# Si.mobil v European Commission (T-201/11) – Undermining the Effectiveness of EU Competition law?

Posted on **October 1, 2015**

**Pablo Figueroa and Catherine Derenne[1]**

*""That's very important," the King said, turning to the jury. They were just beginning to write this down on their slates, when the White Rabbit interrupted: "Unimportant, your Majesty means, of course," he said in a very respectful tone, but frowning and making faces at him as he spoke.*
*"Unimportant, of course, I meant," the King hastily said, and went on himself in an undertone, "important—unimportant—unimportant—important—" as if he were trying which word sounded best."*
(L. Carroll: "Alice in Wonderland")

According to the *Automec* case-law (paras. 73 ff), the European Commission has discretion as to how it deals with complaints. That said, the Court of Justice of the European Union has clearly stated that the Commission's discretion when rejecting complaints is not "*unlimited*" (*Ufex and Others v. Commission*, para. 89). *Regulation 1/2003* awarded to the Commission two additional grounds under which to dismiss cases. Pursuant to Article 13, the Commission can dispose of

complaints where "*one authority is dealing with the case*" (13(1)) or where a complaint "*has already been dealt with by another competition authority*" (13(2)).

In late 2014, the General Court has issued a Ruling in the context of the *Si.mobil* case interpreting the first of these provisions in a way which further enhances the Commission's "*not unlimited*" discretion when rejecting complaints (the "*Si.mobil* Ruling"). More specifically, the General Court endorsed the Commission's deference to the National Competition Authorities of the EU Member States (the "NCA"s). In our view, in doing so, the General Court allowed the Commission to abdicate from its constitutional Role of Guardian of the Treaties and to disregard the effectiveness of the Competition provisions in those Treaties.

Moreover, the Si.mobil Ruling was issued in the context of a broader series of Rulings which further enhance the Commission's discretion when rejecting complaints (See Alexiadis, P. and Figueroa, P., "Commission Discretion Unchained", *Competition Law Insight*, 17 March 2015). Indeed, the *Si.mobil* Ruling becomes particularly surprising in the light of a series of unambiguous and repeated statements of the Commission in relation to the institutional failures of certain NCAs. Note for example the Speech of former Vice-President Almunia in May 2014 where he expressed concerns in relation to the lack of resources and independence of certain NCAs.

The *Si.mobil* Ruling hinged on the interpretation of Article 13(1) *Regulation 1/*2003, according to which, "*[t]he Commission may […] reject a complaint on the ground that a competition authority of a Member State is dealing with the case*".

On 14 August 2009, Si.mobil telekomunikacijske storitve d.d. filed a complaint before the Commission against Telekom Slovenije d.d. ("TS"), the incumbent mobile operator in Slovenia, for an alleged abuse of TS' dominant position consisting, *inter alia*, in margin squeezes and predatory pricing. On 24 January 2011, the Commission rejected the complaint mainly on the grounds that the Slovenian NCA (the "UVK") was already dealing with the case.

The Commission's case rested on the proposition that Article 13 of *Regulation 1/2003*should be interpreted in such a manner that the mere fact that an NCA *claims to be dealing with a case* is sufficient, in and of itself, to enable the Commission not to take the case (Commission Decision *Si.mobil / Mobitel*, Section 2(1)). Under the Commission's interpretation, *even in scenarios with an effect on trade between Member States*, and thereby meriting the application of the EU Competition rules, as long as such NCA claims to deal with, for example a margin squeeze case, which tends to be resource-intensive to investigate, the Commission is obliged to relinquish jurisdiction.

However, such a proposition involves a dramatic re-assessment of the Commission's role as regards the exercise of its jurisdiction in relation to subject-matter which falls within the exclusive competence of the Union, and thus has far-reaching implications for the Community's legal order. By *de facto* completely disregarding the general legal principle of "effectiveness" from its decision to assert jurisdiction to apply European law, the Commission undermines the

very foundations of the Treaties whose application is entrusted to ensure pursuant to Article 17 of the *Treaty on the European Union* (the "TEU").

The idea of effectiveness underlies a series of developments in the sphere of judicial protection and has been recognised as a general principle of European Union law by the Court of Justice of the European Union (the "CJEU") (*Brasserie du Pêcheur v Germany and the Queen v Secretary of State for Transport, ex p Factortame Ltd*, para. 95). Professor Snyder highlights that "*[t]he general principles of law, elaborated by the Court of Justice […] surely include the right to an effective remedy*" (See Snyder, F., "The Effectiveness of European Community Law: Institution, Processes, Tools and Techniques", *MLR 56:1*, January 1993, p. 51). According to the CJEU, this principle requires, at a minimum (as explained in Tridimas, T, *The General Principles of EU law*, Oxford EC Law Library, p. 424), that the exercise of Community rights is not made virtually impossible or excessively difficult (*Administrazione delle Fianze dello Stato v. SpA San Giorgio*, para. 14). According to a general rule of interpretation which derives from the principle of hierarchy of norms, the interpretation of a Community measure must be such as to render it compatible with the TFEU and with the general principles of law (*Commission v Council*, paras. 15 and 17). Therefore, Article 13 of *Regulation 1/2003*should be interpreted in a way that ensures the most effective application of the Competition Law provisions of the TFEU. In any event, the General Principles of European Union law form part of the Union's legal order and their infringement therefore constitutes an "*infringement of the Treaties or of any rule of law relating to their application*" within the meaning of the second paragraph of Article 263 TFEU (*Töpfer v. Commission*, para. 19). In other words, a Decision should be annulled insofar as it would jeopardize the general principle of effectiveness, even if it were, *quod non*, to otherwise constitute a reasonable interpretation of Article 13 of *Regulation 1/2003*).

*Regulation 1/2003* was not introduced only, or even primarily, to achieve a decentralized application of the competition rules, and certainly *not at the expense of the doctrine of effectiveness of enforcement of Competition rules*. Indeed, Regulation 1/2003 begins in its very first Recital with the observation that "*in order to establish a system which ensures that competition in the common market is not distorted, Articles [101] and [102] of the Treaty must be applied effectively and uniformly in the Community*". Moreover, according to Recitals 2 and 3 of *Regulation 1/2003*, the de-centralised system of implementation of the Competition Rules that the Regulation establishes intends to achieve a balance between "*the need to ensure effective supervision on the one hand and to simplify administration to the greatest possible extent on the other*". The fact that achieving the effective application of Competition Rules is the key objective of *Regulation 1/2003*becomes further evidenced at Recital 6 of the latter, according to which the rationale for de-centralised enforcement is precisely to ensure the effectiveness of Competition Rules. In the words of Recital 6: *"[i]n order to ensure the effective enforcement of the Community competition rules, the competition authorities of the Member States should be associated more closely with their application*". Further references to the principle of

effectiveness can be found at Recitals 5 and 8 of *Regulation 1/2003*. *Regulation 1/2003* also highlights that it is only "*to this end that the said competition authorities of the Member States should be empowered to apply Community law*" (Recital 6).

Similarly, according to the European Commission's Notice on the Handling of Complaints(para. 20): "*[t]he Regulation [1/2003] pursues the objective of ensuring the effective enforcement of Articles [101 and 102 TFEU] through a flexible division of case work between the public enforcers in the Community*".

Since ensuring the effectiveness of the competition provisions of Articles 101 and 102 TFEU is one of the overarching objectives of *Regulation 1/2003,* it is, unsurprisingly, also a key objective that should be pursued by the network of NCAs created in order to implement the said Regulation. According to the Commission's Notice on the Network of Competition Authorities (para. 3), "*[t]he network formed by the competition authorities should ensure both an efficient division of work and an effective and consistent application of EC competition rules*".

Similarly, following the Joint Statement on the Network of Competition Authorities: "*[t]he cooperation within the Network is dedicated to the effective enforcement of EC competition rules throughout the Community*" (para. 5). Moreover, where it is stated that "*[i]n order to ensure that the Community competition rules are applied effectively and consistently, the Commission and the national competition authorities designated by the Member States […] form together a network of competition authorities […] for the application in close cooperation of Articles [101] and [102] of the Treaty*" (para 2).

In short, the principle of effectiveness lies at the core of *Regulation 1/2003* and the system of allocation of jurisdiction established by that Regulation. Consequently, when in doubt as to how to interpret a rule, the Commission should pursue an interpretation that is more conducive to achieving an effective application of the Competition Law provisions.

However, on 17 December 2014, the General Court upheld the Commission Decision,*without any resort whatsoever to the general principle of EU law when interpreting Regulation 1/2003*. More specifically, Si.mobil had alleged that the UVK did not have an effective system to apply EU Competition law. Despite conceding that the "*objective pursued by the [R]egulation 1/2003*" is to safeguard "*the effective application of the EU competition rules is attained*" (para. 56), the General Court found that Article 13(1) of the Regulation does not require the Commission to carry out such an assessment. In the words of the General Court:

"*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*" (para. 57).

In doing so, the General Court disregarded unambiguous statements in reports of the Commission as to institutional failures of the UVK to handle telecommunications sector-related competition law complaints. Moreover, arguably contradicting its finding according to which the

Commission could disregard whether an NCA has the ability to effectively apply EU Competition law, the General Court found that a statement made by a former President of the UVK, "*to the effect that, at the material time, that competition authority was in favour of the Commission examining the case does not show that the UVK did not have the capacity to deal with it*" (para. 65). *I.e.*, as long as an NCA has begun to deal with a case, even if the NCA in question clearly indicates that the Commission should take it, the Commission will not be able to.

*"I will show you fear in a handful of dust"*
(T.S. Eliot, "The Waste Land")

The *Si.mobil* Ruling is disturbing, most notably in relation to the EU general principle of law of effectiveness and the Commission's preeminent Role as the Guardian of the exclusive competences of the Union. More specifically, it should be highlighted that curtailing the powers of the discretionary powers of public authorities is a role that general principles of law usually enjoy in public law proceedings. In the words of Professor Tridimas, this principle turns the discretion left by the law to the authorities of the communities "*into an obligation so as to enhance the protection of Community Rights*"[2] (See Tridimas, T., *The General Principles of EU law*, Oxford EC Law Library, p. 422, quoting *van Schijndel and van Veen v SPF*).

The *Si.mobil* Ruling will place additional power and burdens on the NCAs during times where they face budgetary cuts and when the broader *ethos* in Europe is arguably sliding towards nationalism. The *Si.mobil* Ruling will make it even more difficult to make big national champions in countries more prone to regulatory capture subject to the EU Competition rules: all the national incumbents will need is to convince a national NCA to claim it is investigating the case and the Commission will be pre-empted from taking it. We fail to see why the Commission and the General Court have cornered themselves into such a scenario.

---

[1] Pablo Figueroa and Catherine Derenne (LL.M. in Competition Law, King's College London) are, respectively a Senior Associate and Legal Trainee at the Brussels office of Gibson, Dunn & Crutcher. Together with Peter Alexiadis, a partner in the same firm, Mr Figueroa acted for Si.mobil in Case T-201/11 Si.mobil telekomunijacijske storitve d.d. v European Commission, Ruling of 17 December 2014. The usual disclaimers apply. "A extended version of this post was published by Estudios Deusto 63/1, Deusto (Bilbao, Spain)."

[2] Note that this would also be the case under the laws of several decentralized Member States. For example, both under German and Spanish Public Law, the Administration, even when exercising discretionary powers, can never act in an unfettered manner, and one of its limits is set forth in the General Principles of Law (Proportionality, Human Rights, etc.). See regarding German law the rulings of the Bundesverfassungsgericht (German Federal Constitutional Court) BVerfGE volume 8 (1959), p. 155, 169 ff.; volume 40 (1976), p. 237, 247 ff.; volume 114 (2006),

p. 196 ff and the Bundesverwaltungsgericht (German Federal Administrative Court), BVerwGE volume 117 (2003), 313, 317 ff. Regarding Spanish Law, and in the words of García de Enterría and Tomás Ramón Fernández: "the law, which awarded the Administration the power to act in a discretionary manner in the first place, did not, in order to do so, derogate the entire Legal Order which, including the General Principles of Law, is still binding on the Administration" (see García de Enterría, E. and Fernández, T. Ramón, Curso de Derecho Administrativo. I, Thomson Civitas, 2004 at p. 482; see further Parada, R. Derecho Administrativo I Parte General, Marcial Pons, 2007, at pp.107 and 108). There are also rulings by the Tribunal Supremo (Spanish Supreme Court) to this effect (see, inter alia, rulings of 28 June 1978, 30 November 1980, 6 November 1981, 22 February 1984, 12 June 1985 and 1 and 15 of December of 1986)).