

**THE RELATIVE MERITS OF COURTS AND AGENCIES IN  
COMPETITION LAW:**

**- INSTITUTIONAL DESIGN: ADMINISTRATIVE MODELS;  
JUDICIAL MODELS; AND MIXED MODELS**

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## INTRODUCTION

### AIM OF THIS PAPER

The aim of this paper is to consider the relative merits of courts and administrative agencies in competition law administration and enforcement. The paper seeks to answer the question as to which model is better. It also seeks to answer the question of whether each has its merits and one should work on the basis of having both models in any jurisdiction. It also touches briefly on whether the hybrid model works. Given that the topic is an enormous one spanning so many jurisdictions and such a wide canvas, the paper must be somewhat preliminary in nature but it is designed to provoke some discussion and debate.



### SIGNIFICANCE OF THE DEBATE

The debate on the merits of the judicial and administrative models is not a matter of mere idle or theoretical speculation. It is an important task with universal significance.

It is an *important* task because courts and agencies have been given enormous power to take so many critical decisions. Three examples demonstrate the point. First, the power of many (but not all) agencies around the world to impose fines confers enormous power on agencies. We have now reached the stage where a single fine imposed by the European Commission could exceed all the fines of a sovereign State in a whole year; for example, the fine imposed by the Commission of over €1 billion on Intel on 13 May 2009<sup>1</sup> represented 40 times the total amount of fines imposed by Ireland (a sovereign State) in all of its courts during the whole of 2008.<sup>2</sup> Secondly, the power of many (but not all) agencies or courts to block mergers or impose certain onerous conditions on them should not be underestimated because such decisions can shape an industry and influence an economy generally. Thirdly, agencies which deal with State aid can alter not entire industries as has been seen, to some extent, in shipbuilding, airports and banking.<sup>3</sup> Moreover, at a human level, to take a poignant example, in one paragraph (paragraph 47) in the *Commerzbank* decision of 7 May 2009, the Commission mention that there will be 9,000 job losses as part of the approval of the State aid process. Ultimately, given the pithy drafting of competition law, much is left in competition law litigation to the ingenuity of the judicial mind. It is therefore interesting to review how judges and agencies approach competition law because they are like on-going drafters of the law.

In any event, it is also an *important* debate because the proper functioning of any competition law regime is dependent on there being an efficient and effective legal regime – as Hayek wrote:

“[the] functioning of competition not only requires adequate organisation of certain institutions like money, markets, and channels of information ... but it depends above all on the existence of an appropriate legal system, a legal system designed both to preserve competition and to make it operate as beneficially as possible”.<sup>4</sup>

It is also an issue of *universal* interest because competition law now operates in more than 120 jurisdictions worldwide and each of these jurisdictions has to grapple with the question of whether they should have courts or competition agencies or both. As jurisdictions as large as

<sup>1</sup> <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/745>.

<sup>2</sup> Irish Court Services Annual Report 2008, page 93.

<sup>3</sup> E.g., *Commerzbank* being forced by the European Commission to engage in large-scale divestments which amount to around 45% of its current balance sheet total.

<sup>4</sup> Hayek, *The Road to Serfdom* (1974).

China and as small as Jersey are coming to terms with competition law, it is useful to debate the issue. And that debate helps every jurisdiction including those who have had competition law for sometime and are considering reforming it again.

It is a debate which is not easily resolved or perhaps even capable of resolution at an abstract level because the circumstances of each jurisdiction, each era and each phase of development require its own solution. There are also biases engrained in the debate with for example, and this is a very broad generalisation, lawyers being more comfortable with courts and economists being more favourably disposed towards agencies. Even if it were possible to reach a conclusion on this issue, it is wholly wrong for any regime or solution to be imposed on other jurisdictions because each jurisdiction needs to have its own customised regime.<sup>5</sup>



In any event, it is useful to have the debate because it enables everyone who has to operate within a competition law regime to look afresh at the institutions which operate in their environment.

## **APPROACH OF THE PAPER**

Instead of trying to analyse every jurisdiction and consider what is happening in each of them – which would be an impossible task - the paper seeks to take an overview by considering the merits of each approach (i.e., the judicial and the agency) by reference to a range of criteria which are likely to be useful in practice. These criteria might well be used in designing a new regime. There are many other criteria and traits which could be used but a sample is used in this paper.

## **B. MERITS OF COURTS AND AGENCIES**

### **THE POSSIBILITY OF POLITICAL *INTERFERENCE* IN THE PROCESS**

Let us begin with politics – something which is always bubbling under or bubbling over in the context of competition law and policy.

Politicians occasionally seek to interfere with the deliberative process in competition matters. There are some examples in the public domain and, presumably, there are many more examples which are not (or not yet) in the public domain.

Let us take some examples relating to the European Commission. It is well-documented that President George W Bush sought to influence the European Commission to try to alter the Commission's decision-making process in the *General Electric/Honeywell* case.<sup>6</sup> A former Competition Commissioner at the European Commission has said publicly that while considering a merger involving Swedish business interests, he had received a telephone call from the King of Sweden. There are probably other examples. It is a tribute to the European Commission when it resists those political interventions. The plain fact remains however that those politicians and others *believe* that they can influence the outcome of a competition *agency* such as the European Commission. This may be because the Commission's

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<sup>5</sup> For a contrary view, see Moschella, "The Necessity of Active American Involvement in Global Competition Law" (2004) 22 *Wisconsin International Law Journal* 187.

<sup>6</sup> No inference, positive or negative, is drawn from that action but what is interesting is that it was believed to be possible.

decision-makers are primarily politicians<sup>7</sup> but it also demonstrates one of the fundamental weaknesses of the competition agency model because there is a probability that politicians are more likely to respect courts more than agencies.

By contrast, it would be unheard of, and regarded as wholly wrong for a president, a king, a prime minister or indeed anyone else to place a telephone call to the European Court of Justice or indeed any other court so as to influence the outcome of proceedings before the court. Such interference with the judicial process would be seen as wrong and unacceptable in the vast majority of developed economies and societies because it would distort the course of justice and interfere with the independence of the judiciary.

Perhaps these brief insights into what politicians seem willing to do, or not do, in the context of courts and agencies is reflective of how politicians view competition agencies and courts. For some politicians, some agencies are “fair game” while courts are very largely immune from political interference. On this first attribute, courts triumph over competition agencies.



## **POLITICAL PERCEPTION OF AGENCIES AND COURTS IN COMPETITION MATTERS**

Even if there is no political *interference*, what about political *perception*? Is it in order for a politician or a government to criticise or ignore the views of a court or a competition agency even if there is no interference as such? It is submitted that it would be unusual (but not impossible) in developed jurisdictions for politicians and governments to disregard or simply ignore the views or findings of courts.<sup>8</sup> By contrast, politicians can more easily question, ignore, criticise and even circumvent the role and findings of agencies in competition matters. Some examples are illustrative of the point.

For example, in 2008, the UK Government ignored very much the views of the Office of Fair Trading in regard to the Lloyds TSB/HBOS merger. No doubt the Government believed that competition is just one of the issues which it had to take into account in its decision-making during the financial crisis. This was a situation where the Government did not seek to *interfere* with the agency, it simply *ignored* the agency. By contrast, it would be very unusual for Governments to ignore court judgments.

Sometimes the views or findings of competition agencies are openly questioned by politicians in a way that one would not usually find courts being questioned. Indeed, some politicians have resorted to ridicule in commenting on some competition agencies when these agencies take a principled stance on various issues.

Ultimately, the role of competition agencies can sometimes be circumvented entirely by way of legislation. In order to deal with the “credit crunch” and the need to permit expeditiously possible future concentrations involving banks, the Irish Parliament enacted legislation which simply removed the Irish Competition Authority from the regulatory regime and instead allows the Minister for Finance to take on certain functions.<sup>9</sup> By contrast, it is rare (but not impossible) for politicians to ignore the courts or to try to limit their role.

So, in terms of political *perception* of agencies and courts, it is very likely that courts are perceived more highly by politicians while they sometimes see agencies as being in a different category. In this regard, courts are probably superior to agencies in that they are less likely to be undermined by politicians.

<sup>7</sup> The lack of the European Commission’s independence has been considered on a number of occasions (see Karagiannis, Yannis, Why the EU Does Not Have an Independent Competition Agency: French Interests and Transaction Costs in Early European Integration (December 30, 2008). IBEI Working Papers 2008/18. Available at SSRN: <http://ssrn.com/abstract=1333505>).

<sup>8</sup> If politicians (particularly, government ones) do not like the decisions of courts then the politicians can often change the law.

<sup>9</sup> Credit Institutions (Financial Support) Act 2008 (Act No.18 of 2008), in particular, Section 7 (for the text of the statute, see. <http://www.irishstatutebook.ie/2008/en/act/pub/0018/index.html>).

## TRANSPARENCY AND OPENESS OF THE PROCESS

Transparency is a fashionably desirable attribute of modern institutional design. Are courts or competition agencies more transparent and open in their procedures?

As a general principle, courts are far more open and transparent in their processes than agencies. In a court, almost everything is transparent and on view. Hearings are generally in public. Each side hears the other side's arguments. Both sides get the opportunity to cross-examine the other side. The judge typically does not know something which was not articulated or exhibited in the court during the case.

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By contrast, competition agencies' proceedings are rarely in public and the "other side" (whether complainant, respondent or whoever) does not usually have the opportunity to comment on the other's arguments directly and is not usually allowed to attend to hear the other side's arguments. Parties to proceedings before administrative agencies often have to rely on the distillation of arguments and counter-arguments contained in statements of objection and similar documents. Indeed, it is not always the case that there will be hearings in every case and even when there are hearings, third parties usually do not have the ability to attend.

Indeed, to take the argument on transparency to the extreme, how transparent is the decision-making process undertaken by the European Commission? The cynic could argue, with some force, that the European Commission is a competition agency which lacks fundamental transparency. It is useful to consider the issue from first principles in the following way: if a judge in a national court imposed a fine of €5 without ever meeting the accused but left it to the judge's staff then one would see the court system being criticised and the fine set aside on appeal but the 27-member European Commission may impose a fine of €1 billion on a company without ever meeting the company or its representatives!<sup>10</sup>

So, in terms of transparency and openness of the process, courts are superior to competition agencies in this regard.

## EXPERIENCE OF, AND EXPERTISE ON, COMPETITION LAW

Apart from courts which specialise in competition law, it is very likely that almost everyone would accept that competition agencies are more expert and more experienced in competition law matters than courts generally.

Agencies will almost invariably have the combined expertise of law and economics as well as other investigative and other experience which courts would not ordinarily possess. Agencies will also be more in touch with evolving thinking on competition issues than most courts. Indeed, the collegiate system operating in most competition agencies enhances and accentuates that system of experience and expertise; there is an almost folk or institutional memory within competition agencies.

This is not to say that agencies know everything and courts know nothing. Courts such as the European Court of First Instance and individual courts worldwide have judges who are experts in competition law so competition agencies do not have the monopoly that they might sometimes perceive themselves to have. Individual judges can already know a great deal about competition law and may be experts on competition law. Some judges may know little but can absorb a lot very quickly – just as they absorb many other areas of the law quickly and easily.

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<sup>10</sup> The criticisms of Dr John Temple Lang in regard to the hearing officer system are worth recalling in this context.

On expertise and experience in competition law matters, agencies will usually trump generalist courts.

## **PERSPECTIVE**

As compared to competition agencies which are focussed almost entirely (or very largely) on competition issues, courts are able to take into account concerns and issues other than just competition. They are less concerned than some competition agencies with issues such as dogma and doctrine.

In terms of issues, court cases are generally not as narrowly based as proceedings before competition agencies (though this is not entirely true where a specialist competition court is involved). Typically, competition agencies review matters solely in terms of the competition law issues. By contrast, in courts, cases can span several different issues and topics; indeed, competition could arise in the context of a tort or contract dispute.

Even within the context of competition, courts are often able to look at matters in a fresh and objective manner while competition agencies can sometimes become entrenched in their positions after battling with, or against, the parties for some time. There is no doubt that some competition agencies and some undertakings can become embroiled in quite bitter battles during long and arduous competition battles (whether those cases relate to cartels, abuses of dominance, mergers or State aid). Indeed, it is very notable how undertakings which lose at the agency stage often feel confident that their position will be vindicated at the court level because they hope to have a “fresh” view of the issues in hand. Indeed, when agencies put a great deal of effort into a case, expending significant resources and spending many years, it is difficult for them to conclude the case by dropping it or finding there is no breach.

## **CONTRIBUTION TO THE EVOLUTION OF COMPETITION LAW AND POLICY**

Competition law is evolutionary and in constant need of reform. The experience at, for example, the EU and national levels bear witness to the evolutionary nature of competition law and policy. But how does this reform occur? It occurs in three ways: new legislation; new precedent; and new practices. But who proposes these changes?

While courts contribute significantly to competition law by adopting particular decisions in particular cases, it is very clear that competition agencies contribute far more to the development of competition law and policy at a wider level in the long run. Unlike most (but not all<sup>11</sup>) courts, competition agencies typically hold conferences, seminars and colloquia to debate and discuss competition law topics and issues. Indeed, agencies often play a pivotal role in the formulation of legislation. Several examples exist but some representative examples would be: (a) the role of the European Commission is convincing the Council of Ministers to repeal the block exemption which it had adopted for liner conferences in the area of maritime transport;<sup>12</sup> and (b) the role of national competition authorities in influencing national competition law. On this criterion, the agencies typically triumph over courts.

## **WHO ENGAGES IN LAW-MAKING?**

There is a near-universal debate as to whether judges make law in their decision-making during cases. Irrespective of whether they do or do not make law, they usually deny it. The reality is that they do so because they either make new law or, at least, adopt new interpretations of the law and thereby develop the law. Are the courts different therefore from

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<sup>11</sup> Courts are beginning to hold more events and foster greater discussion.

<sup>12</sup> I.e., the repeal of Regulation 4056/86.



the agencies? It is submitted that competition agencies also make or develop law by adopting new interpretations of the law. For example, entire areas of law have been largely developed by the agencies rather than the courts.<sup>13</sup> (Indeed, some competition authorities have been given lawmaking powers - for example, section 18 of the Federal Trade Commission Act 1914 in the USA gave the Federal Trade Commission various rule-making powers.) What is interesting is that the agencies generally develop law unapologetically unlike their judicial counterparts. Indeed, all decision-makers do so; as Gray wrote in his lectures "Nature and Sources of the Law",<sup>14</sup> "the difficulties of so-called interpretations arise when the legislator has had no meaning at all; when the question which is raised under statute never occurred to it; and what the judges have to do is, not to determine what the legislator did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present".

So, in regard to the issue of law-making, there is probably little to choose between agencies and courts.

### **TIMELINESS OF DECISION-MAKING/SPEED OF DECISION-MAKING**

Delays are usually<sup>15</sup> undesirable in decision-making. A normal starting point is to say that courts are less expeditious than agencies. This is probably correct as a general principle. There are some notorious examples of long and delayed court proceedings. For example, delays have been reported of 15 years.<sup>16</sup> While courts are able to respond quickly – for example, in the case of injunctions – it is quite likely that competition agencies are better able to respond more quickly than courts. Of course, the speed at which agencies respond may be somewhat illusory in that the decisions of the agencies can be then appealed to the courts which means that the process can be prolonged again. There is no doubt that each case should be judged on its merits; for example, if the Irish High Court in hearing *Magill* had made a preliminary reference to the European Court of Justice then the matter could have been decided in, perhaps, three or four years (including the appeal to the Supreme Court) unlike the nine years which occurred because of the involvement of the Irish High Court, the European Commission, the Court of First Instance and the European Court of Justice. On balance, agencies tend to be quicker than courts but it is difficult to be definitive on the issue.

### **RESOURCES**

While many competition agencies complain perennially about the lack of resources, they have an abundance of riches compared to courts. The reality is that courts tend to have few, if any, additional resources other than the judges involved. While the European Court of Justice is able to draw on its *référéndaires* as well as the Advocates General and some national courts have appointed economic experts to advise the courts, most courts do not have these resources. In regard to resources, the competition agencies easily win out over the courts.

### **SELF-INITIATIVE**

Competition agencies can almost invariably investigate matters on their own initiative. Courts

<sup>13</sup> E.g., national merger control law is very largely the preserve of the agencies rather than the courts. Indeed, it is notable that the first European Court of Justice judgment on what is now Art.82 of the EC Treaty was not decided until the early 1970s despite the rule existing since 1957 and having been applied for several years by the European Commission.

<sup>14</sup> *Smarters* EC.370, P.165

<sup>15</sup> There are situations where delays are desired by, for example, defendants and some delays are contrived. One obvious example would be the so-called "Italian Torpedo".

<sup>16</sup> See *Gestas*, French Conseil d'Etat, [2009] 1 CMLR 28.

in many jurisdictions are not able to investigate matters of their own initiative and have to wait for others to bring the matters to their attention; in other words, courts are not self-starters. In this regard, enforcement is enhanced by having agencies involved because otherwise breaches could go undetected or unpunished. This means that competition agencies also have a certain burden or responsibility to ensure that they investigate matters. On the criterion of self-initiative, agencies are certainly superior to courts.

## FINALITY / CERTAINTY

Litigants generally like finality because it brings certainty. For so long as there is an appeal to a court, no agency can offer the finality and certainty which a court can offer. Courts and legislators can help to ensure a greater level of finality or certainty to the decisions of agencies by ensuring that appeals are limited or confined (e.g., confined by time or issue<sup>17</sup>). It is trite but probably true that everyone (particularly, businesses) like certainty. Courts have the edge over agencies in terms of certainty in so far as courts have the *final* say. It is not always the case that they have the correct answer but they have the final say.



## THE IMPOSITION OF FINES

For the most part, there is nothing to choose between courts may impose fines and agencies which may impose fines. However, how comfortable is society with agencies imposing fines? The debate has not started in earnest but how democratic is it that agencies could impose fines and do so at levels which are much greater than those imposed by courts? There is no doubt that some competition agencies are imposing fines at a level which, if they were imposed by a national court, would be struck down as unreasonable; for example, the rail company responsible for a train which crashed at Southall in the UK which killed seven people was fined a “record” £1.5m – by contrast, the first five cartel fines so far in 2009<sup>18</sup> have imposed fines totalling €1,400 million.

## PROMOTION OF COMPLIANCE / DETERRENCE

Some competition agency officials have become virtual superstar evangelists of competition policy. They preach sermons to the media and the public which are full of the fire and brimstone of imprisonment, fines, extradition, damages, humiliation and social ostracisation. They are very effective in this promoting the message<sup>19</sup> of compliance and this ought to lead to a higher level of deterrence. Courts generally do not do this type of missionary work (apart from the occasional comment in sentencing or in judgments). There is no doubt that competition agencies would generally win out over courts. Indeed, it is very unlikely that courts would ever trump zealous officials in this regard.

## CONSISTENCY

Do courts or competition agencies win on the basis of consistency? Neither institution has a monopoly of virtue. Courts within a court can diverge: the *Crehan v Courage* litigation in the UK bears testament to that proposition. Equally, courts across jurisdictions can diverge: the *Vitamin* jurisprudence in the US<sup>20</sup> and the UK<sup>21</sup> equally bears testament to that proposition.<sup>22</sup>

<sup>17</sup> E.g., restricting appeals to points of law only.

<sup>18</sup> I.e., power transformers (IP/09/1432), concrete reinforcing bars (IP/09/1389), calcium carbide (IP/09/1169), gas (IP/09/1099) and marine hoses (IP/09/137).

<sup>19</sup> Whether the message is converted into compliance requires empirical research which goes beyond the scope of this paper.

<sup>20</sup> *F. Hoffman-La Roche Ltd v Empagran SA* 542 U.S.

<sup>21</sup> *Provimi v Aventis* [2003] 2 All ER (Comm) 683.

It is only fair to ask whether courts and agencies should always decide matters in the same way anyway. It is a similar question as to whether the EU and the US should always decide mergers in the same way (an issue that was so central in the *General Electric/Honeywell* case) and in that context, Eleanor Fox made an observation which is apposite in the present debate about whether courts and agencies should decide matters in the way when she wrote “convergence is not the paramount goal, but convergence can be helpful.”<sup>23</sup> In many way, there is little to choose between courts and agencies but courts tend to be a little more consistent but that may be more the legal approach to respect precedent more than economists do so.<sup>24</sup> It is also interesting to note that agencies almost invariably issue a single decision but courts can (but obviously not all do) issue multiple judgments so there can be a certain internal consistency within the agency decision which is lacking from a multimember court with each judge delivering a judgment.

### **ADOPTING DECISIONS**

Courts cannot give up on a case. Judges might well encourage the parties to settle but they cannot refuse to deal with the case so they must make a decision on every case if the parties do not settle or the case is not withdrawn. However, competition agencies can often decide to drop cases and not pursue matters.

### **RECOMPENSING VICTIMS OF BREACHES OF COMPETITION LAW**

Courts clearly win the day in that they are able to provide compensation to those who have suffered loss because of a breach of competition law. Many (but not all) courts are able to award damages to the victims. This is extremely important. Unfortunately, agencies do not ordinarily have this power.

Perhaps a suggestion worth considering is whether competition agencies should have a role to play in compensating victims. For example, should a portion of the “fine” collected by the European Commission be available to fund compensation to victims who would then claim from the Commission? Obviously, the Commission may not like the idea of having to administer claims (much in the nature of, for example, the Iran-US Claims Tribunal) but it may be the most effective way of dealing with the issue. The Commission would have no difficulty in terms of collating evidence or having access to it – it would already have the evidence – and might find other evidence coming to it from victims. There is no doubt that victims would still have the right to sue in the Member State courts but they may wish to have their compensation paid through this means. It may be that there is a need for a mixed judicial/agency institution to be created. No doubt legislation would be needed and the matter could be very complicated but there may be the germ of an idea worth developing in all of this!

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<sup>22</sup> Ryngaert, “Foreign-to-Foreign Claims: the US Supreme Court’s Decision (2004) v the English High Court’s Decision (2003) in the Vitamins Case” [2004] ECLR 611.

<sup>23</sup> Fox and Crane (eds.), *Fox and Crane’s Antitrust Stories* (2007) at p.357.

<sup>24</sup> Hutchings, “The Competition between Law and Economics” [2004] ECLR 531.

## C. CONCLUSIONS

### INTER-RELATIONSHIP OF COURTS AND AGENCIES

Commenting on the Irish Authority's role in the competition enforcement regime, Gorecki has stated that the "effectiveness of the Authority's enforcement of the civil and criminal provisions of the Act depends critically on the courts. It is the courts that determine in the final analysis whether there has been a breach of the Act, and if so, what penalty is appropriate. It is the court rules that set the parameters within which competition cases are argued. It is also the court system that assigns the judges who hear and decide cases."<sup>25</sup>



In medicine, surgeons and pathologists have a different function. Surgeons look back into the patient's past to understand how they have acquired the particular condition and then look forward as to how the condition could be treated so that the patient can recover. Pathologists, on the other hand, have an entirely retrospective function. Is the judge in a competition matter looking retrospectively or prospectively? While there are situations where a judge can be looking, Janus-like, in both directions, it is fundamentally a retrospective analysis. Agencies tend to be either backward looking (e.g., in cartel investigations) or forward looking (e.g., in merger control).

As a generality, judges tend to look at the instant problem while competition agencies tend to be more concerned with the broader policy issues.

### HOW SHOULD COURTS REVIEW THE WORK OF AGENCIES?

How should courts review decisions by agencies particularly where the agency members might be more expert in an area than the judges themselves? It is worth pondering on how some superior courts deal with appeals from specialist courts. An example is instructive. The US Supreme Court has relatively rarely heard appeals on tax law. In one of those few cases, the 1952 case of *Arrowsmith v. Commissioner of Internal Revenue*,<sup>26</sup> Justice Robert H Jackson dissented from the view of the court and what made his dissent interesting was that he, alone among the Justices hearing the case, had practised in the area of tax before his appointment to the Supreme Court but the fact that he had practised in the area and therefore had experience (and probably expertise) was not treated as sufficient to swing the others to his point of view. In his dissenting opinion, he wrote of the expertise of the Tax Court (a specialised body) as being preferable to the Supreme Court:

"Where the statute is so indecisive and the importance of a particular holding lies in its rational and harmonious relation to the general scheme of the tax law, I think great deference is due to the twice-expressed judgment of the Tax Court. In spite of the gelding of *Dobson v. Commissioner*, 320 U. S. 489, by the recent revision of the Judicial Code, Act of June 25, 1948, § 36, 62 Stat. 991-992, *I still think the Tax Court is a more competent and steady influence toward a systematic body of tax law than our sporadic omnipotence in a field beset with invisible boomerangs. I should reverse, in reliance upon the Tax Court's judgment more, perhaps, than my own.*" (emphasis added)

<sup>25</sup> "Future Challenges for Competition Policy in Ireland: A Personal Perspective" in Evans and Jenny (eds.), *Trustbusters: Competition Authorities Speak Out* (2009) 207 at 216.

<sup>26</sup> 344 U.S. 6.

There is no doubt that courts are willing to review the decisions of competition agencies. The courts may well refer to the Doctrine of Curial Deference<sup>27</sup> but it does not prevent them from overturning or narrowing the decision of the agency if they believe it is correct to do so. Perhaps the court should be free to overrule where there was a lack of balanced or proper judgment by the agency but be reluctant to interfere with technical matters unless the court believes that there is a real reason to do so.

## WHO WINS?

Ultimately, it is not an arithmetical question of whether courts or agencies win more points. It is not simply a matter of totting up the points for the courts and the points for the agencies. It should be clear, by now, that each type of institution has its merits. Competition law systems would be the poorer if there was just one type of institution. Both are required because they fulfil distinct functions.

The fact that the paper does not advocate a radical overhaul is not such a problem. Scientists are occasionally awarded doctorates even though their experiments fail. Apparently, it is sometimes as much of an accomplishment to demonstrate why something does not work or does not need changing as to demonstrate how it works or that it should be changed!

*This is a conference paper only. Privileged and specialised legal advice should be obtained before making any decision on the matters referred to in this paper.*



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<sup>27</sup> See, in an Irish context, O'Reilly, "The Doctrine of Curial Deference in Ireland" (2007) *Journal of Juridical Studies* 197.