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The relationship between judicial review of NCAs decisions and private antitrust enforcement

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PUBLIC AND PRIVATE ENFORCEMENT OF COMPETITION LAW

- ▶ Principle of complementarity in public and private enforcement of EU competition law
- ▶ System of parallel competences between administrative bodies and judiciary (*BRT v Sabam*; *Delimitis*)



NATIONAL COURTS AND PRIVATE ENFORCEMENT: THE ROLE PLAYED

- ▶ Principle of direct effect (*Bosh v De Geus*) of rules directed at private parties (article 101 and 102 TFEU)
- ▶ Stand-alone actions for damages: private enforcement *tout court*
- ▶ Broadly independent from NCA or judicial review decisions
- ▶ Courts are able to develop their own legal reasoning, within certain limitations



NATIONAL COURTS AND PRIVATE ENFORCEMENT: THE LIMITATIONS

- ▶ **Exception to parallel competence**
 - ▶ Duty of abstention: Courts cannot take decisions running counter to a decision adopted or contemplated by the Commission (*Delimitis*)
 - ▶ Conflict resolution rule: should that happen, Commission's decision prevails (*Masterfoods*)
 - ▶ Article 16 of Regulation 1/2003
- ▶ Principle of prevalence of EU Law and institutions over national law and institutions



JUDICIAL REVIEW OF NCA DECISIONS

- ▶ Review court(s) as part of the public enforcement pillar
- ▶ Level of scrutiny: matters of fact and law as an important feature
 - ▶ some MS judicial review is limited to matters of law, which raised opposition to the binding effect of NCA before Directive 2014/104/EU was adopted
 - ▶ diverse national frameworks
- ▶ Power of review courts over NCA infringement decisions
 - ▶ diverse national frameworks
 - ▶ generally quash decisions or at least decrease or maintain the amount of fine



JUDICIAL REVIEW OF NCA DECISIONS

▶ Portugal

- ▶ misdemeanour procedures imposing fines or others sanctions are subject to appeal to the first instance court (*Competition, Regulation and Supervision Court*) and to the *Appeals Court*, the former assessing matters of fact and law
- ▶ possibility of increase or decrease the amount of fines and periodic penalty payments
- ▶ administrative procedures appealable to the *Supreme Court of Justice*



ADMINISTRATIVISATION OF PRIVATE ENFORCEMENT?

▶ Article 9 (1)

- ▶ *iuris et de iure* presumption: final decisions taken by NCAs or by a review court regarding an infringement of competition law shall be deemed irrefutably established on national courts regarding actions for damages
- ▶ only infringement decisions (v.g. non-infringement and closing cases with conditions are not binding)
- ▶ Scope of presumption: material, personal, temporal and territorial limitation

▶ Article 9 (2)

- ▶ final decisions taken by the NCAs or a review court shall be considered as *prima facie* evidence on other MS courts regarding actions for damages: minimum harmonization
- ▶ forum shopping?



JUDICIARY'S INDEPENDENCE PRINCIPLE UNDERMINED?

- ▶ On what grounds is the *Masterfoods* judgement extended to the national (and horizontal) level?
 - ▶ principle of prevalence of EU law is of vertical nature not horizontal

- ▶ Binding nature of a judicial review decision
 - ▶ brings the EU system more in line with the US system
 - ▶ mitigates the risk of decisions taken by administrative bodies being imposed on national courts dealing with actions for damages



JUDICIARY'S INDEPENDENCE PRINCIPLE UNDERMINED?

- ▶ **NCA decisions not appealed**
 - ▶ become final decisions
 - ▶ binding on national courts in the context of follow-on damages actions
 - ▶ is this in line with the principle of independence of the judiciary?

- ▶ **Article 9(3) as the national court's way out**
 - ▶ preliminary ruling to the CJEU is safeguarded



BINDING EFFECT OF NCA DECISIONS AND HUMAN RIGHTS

- ▶ Binding effect of NCA infringement decisions may prevent a right to a fair trial by the defendant in an action for damages
 - ▶ Articles 6 (1) ECHR and 47 of EU Charter Fundamental Rights

- ▶ At the EU level
 - ▶ General Court in *Enso Española* (1998) found that public enforcement by Commission does give rise to a fair trial due to action for annulment before the GC and appeal to the CJEU

- ▶ At the national level
 - ▶ ECtHR: in *Menarini* it indicated that (i) judicial review must reach beyond the control of logical coherence of administrative decision (or legality control), (ii) have power to quash NCA decisions in questions of fact and law and (iii) most importantly, assess how courts exercise that power in practise
 - ▶ Most MS use “monist” systems: investigations and decisions entrusted to single administrative authorities
 - ▶ Level of judicial scrutiny varies significantly among MS



WEIGHING THE OUTCOME

▶ Advantages

- ▶ binding judicially reviewed decisions increases effectiveness of follow-on action for damages while safeguarding the principle of judicial independence
- ▶ procedural efficiency
- ▶ increased awareness of antitrust damages actions with incentives to bring follow-on actions
- ▶ preliminary ruling reference is always possible within an action for damages procedure



WEIGHING THE OUTCOME

▶ Disadvantages

- ▶ limitation of judges' margin of discretion in the evaluation of facts, evidence and law in follow-on actions based on not reviewed administrative body decision
- ▶ widespread use of stand-alone actions may still entail inconsistent application of articles 101 and 102 TFEU
- ▶ enhancement of legal uncertainty
- ▶ possible overcomplaining phenomenon with the NCAs



CONCLUDING REMARKS

- ▶ **Judicial review of NCAs decisions**
 - ▶ with smaller impact on private enforcement than expected due to scope limitations established by the Directive
 - ▶ contributes to mitigate the risk of administrativisation of private enforcement before national courts

- ▶ **Net gain of irrebuttable presumption is not granted, if taken into account the possibility of:**
 - ▶ undermining the principle of independence of judges
 - ▶ excess of private parties reliance on NCAs through the file of complaints
 - ▶ lack of effectiveness of enforcement of NCAs decisions in other MS
 - ▶ forum shopping



Thank you!

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