Commission discretion unchained

Is the effectiveness of competition law enforcement at stake?

*by **Peter Alexiadis** and **Pablo Figueroa****

The General Court has thrice had cause to revisit some hitherto unexplored territories in the wilderness known as "The European Commission's discretion to pursue competition actions". Just as St Peter suffered bitter memories after the third crowing of the cock in the New Testament, EU competition practitioners have also been left with the painful realisation that, well over 20 years since the *Automec* ruling, emergence out of the wilderness has done little more than confirm their worst fears: namely, that the Commission's discretion in exercising its competition competence under Regulation 1/2003 is as close to unfettered as one can imagine.

According to the *Automec* case law, it is the European Commission that is responsible for designing and implementing the competition policy of the European Union. To this end, it enjoys a broad discretion as to how it deals with complaints. An element of that discretion lies in the ability of the Commission to "reject the complaint on the ground that there is an insufficient [Union] interest in further investigation of the case". That said, it is equally clear that the Commission's discretion when rejecting complaints is "not unlimited" (see the *Ufex* case of 1999).

Yet, while the principle of "effectiveness", developed under the *Factortame* case law, assumed the status of a general principle of all EU legal principles with the passing of time – and while its general applicability to the decentralised system of applying European law was assumed in the application of Regulation 1/2003 – the European Courts had not had the opportunity to express a view on the status of that cornerstone principle when determining the scope of the Commission's jurisdictional competence in competition matters.

The Orwellian tale of the *Horlogers* ruling

In 2004, the European Confederation of Watch and Clock Repairers' Associations filed a complaint before the Commission, alleging that certain watch manufacturers had refused to supply spare parts to independent repairers. By mid-2008, the Commission had rejected the complaint on the grounds that (1) the complaint related to markets or market segments of limited size and economic importance; (2) it was likely that the problematic selective distribution schemes at issue were compatible with the Commission's Vertical Block Exemption Regulation 330/2010; and (3) the investigated entities were unlikely to enjoy a dominant position.

The General Court annulled the Commission's decision in December 2010 finding (among other things) that the Commission was neither justified in its generalisations about the relevance of the market segments in question, nor in its failure to define the relevant market for the purposes of articles 101 and 102 TFEU. Most importantly, the Court ruled that, given the broad scope of the alleged infringement, action taken at the EU level was probably more effective in the circumstances. Citing the *Ufex* case law in support of its view, the General Court said that:

> "[there] was no rule of law requiring the Commission to determine the size of the market or markets to which the complaints relate. By contrast, since it decided to rely on the finding that the complaint concerned at most [a] market segment of a limited size, the Commission has a duty to give reasons for its finding."

The Commission's response to the *Horlogers* judgment was to adopt a new decision in July 2014, in which it rejected the complaint, holding that "[following] a comprehensive investigation, the Commission has concluded that there is limited likelihood of finding such an infringement in the present case".

Not unsurprisingly, the original complainants appealed this Commission decision in January 2015 on the grounds that:

> "(1) the Commission's findings are based on manifest errors of appraisal, in law and fact; (2) the contested decision fails to provide appropriate reasoning for the Commission's findings; and (3) the contested decision is the result of a procedure during which the Commission failed to attentively examine the elements of law and fact raised in the complaint, in violation of [the] applicant's right to good administration".

While it would be unwise to prejudge the result of the appeal that is still pending, the formalism displayed by the General Court in its two most recent judgments on jurisdictional disputes will do little to instil optimism in the complainants.

The Kafkaesque tales of *Si.Mobil* and *easyJet*

Beyond the discretion enjoyed by the Commission in declining or exercising competition jurisdiction under the *Automec* case law, there exist a number of jurisdictional grounds in article 13 of Regulation 1/2003 according to which the Commission can refuse to exercise its competition law jurisdiction, namely: (1) where "one authority is dealing with the case"; or (2) where a complaint "has already been dealt with by another competition authority". Until very recently, these two grounds had not been the subject of any judicial precedents.

- **The *Si.mobil* case: Where the expression "somebody would prefer not to deal with the case" really means that "somebody is dealing with the case".** In the words of article 13(1) of Regulation 1/2003, the European Commission may "reject a complaint on the ground that a competition authority of a member state is dealing with the case".

* *Peter Alexiadis is a partner in – and Pablo Figueroa is an associate with – Gibson, Dunn & Crutcher LLP (Brussels). The authors acted as EU counsel to Si.Mobil.*

On 14 August 2009, Slovenia's second largest mobile operator, Si.mobil, filed a complaint before the Commission for an alleged abuse of a dominant position by Telekom Slovenije, Slovenia's largest mobile operator (consisting, among others, of allegations regarding margin squeezing, predatory pricing and foreclosing wholesale access pricing). On 24 January 2011, the Commission rejected the complaint, on the grounds that (1) Slovenia's Competition Authority (the UVK) had already begun to deal with those aspects of the case relating to retail markets abuses; and (2) in relation to the wholesale-related allegations of Si.mobil, the complaint had not satisfied the test under the *Automec* case law.

Si.mobil challenged both findings of the Commission's decision on appeal before the General Court. At the heart of the appeal was the argument that there must be limits to the Commission's discretion to reject complaints on the basis of *Automec*, and that article 13(1) of Regulation 1/2003 should be interpreted in a manner consistent with the general principle of effectiveness of EU law.

On 17 December 2014, in a cavalier disregard of the principle of effectiveness, the General Court upheld the Commission's decision. Specific to the facts of the case, Si.mobil had alleged that the UVK did not have an effective system to apply EU competition law at the time, as could be borne out by contemporaneous statements from the Commission itself in other contexts.

In response, the General Court held that article 13(1) does not require the Commission to carry out assessment as to whether a national competition authority is in a position to apply EU competition rules effectively, concluding that:

> "the requirement to ensure the effective application of EU competition rules cannot […] have the effect of imposing an obligation on the Commission to verify […] whether the competition authority concerned has the institutional, financial and technical means available to it to enable it to accomplish the task entrusted to it by that regulation."

Moreover, when confronted with clear evidence that the UVK president at the relevant time had written to the Commission "to the effect that, at the material time, that competition authority was in favour of the Commission examining the case", the General Court simply concluded that this "does not show that the UVK did not have the capacity to deal with it".

What the General Court has done is to draw a large veil over all the relevant facts that might otherwise inform a wise choice as to jurisdictional competence between members of a federated union in competition cases. By relying on a formalistic application of Regulation 1/2003 (and attaching importance to the place where the complaint was first formally filed), the Court has de facto precluded the principle of effectiveness from playing any role in as important a decision as which authority is best placed to apply the competition law provisions of the treaties. One needs to avoid the temptation to declare that "hard cases make bad law", especially in the light that the Court felt no qualms in completely ignoring the express wishes of the president of the UVK to have the case transferred to Brussels.

▌**The *easyJet* case: Where the expression "somebody else decided not to deal with" really means that it has "already been dealt with".** According to article 13(2) Regulation 1/2003, "[where] a competition authority of a member state or the Commission has received a complaint against an agreement, decision of an association or practice which has already been dealt with by another competition authority, it may reject it".

In 2008, easyJet filed three complaints before the Dutch national competition authority (the NMA) against Luchthaven Schiphol NV (the operator of Amsterdam airport) for its allegedly setting discriminatory and excessive charges. Over the course of 2008 and 2009, the NMA rejected these complaints, invoking its "priority policy" for enforcement as the basis for why it refused to pursue the actions.

On 14 January 2011, easyJet filed a complaint covering similar allegedly abusive conduct before the Commission. In 2013, the Commission rejected the complaint on the ground that a national competition authority had already dealt with the case. An appeal against this decision was lodged by the complainant to the General Court.

In January 2015, the General Court upheld the European Commission's decision. In doing so, the Court saw no conflict of principle in holding that "one of the main objectives of Regulation 1/2003 is to establish an effective decentralised scheme for the application of EU competition law rules", while also concluding that the Commission can reject a complaint which has previously been rejected by a national competition authority on the ground of the latter's enforcement priorities. In practice, this means that the Commission can not only reject complaints on the basis of its own discretion, but also on the basis of the discretion exercised by a national competition authority.

Conclusions

Competition counsel in EU matters have long bemoaned the fact that the Commission's administrative practice in its application of the *Automec* discretion test has meant that the Commission enjoys carte blanche when rejecting complaints. The list of relevant discretionary factors cited by the Court in *Automec* has been used for over 20 years as little more than a checklist against which the Commission can justify virtually any decision to refuse to hear a complaint. Each and every factor can lend itself to diametrically opposed conclusions (for instance, the existence of precedent can just as easily justify why action should be taken as it can support the view that action is unnecessary). However, the *Horlogers* ruling suggested that the time might be ripe for the General Court to establish some guidance for how a true balancing test could be used to determine the European Commission's jurisdiction in EU competition matters. The Commission's immediate response to that judgment, though, confirms that it guards its discretion to reject complaints with great zeal.

Practice suggests that this zeal is often misplaced. As a result, today we have the unedifying spectacle of similar competition complaints about online hotel reservations being addressed by many member states, with the actual or likely adoption of different end results, different market definitions, and different theories of harm. This fragmentation of EU competition law with respect to a subject matter with obvious pan-European implications does little to support the effective implementation of articles 101 and 102 of the TFEU.

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Similarly, in the *Si.Mobil* case, the Commission, by relying on a technicality, managed to avoid adopting a decision in relation to what is arguably the single most problematic commercial practice in the mobile communications sector (the so-called "on-net/off-net" tariffs which are at issue before many EU member state courts or competition authorities). To make matters worse, the implication of the *easyJet* ruling is even more unsettling – the fact that Commission sees fit to publish a communication in 2011 on the competition law issues arising from airport practices is no bar to a key member state and the Commission declining to entertain an article 102 TFEU action because of the member state's enforcement "priorities". This utter disregard for the doctrine of effectiveness contrasts with the role that general principles of law usually enjoy in public law proceedings – namely, curtailing the discretionary powers of public authorities.

The *Si.Mobil* and *easyJet* rulings both beg the question of whether jurisdictional rules should be interpreted formalistically (as would be the case between sovereign states in deference to comity principles under general international law) or more holistically, given that it should not be open to the Commission to abdicate from its traditional constitutional role of guardian of the treaties, and thus to disregard the effectiveness of enforcing the competition provisions in those treaties.

By way of background, one needs to take into account two important policy elements that should inform the debate. First, the cases arose under the stewardship of Commissioner Almunia, according to whom a number of national competition authorities were characterised, at the relevant time, by many institutional failures that jeopardised their ability to enforce EU competition rules effectively. Second, the current competition commissioner, Ms Vestager, is supposed to be presiding over a competition directorate which is, at least in theory, now supposed to be playing an important role in synchronising competition policy with broader common market goals and policies.

Clearly, the lessons learned from the *Si.Mobil* and *easyJet* rulings is that the only yardstick for "effectiveness" envisaged by the General Court is that jurisdiction is actually allocated in a manner which is not arbitrary, rather than appropriate. This falls far short of what the authors would consider to be a substantive application of the general doctrine of effectiveness. Any glimmer of hope that the General Court might introduce some reasonable fetters on the Commission's discretion has, at least for the moment, been lost. In the words of John Cleese: "It's not the despair…. I can take the despair…. It's the hope I can't stand."