



TRIBUNAL DE
L'UNION EUROPÉENNE

DUE PROCESS

The role of the Court of Justice of the European Union in a changing environment

Pascal Berghe
Référéndaire
General Court of the European Union

-

6th AIJA Annual Antitrust Conference, Amsterdam, 2nd June 2017



The mission

- ECtHR, Menarini Diagnostics v. Italy
 - Confirms competition decision imposing heavy fines may be adopted by an administrative body at first instance BUT
 - Confirms the necessity of intense judicial review of law and fact
 - Case T-9/11, Air Canada/ Commission
 - “[Competition law] penalties pertain to criminal matters for the purpose of Article 6 of the ECHR” (§33)
- ⇒ In light of the requirements of the ECHR, the Court of Justice and General Court have to **guarantee the legitimacy** of the EU enforcement system as a whole



A reformed General Court...

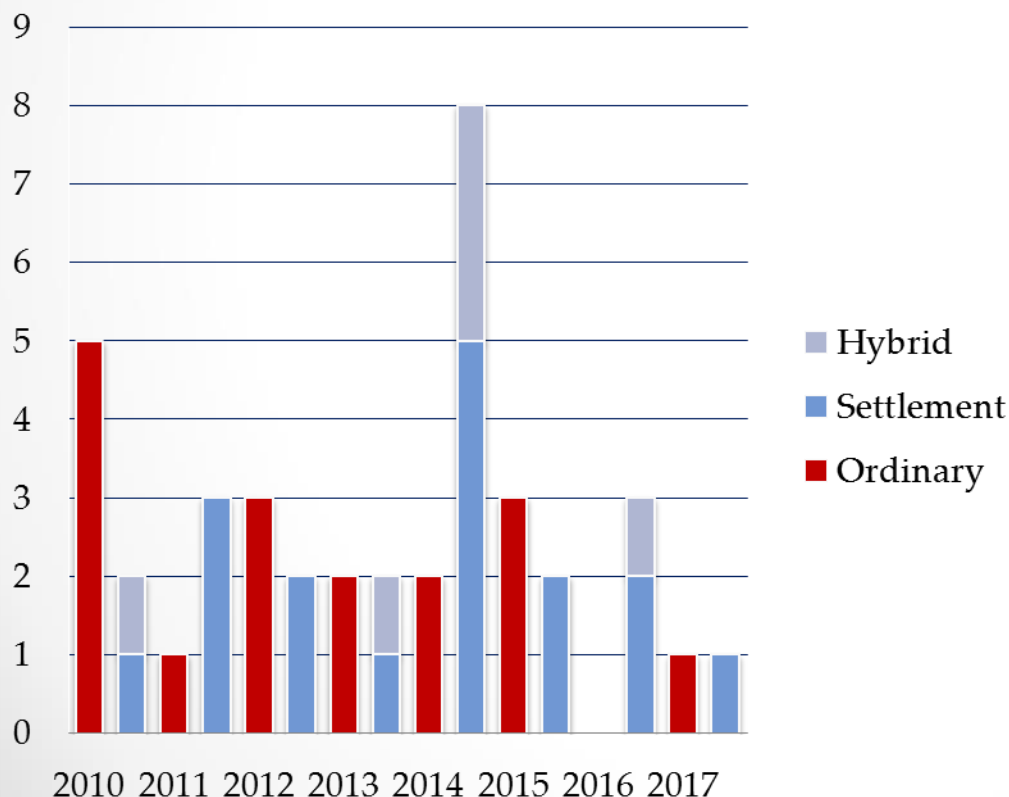
- Created in 1989
 - 12 judges
 - Discharging Court of Justice
 - Focus on competition cases
- Regulation 2015/2422
 - Objective: workload and duration of proceedings
 - From 1 to **2** judges/Member States by 2019 (currently 44 judges)
 - Integration of the Civil Service Tribunal
 - Future reforms: possibility of transferring preliminary references to GC, structural changes such as specialised chambers?
- The new structure in practice
 - Nine chambers of 5 with working panels of 3
 - More resources to deal with cases
 - More opportunities to allocate important cases to 5-judge chambers
 - Cruising speed first, experiments later
- ◦ Role of the Vice-President



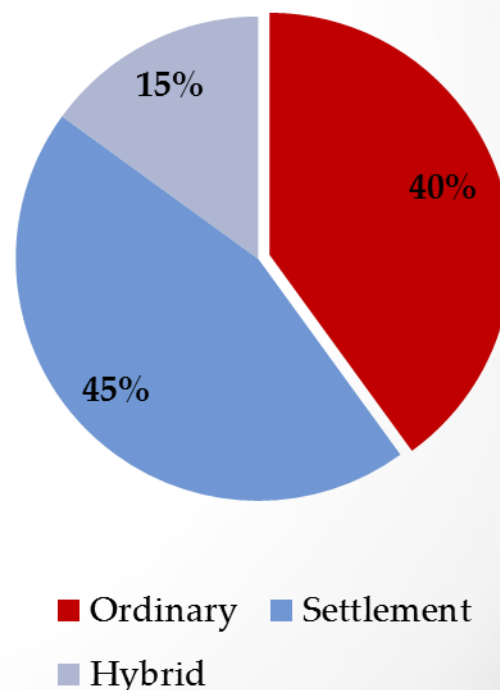
... in a changing environment (1)

- Where leniency and settlement have become the norm

Number of cartel decisions (2010-2016)



Share of cartel decisions (2010-2016)



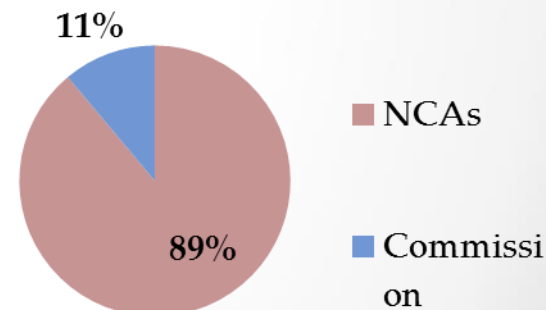


... in a changing environment (2)

- and the centre of gravity has shifted to Member States

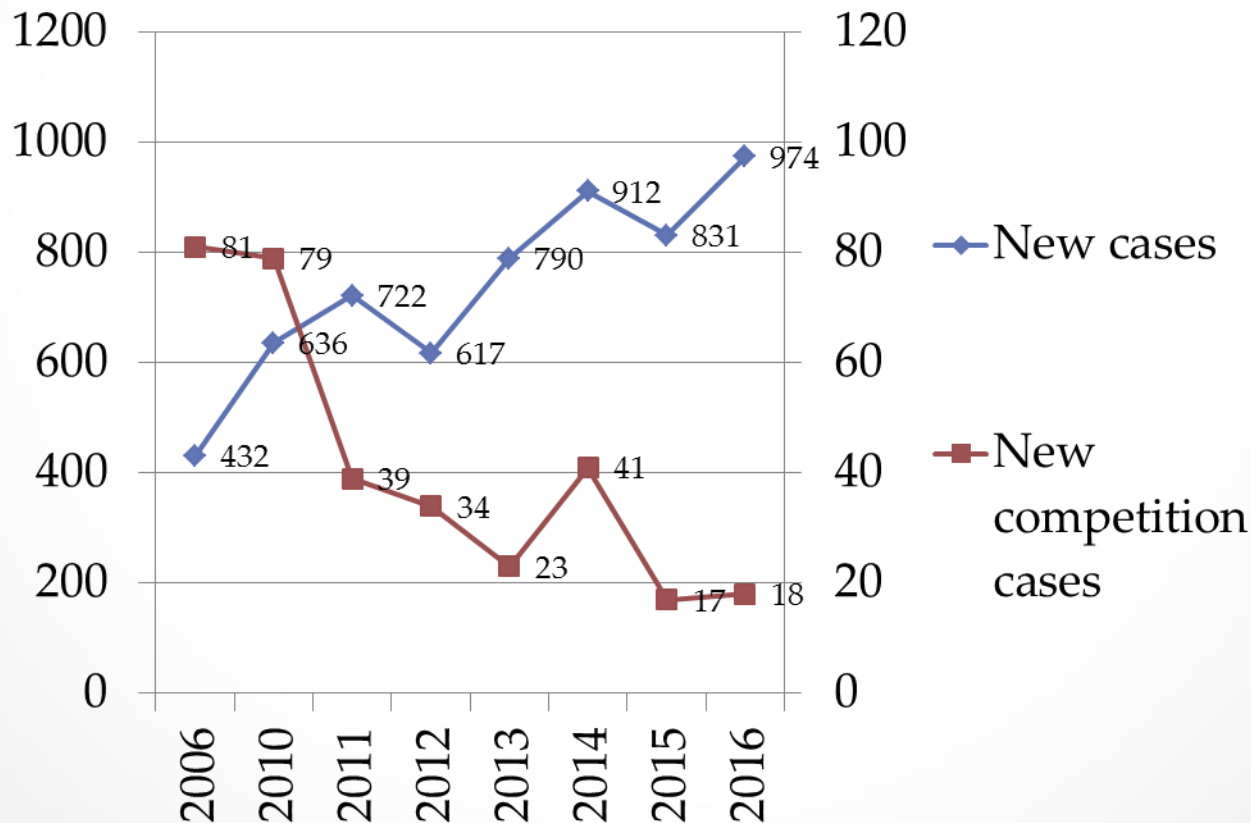
	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Investigations of which the ECN was informed	203	165	150	159	150	169	163	112	121	194	179
- of which COM	22	21	10	10	21	11	26	6	5	21	43
- of which NCAs	181	144	140	149	129	158	137	106	116	173	136

Average share of investigations of which the ECN was informed (2005-2015)



Decrease in quantity...

- Increase in new cases filed to the GC, but decrease in new **competition** cases





... but not in intensity

- “[...] the General Court must generally undertake, on the basis of the evidence adduced by the applicant in support of the pleas in law put forward, a **full review** of whether or not the conditions for applying [Articles 101 and 102 TFEU] are met [...]” (Cases C-67/13 P, CB v Commission, §44; C-386/10 P, Chalkor, §§ 54 and 62)
- “In carrying out such a review, the General Court **cannot use the margin of assessment** which the Commission enjoys by virtue of the role assigned to it in relation to competition policy by the EU and FEU Treaties, as a basis for dispensing with an **in-depth review of the law and of the facts** [...]” (Cases C-67/13 P, CB v Commission, §45; C-386/10 P, Chalkor, §§ 54 and 62)
- “[...] although the Commission has [...] a margin of assessment with regard to economic matters, in particular in the context of complex economic assessments, that does not mean [...] that the General Court must refrain from reviewing the Commission’s legal classification of information of an economic nature. Although the General Court must not substitute its own economic assessment for that of the Commission, which is institutionally responsible for making those assessments, it is apparent from now well-settled case-law that not only must the EU judicature establish, among other things, **whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the relevant information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it**” (Cases C-67/13 P, CB v Commission, §46; C-386/10 P, Chalkor, §CB, C-67/13P, §54)



Full review of legality...

- “In that regard, as the Court has stated on many occasions, the scope of judicial review provided for in Article 263 TFEU extends to **all the elements** of Commission decisions relating to proceedings applying Articles 101 TFEU and 102 TFEU which are subject to **in-depth review** by the General Court, **in law and in fact**, in the light of the pleas raised by the appellants [...] and taking into account all the evidence submitted by the latter, whether that evidence be presented prior to or after the decision taken, whether it was submitted previously in the context of the administrative procedure or, for the first time, in the context of the proceedings before the General Court, in so far as that evidence is relevant to the review of the legality of the Commission decision [...]” (Case C-603/13 P, Galp Energia Espana/Commission, §72)
- “It should be noted, however, that the EU Courts **cannot**, in the context of the review of legality referred to in Article 263 TFEU, **substitute their own reasoning** for that of the author of the contested act” (Case C-603/13P, Galp Energia Espana/Commission, §73)



...and limited unlimited jurisdiction

- 261 TFEU + 31 Regulation 1/2003
 - Complement to the review of legality under 263 TFEU
 - GC can substitute its own assessment (cancel, reduce or increase)
 - GC can vary even without annulling
- **Scope limited to the amount of the penalty**
 - Cannot rely on evidence not used by the Commission to reformulate the accusations (Case C-603/16, Galp Energia Espana a.o./Commission, §76-77)
- **Procedural limits**
 - Not of its own motion
 - Compliance with the audi alteram partem principle
 - Cannot fill a gap in the investigation of the case (T-208/13, Portugal Telecom/Commission, §245 -250; T-216/13 §311-316)
- **Cour of Justice**
 - Not substitute its own assessment; only if disproportionate (legal error)



Procedural tools to help the GC in its review

- Measures of organisation of the procedure and measures of inquiry (88-104 RoP)
 - Application of a main party or ex officio
 - Parties are heard
- Questions to the parties for oral or written answers
- Production of documents
- Oral testimony
- Expert's report



Thank you for your attention

QUESTIONS ?