Celebration of 20 years of the Court of First Instance of the European Communities

25 September 2009

Mario Siragusa, Avocat (Rome)

Mr. President, Members of the Court:

First of all, I thank you for your kind invitation to this important celebration.

As a practitioner of Community law, in particular competition law, I have often appeared before this Court and, therefore, I feel honored. It is with great emotion and pleasure that I am participating in this seminar today.

It is precisely from my experience as a competition lawyer that I would like to start my address by making a few remarks on the interplay between the European Commission and the Court in the field of competition law. This interplay is important since the Court of First Instance was created – to a substantial extent – in order to improve the judicial review of the Commission's decisions in the competition field: as stated in recital 4 of Council Decision of 24 October 1988, 88/591/ECSC, EEC, Euratom, establishing a Court of First Instance of the European Communities:

"in respect of actions requiring close examination of complex facts, the establishment of a second court will improve the judicial protection of individual intents".

And, indeed, there has been an improvement!

I often appear in front of national courts reviewing decisions of national competition authorities on the basis of a "legality test" similar to the one applied by this Court, and very often I remind the national judges of your willingness to subject to full judicial review not only the correctness and completeness of the factual basis of any Commission determination and any question of law, but also the Commission's application of the law to the facts.

And, of course, I hope that the national judges will follow your example.

On the other hand, it is also true that the Court has developed a double standard of judicial review of Commission competition decisions, depending on whether the decision under scrutiny in a particular case entailed "a complex economic assessment".

The formula often used by this Court is the following one: "*the Court must undertake a comprehensive review of the examination carried out by the Commission, unless*

that examination entails a complex economic assessment, in which case review by the Court is confined to ascertaining that there has been no misuse of powers, that the rules on procedure and on the statement of reasons have been complied with, that the facts have been accurately stated and that there has been no manifest error of assessment of those facts" (*e.g.*, Judgment of 27 September 2006, Case T-168/01, *GlaxoSmithKline Services/Commission*, paragraph 57).

Based on the "manifest error" fact, the review of Commission decisions is

- thorough and strict with regard to the accuracy of the facts of the case and the correct interpretation and application of the law, but

- much more deferential to the Commission's discretion with regard to the application of the law to these facts.

Now, Mr. President, the question is:

Is the doctrine of "judicial deference", which requires respect for the Commission's margin of appreciation in economic or technical matters, still justified today, in light of the evolution of the EC competition law system and the role of the Commission in the enforcement of competition policy?

It goes without saying that, in considering this question, we must take into account, among other things, the powerful role of the Commission as prosecutor and decision maker at the same time.

Certainly in 1962, at the time of enactment of Council Regulation 17, and for the "first phase" of enforcement of the competition rules, a certain degree of judicial deference made perfect sense for the following reasons:

1. The Commission played an essential role in spreading in Europe the values and the principles of the market and competition, which had little acceptance in several Member States. The Commission played a role of advocacy for those value and those principles.

2. The Commission had exclusive jurisdiction over the application of Article 81(3) EC: through the application of the said provision and the authorization system set up by Regulation 17, it was able to influence and shape competition policy in several sectors.

3. More generally the system of notification was a very useful source of information on the behavior of enterprises, and it allowed the Commission to exercise an *a priori*-control and to influence the behavior of enterprises, often playing a sort of advisory role and giving legal certainty through administrative comfort letters and clearance decisions.

4. Moreover, although the Commission acted as prosecutor and decision maker at the same time, the role of guidance it played was more important than the prosecutorial one, and even when it prosecuted infringements, it generally imposed

fines of modest amount. Thus, the issue of defining clear boundaries to the exercise of the Commission power appeared to be less crucial.

In such a context, it was perfectly reasonable, for the Court of Justice to hold, as it did in *Consten & Grundig* (Joined Cases 56 and 58-64), that since the exercise of the Commission powers, specifically under Article 81(3) EC, necessarily implied complex evaluations on economic matters, judicial review of those evaluations had to take account of their nature.

Having been conceived in the context of the application of Article 81(3) EC, the doctrine of the "margin of appreciation"/"judicial deference" was later extended to all other matters requiring a "complex economic assessment" (such as, *e.g.*, monetary compensatory amounts: Judgment of 22 January 1976, Case 55-75, Balkan-Import Export, paragraph 8; and the method for fixing minimum prices in the steel sector under the ESCS Treaty: Judgment of 18 March 1980, Joined Cases 154, 205, 206, 226-228, 263 and 264/78, 39, 31, 83 and 85/79, *Ferriera Valsabbia a.o.*, paragraphs 71 and 72).

But now we are in "phase two" of our competition law enforcement system.

The system of enforcement has dramatically evolved, and today – over five years after the entry into force of Regulation 1/2003, it looks completely different from what it did before "modernization" and "decentralization":

1. First, competition and market principles are now widely accepted in most Member States, and have become part of the constitution of several Member States;

2. The Commission's exclusive jurisdiction to apply Article 81(3) EC, which provided the very basis of the origin of the "judicial deference" doctrine, has been abolished, moving away from a system of "authorization" to one of "legal exception". Article 81 EC is now directly applicable in full by national authorities and courts. Competition rules are now applied in parallel by the Commission, national competition authorities and the national judges, subject to the principles of cooperation and case allocation. Private litigation will become a very important part of the enforcement system of competition rules; in this scenario, a decision under Article 81 or 82 EC of a national judge is going to be subject to full review on appeal.

3. With Regulation 1/2003, the role of the Commission has substantially changed. The notification system has been abolished. The Commission does no longer play an advisory role, even if the regulation has left some room for such a role. The Commission is now fundamentally a prosecutor: it no longer issues comfort letters or clearance decisions, but only infringement decisions.

4. In its prosecutorial role, the Commission has completely changed its fining policy, imposing sanctions of unprecedentedly high amount, which: (i) are explicitly deemed to be punitive and meant to have a deterrent effort; (ii) have a huge economic and financial impact on companies, their shareholders and employers; and (iii) imply a "de facto criminalization" of competition law.

5. Furthermore, Commissions decisions finding infringements of Article 81 or 82 EC are increasingly becoming the basis for "follow-on" damage actions in national courts; and national courts, pursuant to Article 16 of Reg. 1/2003, are bound by the findings made by the Commission in its final decision.

6. Finally, the Commission continues to play its double role as prosecutor and decision maker. I do not think that the internal innovations made within the Commission, as the role of the Hearing Officer or the Chief Economist, change at all the nature of the problem: these innovations help the Commission in making its case stronger, correcting errors made by the Commission services. However, they do not really improve the right of defense.

In this changed scenario, Mr. President, is it appropriate for the CFI to continue to apply the "judicial deference" doctrine?

My answer is no!

1. The elimination of the Commission's exclusive jurisdiction to apply Article 81(3) EC has eliminated the very basis for the foundation of this doctrine.

2. In the system laid down by Regulation 1/2003, where both Article 81 and Article 82 EC are applied in their entirety and in parallel by the Commission and national competition authorities and courts, there is no reason to submit the Commission decision to a less intense scrutiny than what would be the case for the parallel decisions taken by national courts, particularly since a national judge may be bound by the findings made by the Commission in its decision on the same case.

3. The role of prosecutor played today by the Commission calls for more intense review, and its fining policy, together with the ongoing "*de facto* criminalization" of competition law, raises the issue of whether our enforcement system as a whole is in compliance with Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which requires judicial control with "full jurisdiction" over administrative decisions.

4. Thus, the full jurisdiction that this Court enjoys, pursuant to Articles 229 EC and 31 of Regulation 1/2003, should imply that the CFI recognize no margin of discretion to the Commission not only as far as the working method followed by the Commission in its calculation of the fines imposed in individual cases, but also with regard to the appropriate and proportionate character of the amount of those fines.

5. In light of the serious effects that the Commission decisions have on the life of companies, it is important to preserve the right of companies to seek compensation for the damage suffered by reason of unlawful decisions taken by the Commission. Recognizing a broad discretion to the Commission weakens this right of compensation.

6. Moreover, to the extent that Commission decisions have binding effect on national judges, thus increasing the exposure to damage actions, there is no reason to recognize it such a broad discretion.

Mr. President, in light of the above reasons I am convinced that, in assessing the interplay between the Commission and the EC Courts, the real issue is to ensure that the review of Commission decisions is full, and not limited on the basis of the "margin of appreciation"/"judicial deference" doctrine.

On the other hand, in my view the creation of a new court specialized in competition cases would provide no solution to the issues I have briefly discussed in this address.

The CFI was created 20 years ago precisely in order to review complex cases and to provide adequate protection of individual rights in the application of Articles 81 and 82 EC. The CFI has demonstrated in a number of cases that it can do that very well.

This Court should now recognize that in the new system of competition law enforcement there is no longer any justification for any self-imposed restraints such as the doctrine of "margin of appreciation" or "judicial deference".

If it does so, I am sure that the Court will be perfectly able to perform the role for which it was created also for the next 20 years.