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Judicial Deference in Competition Law, University of Warsaw, 11 October 2018

This conference report captures a one full-day programme of presentations and discussions within the conference on Judicial Deference in Competition Law, organised by the Centre for Antitrust and Regulatory Studies (CARS) hosted by the University of Warsaw (Faculty of Management) on 11 October 2018.[1]

The conference aimed at discussing the place for judicial deference in the area of law that requires expert knowledge and involves policy questions: competition law. The discussion included the theoretical and axiological aspects of judicial deference in administrative law, the place for judicial deference to a competition authority's economic assessment and determinations regarding fines, as well as the link between the institutional and the procedural organisation of the proceedings before the competition authority and the intensity of judicial review. The event brought together academics, judges, national competition authorities' members and practitioners from the EU and the US willing to discuss judicial review in competition and administrative law.

First, the Dean of the Faculty of Management of the University of Warsaw, Alojzy Z. Nowak, gave a welcome address to the attendees and conveyed his enthusiasm in having the University of Warsaw hosting such a conference.

Opening the scientific programme of the conference, Maciej Bernatt (University of Warsaw, CARS) highlighted the need to discuss judicial deference, also considering the times we live in, and the crisis of democracy Central Europe is facing. The crucial question of the conference was what is an appropriate model of judicial review of administrative actions and, more generally, how to balance the powers of courts and administration.[2] It is indeed important to discuss how intense should be the judicial review and what are the conditions to be satisfied to allow a court to defer to the administration's assessment. According to Maciej Bernatt, judicial deference relates

[1] The conference was organised in the frame of the research project 'The Limits of Judicial Assessment in Competition Law' funded by the Polish National Science Centre (UMO-2014/15/D/HS5/01562). The conference was supported by Clifford Chance, Gessel and Modzelewska&Paśnik law firms. See the conference web page: http://www.cars.wz.uw.edu.pl/konferencje_gb-40.html This report has been written within the mentioned research project.

[2] See also M. Bernatt, *Transatlantic Perspective on Judicial Deference in Administrative Law*, Columbia Journal of European Law, nr 22(2), 2016, 275–325, available: http://ssrn.com/abstract=2648232.

to the intensity of judicial review; it is not about areas that are beyond judicial review but rather about respect to the choices made by expert administration (out of the permissible ones) after effective judicial review is provided. Judicial deference is permissible once certain variables are present to a sufficient extent. They include due process guarantees during administrative proceedings, impartiality of administrative decision-makers, and expertise of the authority. Maciej Bernatt presented the conference programme which was planned to start with general issues of judicial review and judicial deference (keynote speech and session 1), move to the competition law field with specific regard to intensity of judicial review of the economic assessment (session 2) and the intensity of judicial review of administrative determination of fines (session 3) and then discuss the link between institutional organisation of a competition authority and the intensity of judicial review (session 4).

After the opening remarks, the conference continued with the keynote speech of Paul Craig (Oxford University) who provided the audience with an insightful explanation of the foundations of judicial deference, focusing both on issues of law and fact.[3] In particular, Paul Craig began his speech stressing the importance of locating deference (that is, different contexts differently deal with judicial deference). Then, he focused on the issues of law arising from deference, stressing the differences between the existing models (adopted by civil law countries, common law countries and by the Court of Justice of the European Union). In this context, Professor Craig remarked the tensions with the US Chevron Test. After having dealt with the legal issues, Professor Craig moved to the analysis of the issues of fact (in particular, interpretative discretion) explaining their consequences, qualification and exemplification.

After this solid theoretical background on judicial deference, the conference continued with the mentioned four sessions.

Session 1: Judicial Deference: General Aspects

The chair of the session, Mirosław Wyrzykowski (Judge Emeritus, Constitutional Tribunal of Poland) took the opportunity to make some reflections on the current situation in Poland, which is facing a deep constitutional crisis. Therefore, Mirosław Wyrzykowski remarked how important it is for such a conference to happen in Poland.

The first speaker of the session, Kent Barnett (University of Georgia), after having stressed the relevance of a comparative debate on judicial deference, framed the main categories of deference. Next, the speaker concentrated on challenges that concern *Chevron* deference (as opposed to *de novo* review with or without *Skidmore* review). The challenges, in his view, arise largely from *Chevron*'s questionable primary justification (legislative delegation to agencies) and its failure to account for how secondary justifications fit with the doctrine (expertise, uniformity, and political accountability). He discussed the need for these justifications and their tension with one another. In conclusion, he considered how a more orderly, searching inquiry

[3] Paul Craig presentation is available at http://www.cars.wz.uw.edu.pl/konferencje_gb-40.html.

into whether statutory ambiguity or vagueness exists might leave a smaller, yet more legitimate space, for an agency's institutional advantage in statutory interpretation.

After the US picture, Rob Widdershoven (University of Utrecht) focused on judicial deference and the Court of Justice.[4] He then selected two key categories: the intensity of judicial review of EU acts exercised by the Union Courts as administrative courts and the EU influence on the intensity of judicial review by national courts of national acts within the scope of EU law. Rob Widdershoven then identified a convergence between the two, considering that the CJEU increasingly exports its standards of judicial review of EU acts to judicial review by national courts of acts within the scope of EU law.

Miroslava Scholten (University of Utrecht) was asked to focus on judicial deference from a broader perspective, within the system of the rule of law.[5] She observed that different jurisdictions use different logics and arrive at different tests developed by the courts to set the 'rule of the game' for judicial deference, but notwithstanding these differences, the function of the mechanism is the same. It is to prevent abuse/misuse of public power by public authorities while preserving the effective operation of the executive machinery. To determine/assess to what extent judicial deference ensures this function in a particular jurisdiction, one needs to look at the broader system of control. This broader picture requires mapping out the availability and effective operation of other relevant types of controls, such as administrative review and political accountability, as well as the balance between ex-ante and ex-post procedural safeguards. The availability and operation of these other mechanisms will impact the need for and scope of judicial deference to create an effective system of controls and the rule of law without undesirable gaps in control and excesses which could jeopardize the effectiveness of decision-making.

The debate which followed well framed the theoretical points of the session's presentations in the current scenario and, in particular, within the democratic crisis we are dealing with. More in general, a pathway between theory and practice has been traced, both from an EU and a US perspective. Last, the discussion underscored the importance of the expertise requirement and several understandings of it have been shared.

Session 2: Judicial Deference and Competition Authorities' Economic Assessment

Małgorzata Modzelewska de Raad (Modzelewska&Pasnik Law Firm) – who chaired the second session – first explained its scope. Having heard and discussed the general categories both in abstract and in concrete, the session had the goal to apply

[4] Rob Widdershoven presentation is available at: http://www.cars.wz.uw.edu.pl/konferencje_gb-40.html.

[5] Miroslava Scholten presentation is available at: http://www.cars.wz.uw.edu.pl/konferencje_gb-40.html.

the notion of judicial deference in the competition law field, stressing that competition law, by its very nature, requires economics.

Ioannis Lianos (University College London) framed the use of economics and econometric evidence in EU competition law.[6] He stressed that the review made by the CJEU toward the Commission is limited and concerns manifest errors. He argued that if we overly limit deference through some heavy scrutiny of the economics applied by the agency, in particular non-mainstream economics, this will ossify the economic thinking used by the authority. He observed that there should be some balance in making sure the Commission respects the rule of law but also in providing it with the policy space to shift to new economic theories if it so decides. He then discussed the recent Dow/Dupont and Bayer/Monsanto mergers and the focus on innovation as a possible test case for less mainstream economic positions.

Andriani Kalintiri (City University London) argued that the Commission's economic assessment should not be beyond judicial review. She stressed that economic assessments underpinning the construction of the law are subject to *full* – not marginal – review. On the other hand, once the Commission performs economic evaluations, that is, when it applies the law to the facts of a specific case, the authority seems to enjoy some margin of appreciation: it is free to decide which theory or theories of harm to pursue, how to investigate the case and what tools to use. In this respect, the General Court may not substitute its own economic assessment for that of the Commission. Nevertheless, in practice, marginal review is far less marginal than what one might initially think. A look at the case law suggests that 'manifest errors of assessment' may take four different forms: a failure to correctly assess the material facts underpinning the Commission's evaluations; a failure to take into account a relevant factor; taking into account an irrelevant factor which distorted the outcome of the analysis; and a failure to satisfy the standard of proof. Accordingly, thinking of 'manifest error of assessment' as a single object category is inaccurate.

Annalies Outhuijse (University of Groningen) then moved the discussion to judicial review of national competition authorities.[7] She argued that the Member States apply different systems of judicial review of national competition authorities' economic assessment with a particular focus on cartel fines. National courts, both first and second instance courts, take different positions concerning the opportunity of reviewing the economic assessment and the intensity of the review. There are also clear differences in whether the agencies, according to the courts, are supposed to pursue detailed market analyses to assess if a specific conduct is anti-competitive or if the use of legal presumptions of the anti-competitiveness of a given behaviour is sufficient. In addition, other factors lead to differences in judicial review. They include, among others, the degree of specialisation of the courts.

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[6] Ionnnis Lianos presentation is available at: http://www.cars.wz.uw.edu.pl/konferencje_gb-40.html.

[7] Annalies Outhuijse presentation is available at: http://www.cars.wz.uw.edu.pl/konferencje_gb-40.html.

The discussion that followed dealt with the definition of the standard of review and with the role that should be given to economic expertise.

Session 3: Judicial Deference and Competition Authorities Fining Policy

Iwona Terlecka (Clifford Chance) opened the discussion of the judicial review of fines from an EU, Polish and Hungarian perspective: each of the panellists had a market to cover.

As far the EU is concerned, Krystyna Kowalik-Bańczyk (Judge of the General Court) first identified the jurisdiction of the General Court as a clear example of a non-specialized court.[8] After having framed the notion of unlimited jurisdiction, she explained why, in practice, it is not so unlimited. She focused on three aspects of control within the EU General Court: the scope, the intensity and the quality, providing several cases in support.

Dawid Miąsik (Judge of the Polish Supreme Court, Polish Academy of Sciences) dealt with the intensity of judicial review of fines in Poland starting with an overall background which clarified the peculiarities of the Polish situation.[9] In the light of this overview, it is difficult to identify specific drivers and rationales of the judicial review of fines in Poland. Several examples have been given to explain the different scenarios that can arise.

Csongor Nagy (Szeged University) moved to the Hungarian context, explaining the peculiarities of the Hungarian competition authority and the trends of its activity.[10] In particular, he identified two fundamental changes: the decrease in deference accorded by Hungarian courts to the finding of the competition agency and the application of more stringent standards by courts

Iwona Terlecka then put on the table the question if judicial review could provoke an increase of the fines, collecting answers from different perspectives. Discussed furthermore were the requirements that authorities should satisfy to have a good reputation.

Session 4: Institutional Structure of a Competition Authority and the Intensity of Judicial Review

Bernadeta Kasztelan-Świetlik (Gessel law firm), framed the relevance of understanding the intensity of judicial review and, in this context, she commented on the recent changes in the procedure at the Polish level.

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[8] Krystyna Kowalik-Bańczyk presentation is available at: http://www.cars.wz.uw.edu.pl/konferencje_gb-40.html.

[9] The abstract of Dawid Miąsik presentation is available at: http://www.cars.wz.uw.edu.pl/tresc/konferencje/40/11_10_2018_Abstrakty.pdf.

[10] Csongor Nagy presentation is available at: http://www.cars.wz.uw.edu.pl/konferencje_gb-40.html.

Starting from the EU framework, Renato Nazzini (King's College London) provided the audience with his view and, in particular, he explained that we still have problems to be resolved with regard to judicial deference within the EU, notwithstanding the case-law.[11] He developed his reasoning, commenting on the relevant case-law (of the ECHR and the CJEU) and placing the problem in a comparative context, looking at the US and Canadian systems. Then, Renato Nazzini stressed the need for a clear taxonomy of discretion and stated that full jurisdiction is both about the scope and the intensity of judicial review.

Moving to the UK competition law institutional model, David George (UK Competition and Market Authority) dealt with the intensity of judicial review by the UK Competition Appeal Tribunal (CAT).[12] After having framed the role of the CAT, David George focused on the relevant discipline and explained the standard of review.

Maciej Bernatt's presentation focused on the intensity of judicial review in several member states (Poland, Slovakia, Czech Republic and Hungary), comparing this scenario with the US one.[13] The speaker compared models of judicial review of NCAs decisions: cassatory in the Czech Republic and Slovakia (legality review) and reformatory in Poland and Hungary (*de novo* review). After distinguishing the competences of courts, he discussed whether the review (whatever the model) is in practice effective. Next, he analysed if national courts tend to defer to the expert findings of the NCAs and whether such an approach (if existent) is based on the courts' acknowledgement of the competition authority's superior expertise. Finally, he discussed whether proceedings before the NCAs ensure sufficient due process guarantees, the impartiality of decision-makers, and the overall expert character of the decision-making process. On this basis, he examined whether there are grounds for the reviewing courts to defer to NCAs expert findings. He concluded that, currently, the review undertaken by national courts is often superficial and formal and thus ineffective. At the same time, the review by higher courts is rarely deferential towards the NCAs findings. These courts – often because of expertise of judges in the antitrust field – tend to substitute the NCAs expert determinations with their own. However, according to Maciej Bernatt, in the majority of the analysed countries, there are currently no grounds to argue for greater judicial deference. Proceedings held before the NCAs still do not provide for sufficient division between investigatory and decision-making functions (case of Poland, Slovakia and the Czech Republic); also, due process guarantees should be broadened. In addition, NCAs' expertise may be insufficient for both institutional and practical reasons; in particular, it is put at risk due to the political model of appointment of NCAs' presidents.

[11] Renato Nazzini presentation is available at: http://www.cars.wz.uw.edu.pl/konferencje_gb-40.html.

[12] David George presentation is available at: http://www.cars.wz.uw.edu.pl/konferencje_gb-40.html.

[13] Maciej Bernatt presentation is available at: http://www.cars.wz.uw.edu.pl/konferencje_gb-40.html.

Katalin Cseres (University of Amsterdam) continued the discussion on the variables of judicial deference already mentioned, that is, she dealt with the role of consumers in competition proceedings and linked this to judicial review in general, and to judicial deference in particular.[14] She first identified scenarios where consumers access EU competition procedures and then referred to relevant recent EU cases. She argued that despite the fact that consumers' participation could, in fact, strengthen the ways in which competition authorities collect the information that is needed to establish the relevant factual and legal aspects of a given case, and could thus justify courts' deference to the competition authorities' discretion, it is this very discretion and its marginal review that stands in the way of such 'improvement' of administrative decision-making.

Summary of the Conference

Spencer Waller (Loyola University Chicago) summarized the conference.

First, he provided the audience with a useful frame, put forward by Maciej Bernatt, to think about all the presentations and to check the activity of all competition law authorities which is based on three variables: independence, expertise and due process. These three are essential tools to understand how far deference should and should not go.

From a definitional point of view, Spencer Waller highlighted that the labels different jurisdictions use for discretion and the related actions do not fit. Therefore, he stressed the need to develop a better taxonomy within judicial deference in order to be sure we refer to the same meaning when we use words such as discretion.

Another key aspect of the debate concerning judicial deference is the democracy issue, also considering that agencies have to be democratic bodies. In this context, Spencer Waller discussed democracy in the antitrust system, showing that the latter should be seen as an evaluative process based on democratic values.

Last, Spencer Waller framed challenging hypothetical scenarios – at the US and EU level – aimed at leaving open the question on what judges should do in terms of degree of deference and at showing that the conference fulfilled its stated goals.

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[14] Katalin Cseres presentation is available at: http://www.cars.wz.uw.edu.pl/konferencje_gb-40.html