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REVIEW BY COURTS OF DECISIONS OF COMPETITION AUTHORITIES

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Overview

- Introductory Remarks
- Decisions by Competition Authorities (e.g. by European Commission)
- Who Decides on Competition Rules?
- General Applicability
- Consequences as to Generally Applicable Rules
- Consequences as to Rules not Generally Applicable
- Case Law of European Courts



Introductory Remarks

- Question to be answered: What is the standard of judicial review when courts decide on appeals against decisions by competition authorities?
 - Does the competition authority enjoy a margin of appreciation when assessing complex economic issues?
 - Do the courts have to review with scrutiny any detail of a decision taken by an administrative body?
- What kind of administrative decisions are we looking at?
 - European competition rules as a starting point



Introductory Remarks ...

■ Distinction in German law

- Margin of discretion
 - Relates to legal consequences (discretion of competition authority to start proceedings)
- Margin of appreciation or scope for judgment evaluation
 - Relates to legal terms which call for a legal assessment



Decisions by Competition Authorities (e.g. by EU Commission)

■ What kind of administrative decisions are we looking at?

- Article 101(1) TFEU: Decision enjoining cartels (*agreements between undertakings ... which have as their object or effect the prevention, restriction or distortion of competition within the internal market*)
- Article 101(3) TFEU: Exemption under certain conditions (*... may, however, be declared inapplicable ...*)
- Article 102 TFEU: Decision enjoining abuse of dominant market position (*Abuse by ... undertakings of a dominant position ...*)
- Article 2(3) ECMR: Decision enjoining a merger (*A concentration which would significantly impede effective competition ... shall be declared incompatible with the common market*)



Who Decides on Competition Rules?

- European Commission

- Decentralised application of European Competition Law

 - National competition authorities

 - Civil courts in the Member States

 - Validity of contracts (Article 101(2) TFEU: *Any agreements ... prohibited pursuant to this Article shall be automatically void*)

 - Is agreement exempted according to Article 101(3) TFEU?

 - Action for damages following an infringement against Article 101 or 102 TFEU



General Applicability

■ General applicability of Competition Rules

- Article 101(1) TFEU
- Article 101(3) TFEU
- Article 102 TFEU

■ No general applicability of Merger Regulation

- Monopoly of Commission to decide on prerequisites of enjoinment of a merger

■ Consequences as to margin of appreciation

- If Commission enjoys a margin of appreciation what about
 - competition authorities of Member States?
 - civil courts of Member States?



Consequences as to Generally Applicable Rules

- No margin of appreciation whenever a law is generally applicable by competition authority and civil courts
 - Civil court deciding on validity of a contract or on damages in the context of Article 101 TFEU has to decide
 - whether or not an agreement has as its object or effect the prevention, restriction or distortion of competition according to Article 101(1) TFEU
 - whether or not an agreement is exempted according to Article 101(3) TFEU
 - Contract is either valid or void leaving no room for any margin of appreciation



Consequences as to Generally Applicable Rules ...

- No margin of appreciation whenever a law is generally applicable by competition authority and civil courts ...
 - Civil court deciding on damages has to decide in the context of Article 102 TFEU
 - how the relevant market has to be defined
 - whether or not an undertaking is dominant in a specific market
 - No reason why this should be different when courts decide on appeals against decisions of competition authorities



Consequences as to Rules not Generally Applicable

■ Merger control

- Margin of appreciation theoretically feasible because there is a monopoly of competition authority to decide on conditions of merger control
- Question on constitutional grounds
 - Should government agencies be allowed to enjoin a merger on grounds which are not open to judicial control?
 - Answer according to German constitutional law: Clearly not!

■ Same is true for rules generally applicable

- Should government agencies be allowed to fine citizens and private companies on grounds which are not open to judicial control?
- Answer should be: Clearly not!



Case Law of European Courts

- General opinion: wide margin of appreciation
- Example: *Microsoft v. Commission*, Judgment of 27.9.2007 - T-201/04
 - [87] *Although as a general rule the Community Courts undertake a comprehensive review of the question as to whether or not the conditions for the application of the competition rules are met, their review of complex economic appraisals made by the Commission is necessarily limited to checking whether the relevant rules on procedure and on stating reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers.*
 - [88] *Likewise, in so far as the Commission's decision is the result of complex technical appraisals, those appraisals are in principle subject to only limited review by the Court, which means that the Community Courts cannot substitute their own assessment of matters of fact for the Commission's.*



Case Law of European Courts ...

■ Example: *Microsoft v. Commission*, Judgment of 27.9.2007 - T-201/04 ...

- [89] However, while the Community Courts recognise that the Commission has a **margin of appreciation in economic or technical matters**, that does not mean that they must decline to review the Commission's interpretation of economic or technical data. The Community Courts must not only establish whether the **evidence put forward is factually accurate, reliable and consistent** but must also determine whether that **evidence contains all the relevant data** that must be taken into consideration in appraising a complex situation and whether it is **capable of substantiating the conclusions drawn from it**.



Case Law of European Courts ...

- Difference between legal theory and practice
 - In the old days: wide margin granted to Commission by ECJ
 - Things changed dramatically with the General Court
- My interpretation: Density of judicial control is a function of the expertise on the bench
 - ECJ in the early days: court not specialised in Competition law
 - General Court: from the start specialised court for competition matters
 - In spite of the old principles set out by the Court of Justice in the old days and repeated by the General Court in *Microsoft*, the General Court exercises judicial control with a high standard of scrutiny