Rule Enforcement and Dispute Resolution

Ever since the European Coal and Steel Community was conceived in 1950-51, all involved realized that to be successful, the European integration project required effective enforcement and conflict resolution. Only a solid and credible system would instill the confidence necessary to ensure compliance with the rules to which the Member States agreed to be bound. Over the last half century, the institutions designed to pursue these aims – the European Commission and the European Court of Justice (ECJ) – have been remarkably successful in staking their claim and developing a sophisticated framework of substantive law and remedies. This framework has been invoked not only by the member states but also by private parties, i.e., citizens and firms of the member states and of third countries alike. US companies, for example, are routinely involved in administrative investigations before the Commission (both as complainants and defendants) and in litigation before the European Courts (i.e., the ECJ and, since 1989, the Court of First Instance).

This overview lays out the essential characteristics of the EU's enforcement and adjudication system, focusing on institutional features (Section II) as well the bedrock rules concerning market access and competition (Section III). During the 1970s and 1980s, these rules were in many ways the heart and soul of European integration. Although these economically oriented aspects of integration are now flanked by more political fields that have risen in varying degrees to the supranational sphere, market access and competition are still very much at the core of the EU's unique legal system and integration project.

Enforcement and Adjudication in the EU: Institutional Features

A. Enforcement

Among its other duties, the European Commission is endowed with quasi-prosecutorial powers. As "guardian of the Treaties," it is charged with enforcing the fundamental rules laid down, in particular, in the Treaty establishing the European Community ("EC Treaty"). By virtue of Article 226 EC, the Commission may bring legal actions before the ECJ against the member states for failure to fulfill their obligations under the EC Treaty, e.g., by unduly interfering with cross-border trade. Although member states may likewise bring enforcement actions against other member states (Article 227 EC), in practice the Commission acts as primary enforcer, while other member states participate as interveners if the litigation is liable to affect their interests. However, as discussed below, the eradication of State-imposed barriers to cross-border trade has largely resulted from actions initiated by private parties. In a typical scenario, a private party may challenge national law in a national court on the ground that it is inconsistent with the market access provisions in the EC Treaty. Then, by way of a "preliminary reference"

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procedure (Article 234 EC), the national court refers the question to the ECJ for a ruling on the interpretation of those provisions.

The Commission may also open administrative investigations with respect to private parties for (among other things) anticompetitive conduct with cross-border effects. Such cases are sometimes litigated before the European Courts, for example if a defendant firm challenges a Commission decision to impose a fine or if a third party challenges a decision to close the file without imposing any penalties. Actions brought to "annul" a Commission decision are first heard by the Court of First Instance, whose judgments may be appealed – solely on points of law – before the ECJ. In contrast to the situation in the US, private enforcement actions have so far played a relatively limited role in the development of the EU's competition rules.

B. Adjudication

To the surprise of many, the European Community was not fated to be just another international organization: it evolved, almost unnoticed, into what is now recognized as a constitutional order. Moreover, the constitutionalization of the Community was achieved in an unusual way. Rather than being linked to any radical upheaval such as a revolution or war (although one of the underlying ideals of the Community was of course a lasting peace), the constitution of the Community was constructed judicially, primarily through the doctrines of supremacy and direct effect by the ECJ. The essentials of these famous doctrines are outlined below.

Supremacy

In the landmark case of *Costa v. ENEL* (case 6/64), the ECJ held that "[t]he reception, within the laws of each Member State, of provisions having a Community source, and more particularly of the terms and of the spirit of the Treaty, has as a corollary the impossibility, for the Member State, to give preference to a unilateral and subsequent measure against a legal order accepted by them on basis of reciprocity." In other words, national law, even if enacted subsequent to the EC Treaty (which entered into force on 1 January 1958), could not prevail over conflicting EU law: EU law took precedence. Furthermore, the Court has assigned to itself the role of ultimate arbiter as to the meaning and scope of those areas of EU law over which it has jurisdiction (including, e.g., market access and competition but excluding other areas – notably foreign policy and defense).

The ECJ has even proclaimed that EU law is supreme *vis-à-vis* national constitutional law. Different national supreme courts have reacted differently to such pronouncements. Indeed, some have rejected the Court's reasoning, taking the view that their deference to EU law is contingent and that things could change if the EU strayed off course, for example by rejecting the principle of democracy or by egregiously violating human rights. Nevertheless, despite this "pluralist" conception of the supremacy doctrine, for practical purposes the doctrine is accepted. It will even be enshrined in the EU's Constitutional Treaty (Article I-6) if the Treaty is lucky enough to survive the ratification process.

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Direct effect

The other important "constitutionalizing" principle created and developed by the ECJ is the doctrine of direct effect. To say that a provision of the EC Treaty or of secondary legislation has "direct effect" is to say that individuals may rely on it before national courts. In *Van Gend en Loos* (case 26/62), the Court declared that "this Treaty is more than an agreement creating only mutual obligations between the contracting parties [i.e., the Member States] … Community law … not only imposes obligations on individuals but also confers on them legal rights."

In order to have direct effect, a measure must be sufficiently clear and precise. It must be unconditional and must leave no room for the exercise of discretion in its implementation by national authorities or by the Community's institutions. Certain forms of legislation (e.g., regulations) may be more likely to have direct effect than others (directives). However, the fundamental Treaty rules on market access and competition were held in various early cases to be directly effective. The fact that these rules are contained in an international treaty has therefore not prevented them from being invoked by private litigants, sometimes to astonishing effect.

Market access and competition in the EU

A. Market access rules: developing a single market through the elimination of trade barriers

In the 1950s, the "fathers" of Europe anticipated that, by breaking down nationally-imposed barriers to trade, economic interpenetration across borders would lead to a single, "internal" market and would pave the way for a broader integration along political as well as economic lines. On the one hand, therefore, customs duties were abolished (Article 23 EC) and discriminatory taxes on imports were prohibited (Article 90 EC). On the other hand, and even more importantly for the constitutional development of the EU, rules were laid down to eliminate quantitative restrictions on imports and exports and all measures having equivalent effect.

Article 28 EC provides that "[q]uantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States." Article 29 sets forth a parallel rule for exports. Article 30 then provides for a narrowly-construed derogation from these rules, stating that Articles 28 and 29 "shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants . . . . Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States."[1]

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[1] *Since analogous (although not identical) rules and derogations apply in the areas of cross-border services, migrant workers and capital movements, it is common to speak of the EU's "four freedoms", i.e., the free movement of goods, services, workers (now extended to the free movement of "persons") and capital. In reality, the four freedoms are five, as they are complemented by the freedom of persons and firms already established in one member state to set up an establishment in other member states.*

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Article 28 was interpreted as casting a wide net in *Procureur du Roi v. Dassonville* (case 8/74), where the ECJ held that "[a]ll trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions." This broad formulation, the mechanical application of which fell hard on the member states, had to be tempered in the famous case of *Cassis de Dijon* (case 120/78). In *Cassis de Dijon*, the Court distinguished between those trading rules which on their face discriminated against imports in favor of domestic goods ("distinctly applicable measures") and those which were facially neutral ("indistinctly applicable measures"). While distinctly applicable measures are generally caught by Article 28 (although they may be justified under Article 30), indistinctly applicable measures are subject to a "rule of reason" and hence may not fall within Article 28 in the first place. As the Court explained, "[o]bstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted insofar as those provisions may be recognised as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer." Many different kinds of public interest, such as, e.g., environmental protection and the preservation of "national or regional socio-cultural characteristics", have been held to qualify as "mandatory requirements" sufficiently important to override the prohibition against trade barriers. However, member states may not justify such barriers on purely economic grounds.

If an obstacle to trade is in principle justified under the *Cassis* doctrine of mandatory requirements or under the enumerated grounds contained in Article 30 EC, it must in any event comport with the principle of "proportionality". That is to say, it must not go beyond what is necessary to advance the legitimate public interest concerned.[2] In practice, it is the issue of proportionality on which cases often turn.

Cassis de Dijon was a monumental judgment but it was not the end of the story. In *Keck and Mithouard* (cases C-267 & 268/91), the Court took dramatic steps to limit the application of Article 28, which had come to be a boilerplate defense invoked almost anytime national regulations were infringed. To stem the tide, the Court drew a further distinction between: (i) "product-bound" regulation (i.e., rules pertaining to size, weight, composition, labeling, packaging, etc.), which remained subject to the principles established in *Cassis de Dijon*; and (ii) "certain selling arrangements," to which Article 28 did not apply. The concept of "selling arrangements" is slippery but generally relates to the time, place or manner in which products are sold. Restrictions on selling arrangements may restrict the volume of imports sold insofar as they tend to limit opportunities for sales and/or promotion, as in the case, for example, of a ban on the

[2] One relevant factor may be whether the imported good has already been subject to a regulatory regime in the country of origin designed to pursue the same objectives. If so, then the principle of "mutual recognition" suggests that additional burdens imposed in the importing member state may be disproportionate.

operation of shops on Sundays. Such rules are unlikely to conceal protectionist aims. However, to qualify under *Keck and Mithouard* as a "selling arrangement," a measure must apply to all affected traders operating within the national territory and must have the same effect, *de jure* and *de facto*, on the marketing of both domestic products and imports.

Following a number of inconsistent early judgments by the ECJ, the trend in the case law indicates that, if imported products face, *de facto*, greater impediments to market penetration than competing domestic products, then the contested measure is likely to be examined in accordance with the *Cassis de Dijon* rule of reason. This might be the case, for example, where generally applicable advertising restrictions indirectly favor locally known brands over unknown brands from other member states.

B. Competition rules: policing against restrictive agreements and abuses of market power

Together with the market access rules discussed above, the competition rules are another crucial component of the EU's "economic constitution." Simplifying slightly, the EU's competition regime includes: (i) rules against direct and indirect "state aids" that unduly distort competition (Articles 87 *et seq.* EC); (ii) rules prohibiting large mergers and acquisitions that significantly impede effective competition in the EU, in particular where they create or strengthen a dominant position (Council Regulation 139/2004); and (iii) rules aimed at restrictive agreements and practices by firms operating on the market (Articles 81 and 82 EC). Although the rules on state aids and merger control are important provisions, the following discussion will be limited to the most famous and essential of the competition rules, namely, Articles 81 and 82.

Articles 81 and 82 are essential complements to the market access rules because the rules prohibiting member states from obstructing trade would serve little purpose if private undertakings were free to engage in anticompetitive practices (e.g., by fixing prices or dividing up markets), especially where such practices raise barriers to imports and exports. The objective of market integration has thus shaped EU competition policy in ways that have no precise equivalent in the US, where antitrust was never regarded as a tool to develop a "single market."

Article 81

Article 81(1) EC was inspired by Section 1 of the Sherman Act and is aimed at agreements and concerted practices which: (i) are capable of affecting trade between member states, a liberally construed criterion (failing which national competition law may still be relevant); and (ii) have as their purpose or effect the restriction of competition within the EU. Agreements and concerted practices meeting both criteria are in principle void and unenforceable, unless they are so negligible as to be *de minimis.* However, even agreements and practices that infringe Article 81(1) may be justified under Article 81(3) on the ground that their pro-competitive effects outweigh their restrictive effects on competition.[3] By virtue of important recent reforms (Regulation 1/2003), Article 81(3) is no longer the exclusive province of the Commission but may now also be applied by national courts and national competition authorities. The possibility of notifying agreements to the Commission for its blessing has been abolished and firms are now faced with the disquieting thought of even greater dependence on the advice of their lawyers and economic consultants.

To help firms cope with the new environment, some categories of agreements are presumed to justify an exemption under Article 81(3), provided the parties do not have significant market power[4] and are thus covered by "block exemptions." For example, such block exemptions apply in the areas of distribution and supply agreements, horizontal cooperation agreements, patent and know-how licensing, insurance agreements and transport.

The application of Article 81 in the area of anticompetitive horizontal agreements between competitors (i.e., cartels) is not particularly distinctive compared to the US approach: price fixing, market sharing and collective boycotts are illegal and attract heavy fines (up to 10% of worldwide group turnover) by the Commission.[5] The main substantive difference between the US and EU approaches to restrictive agreements is in the area of vertical agreements, i.e., distribution and supply agreements. In short, whereas non-price vertical restraints are generally assessed under the rule of reason under the US antitrust rules (*see Continental T.V. v. GTE Sylvania*, 433 U.S. 36 (1977)), in the EU the heightened sensitivity with respect to the partitioning of markets along national borders (as well as a perceived need for intra-brand competition among distributors and distribution techniques) has led to a relatively more strict approach.

This is evident above all in the case of territorial restraints: although a supplier may establish an exclusive distribution system with an exclusive dealer in each member state (*see STM v. Maschinenbau Ulm*, case 56/65), the ECJ held in *Consten and Grundig* (cases 56 & 58/64) that absolute territorial protection (whereby the supplier imposes total export bans on its dealers to make cross-border arbitrage impossible) is inimical to the single market and will not be tolerated. Less restrictive territorial restraints may be permitted where a number of conditions are met (e.g., the supplier's market power is an important factor). However, an exclusive distributor may only be prohibited from responding to unsolicited orders from customers in another distributor's exclusive

[3] *In order to qualify for this exemption, the agreement or practice in question must: (i) create efficiency gains (e.g., in the form of cost savings or new or improved products); (ii) ensure that consumers enjoy a fair share of such efficiencies (e.g., because cost savings will be passed on to customers); (iii) be indispensable to the achievement of the pro-competitive effects, with respect to both the agreement as such and the particular provisions that are restrictive of competition; and (iv) avoid eliminating competition in respect of a substantial part of the goods in question.*

[4] *In this context, market power is measured using market share thresholds of up to 30% or, in the case of agreements between competitors, a combined market share threshold of 20%. Exceeding the threshold does not trigger of a presumption of illegality, but the "safe harbor" ceases to apply.*

[5] *Criminal penalties may not be imposed at the EU level, although some member States, including notably the UK, have recently begun to criminalize such conduct.*

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territory in exceptional circumstances, such as where investments by the shielded distributor are necessary to open up a new geographic market.

Article 82

Article 82 EC is modeled on Section 2 of the Sherman Act and prohibits the abuse of a dominant position where such an abuse is capable of affecting trade between member states. Unlike Article 81, no exemption is provided for under Article 82, although some practices may be "objectively justified."[6] The divergence in the US and EU approaches to monopoly power is more pronounced than it is in the area of restrictive agreements (discussed above), as there is less faith in Europe in the self-correcting nature of markets.[7] To the contrary, although care is taken not to penalize firms for their success, once a firm has attained a dominant position it is in some ways treated almost as if it were an incumbent in a regulated industry.

A "dominant position" has been defined by the ECJ as "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition from being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers, and ultimately of consumers." (*See, e.g., United Brands v. Commission*, case 27/76) A firm's "economic strength" (i.e., market power) is assessed by reference to: (i) the relevant product and geographic markets, as defined according to standard economic principles including, above all, cross-elasticity from the standpoint of demand; and (ii) the firm's market power within that market, taking into account factors such as its market share over time, the structure of the market (i.e., the position of competitors), technical, legal and economic barriers to market entry, the strength of the firm's customers and/or suppliers, *etc.* Cases under Article 82 usually involve a single firm but occasionally a "joint" or "collective" dominant position may be held, respectively, by two or more firms.

The Court established the meaning of "abuse" in *Hoffmann-La Roche v. Commission* (case 85/76), explaining that an abuse is "an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of the market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition." However, the most distinctively European feature with respect to Article 82 is that, as the Court held in *Michelin v. Commission* (case 322/81), a dominant firm is imbued with "a special responsibility not to allow its conduct to impair genuine undistorted competition."

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[6] *For example, a refusal to supply may be due to legitimate capacity constraints.*

[7] *In the EU, for example, it would be unlikely to see either the Commission or the ECJ adopt the non-interventionist attitude evinced by the US Supreme Court in Verizon v. Trinko, 540 U.S. 398 (2004).*

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Taking this concept of "special responsibility" as a point of departure, the Court and the Commission have found various types of conduct to be abusive within the meaning of Article 82. Examples include: certain pricing practices (excessive pricing, predatory pricing, margin squeeze, price discrimination, exclusionary discounts); refusals to supply or grant licenses; tying; exclusive dealing obligations; restrictions on resale; market sharing arrangements; and many others.

Although some limiting principles have been established,[8] Article 82 has by and large been applied by both the Commission and the Court in a relatively strict manner. To cite but one example, whereas in the US, a claim of predatory pricing can only be sustained if it is shown that the defendant monopolist would be likely to recoup its losses after driving competition out of the market, in the EU there is no such "recoupment" criterion. However, after many years of criticism from lawyers and economists alike, the Commission has undertaken a review of its practice under Article 82 and will issue a draft set of enforcement guidelines for public comment toward the end of 2005. This could lead to the adoption of a less formalistic and more sophisticated, economics-based approach to certain practices such as, for example, discounts and tying. Assuming this development materializes, it will then be for the ECJ to decide whether to re-think its classic jurisprudence.

Summary

The foregoing overview provides a flavor of the ambitious European project throughout the second half of the 20th century. In the 1970s and 1980s, precisely when the policy-making apparatus of the EU was transfixed by a period of "eurosclerosis," the ECJ's audacious interpretation of the rules on market access and the Commission's enforcement of Articles 81 and 82 were stunningly successful in opening up the "Balkanized" markets of Europe. Although this was essentially an economically oriented process of integration, as foreseen by some early visionaries, political integration was not far behind. Today, much more emphasis is laid on other, more "human" elements that were lacking during the EU's formative years, in particular citizenship and fundamental rights protection. Nevertheless, considering that new national laws are promulgated constantly, and taking into account the enlargement of the EU on 1 May 2004 as well as future enlargements, the relevance of the EU's "economic constitution" remains undiminished.

[8] *For example, a refusal to license intellectual property rights will only be abusive in exceptional circumstances.*