it must at least explain why it is appropriate to do so in a particular context
  - This hallmark of effective judicial review looks like a natural manifestation of the principle of good administration

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‘499. Consequently, there being no need to give a ruling on the Commission’s arguments regarding HP’s market share, it must be held that ***the Commission failed to determine the share of the market covered by the practice at issue***, contrary to the requirement placed on it pursuant to paragraph 139 of the judgment on the appeal. It should be added that that is, moreover, contrary to the Commission’s own guidelines on the analysis of cases falling within the scope of Article 102 TFEU, and in particular ***contrary to paragraph 20 of the Guidance on the Commission’s enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings*** (OJ 2009 C 45, p. 7)’

Case T-286/09 RENV, *Intel*

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- The relevant economic and legal realities must be considered
  - The question of whether a practice amounts to a competition law infringement is a context-specific exercise
    - For instance, whether an agreement has, as its object, the restriction of competition
    - For instance, whether a practice is likely to have anticompetitive effects
  - If a firm provides evidence capable of casting doubts on the premises on which the interpretation is based, it must be considered by the Commission
  - A failure to consider evidence in this sense will lead to the annulment of the decision

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‘138. However, that case-law must be further clarified in the case ***where the undertaking concerned submits***, during the administrative procedure, on the basis of supporting evidence, ***that its conduct was not capable of restricting competition*** and, in particular, of producing the alleged foreclosure effects.

139. […] In that case, the Commission is not only required to analyse, first, the extent of the undertaking’s dominant position on the relevant market and, secondly, the share of the market covered by the challenged practice, as well as the conditions and arrangements for granting the rebates in question, their duration and their amount; it is also required to assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market […]’

Case C-413/14 P, *Intel*