Due Process Requirements and Competition Proceedings Before the European Commission

Centre of European Law, King's College, London

6 May 2011

Eric Gippini Fournier
Member of the Legal Service, European Commission(*)

(*) Any opinions are personal to the speaker
Criticisms

- Institutional Setup
  - Decision taken by a body of « 27 politicians » who have never been involved in the case
  - « No hearing » before a decision maker
  - Role of case team: « same people investigate and decide »

- Judicial review
  - « Luxuriant growth » of limited judicial review
Case team investigates and decides

- « Unique » procedures. Really?
  - 20 Member States have a system of one administrative authority investigating and deciding the case.
  - Other examples

- Quite unique indeed:
  - Case team (alleged « prosecutor-decision maker ») has no power to decide even on initiating proceedings
  - Internal mechanisms. Peer review panels. Role of LS, other services. Multiple actors in the process systematically challenge the proposed findings.
  - Probing and challenging even before the « accusation ». Before the SO, at the hearing, after the hearing, and before a decision is adopted
  - Hearing Officer (not a member of DG COMP, a « Head of service » reporting directly to the Competition Commissioner)
  - Member States, Advisory Committee
Clear tension with the criticism that decisions are taken by "27 politicians"

The dynamics of a multiple-actor process show that this criticism is not founded

- Case team has no powers, in law and de facto.
- DG COMP basic investigative functions; College of Commissioners decision-making functions
- Before the College of Commissioners takes a decision, multiple actors in the process systematically challenge the case team's analysis and proposals, examine the evidence and probe in depth the assessment of the case team.

"Lobbying" at the final stages? Defence representations

Outcomes show that the system is not one where the case team ("prosecutor") gets its way; far from that. Multi-layered, demanding filters that on occasion lead to accusations of underenforcement.
Undertaking heard in writing: Reply to SO.
- Particularly suited to the complexity and detail of competition cases
- ECHR only requires oral and public hearing at the judicial review stage (and only once).

Is « oral » hearing the issue? « hearing before the case team »? Presence of high-ranking officials with decisive influence and powers:
- Hearing Officer
- Member of Commissioner's cabinet
- Senior management (Best practices): often Deputy Director-general
- LS
- Some Commissioners represented by associated services
“27 politicians”

- U.S. FTC a bipartisan body (3+2 and Chairman appointed by President).
- In 39 States (U.S.) antitrust laws applied by judges...
  - who run and campaign for election and receive contributions (Republican Party v. White);
  - free speech allows corporations to support their preferred candidates (Citizens United v. FEC);
  - recusal may limit damage (Caperton v. Massey), standards defined by State laws.
- How are selection process and guarantees of independence different and less rigorous than the appointment of members of NCAs?
- Independence of the Commission in competition decisions cannot be seriously contested. Is “ability” (cf. 253-254 TFEU) the criticism?
- “Political influence” and “horse-trading” in competition cases? Really? In 2011?
Alternative institutional arrangements

- Proposal for internal decision-maker (Hearing Officers): one or three persons would pass to the College of Commissioners a draft decision for endorsement or rejection 'en bloc'
  - Inspired by ALJs in the FTC? Compare
  - Institutional law issues: 103(d) and 105 TFEU; Case 9/56, Meroni v High Authority; Commission's Rules of Procedure
  - Preponderant role of Competition Commissioner resembles this proposal...with additional advantages for the defence
  - Differences with the proposal: *ex parte* representations / contacts with the decision-makers; multiple-actor process; Commission could only adopt or reject 'en bloc' (no changes by the College).
  - Would eliminating these differences benefit the defence?
Alternative institutional arrangements

- The alternative: a purely «prosecutorial» model.
  - Feasible under the Treaty?
    - 103(2)(d) TFEU: Council regulations or directives designed in particular to «define the respective functions of the Commission and of the Court of Justice of the European Union in applying the provisions laid down in this paragraph»
  - Fact vs Myth:
    - Only «one shot» vs multiple chances
    - In a system with settlements, prosecutorial model offers fewer guarantees.
    - Unleash DG Competition as a «pure prosecutor» and do away with most internal checks.
    - Would go hand in hand with true criminal prosecutor fact-finding powers: compelled testimony, wiretaps...
Article 6 ECHR

- « Criminal » for purposes of Article 6 ECHR?
  - Does it matter? « Civil » and « criminal » in Art. 6. Cf. expropriation proceedings (see Bistrovic v Croatia); refusing social housing
  - Engel criteria
  - Neste v Russia
  - Jussila v Finland
  - Spector Photo (C-45/08, 42); Hüls (150), AG opinion in Baustahlgewebe… (but see T-276/04, Compagnie Maritime belge v. Commission, para. 66 and C-338/00 P, Volkswagen v. Commission, para. 97).
  - At any rate, case law has always endeavoured to maintain a state of affairs that meets or exceeds the requirements of Art. 6 ECHR (Orkem, AG Vesterdorf in Polypropylene)
Article 6 ECHR: fining by administrative bodies cumulating investigative and adjudicative functions

- The Commission is not an independent tribunal.
- Jussila v Finland (2006). Grand Chamber ECtHR, 14 votes to 3
  - Distinction: « core » of criminal law and other areas which can be considered « criminal » under ECHR but are not part of the traditional « core » of criminal law.
  - Competition cases specifically mentioned.
  - « Compatible with Article 6(1) for criminal penalties to be imposed, in the first instance, by an administrative or non-judicial body » provided there is an appeal to an « independent and impartial tribunal » (para 43)
- AG Sharpston, KME (C-272/09, §§ 67-70); AG Kokott, Solvay (C-109/10, § 256); AG Mengozzi, Elf (C-521/09, §§ 30 ss).
- Swisscom (Swiss Administrative Federal Court, 24.02.2010)
- e.g. Mamidakis v Greece (2007).
Some confusions about the guarantees of the « criminal » heading of Article 6 ECHR

- Engel; Dubus v France: actual fines imposed do not matter. It is the severity of the maximum sanction that can be imposed
  - i.e. 10% of turnover
  - Competition fines are no more criminal today than they were in 1962

- « Only minor and disciplinary offences » confusion
  - Jussila v Finland; Janosevic v Sweden (tax penalties « no upper limit and may come to very large amounts »); Bendenoun; Valico v Italy

- Natural persons vs corporations: does it not matter?
  - Niemietz v Germany; Colas Est v France (ECtHR)
  - Roquette Frères; Hoechst (ECJ); AG Ruiz-Jarabo, VW, C-338/00, 66)
If you Fine a Corporation, Does it Not Cry?

“\textit{If you prick a corporation, does it not bleed? If you tickle it, does it not laugh? If you poison it, does it not die?}”

\textit{Sipress}
Judicial review: Art. 6 ECHR requirements

- Requires that the judicial body reviewing the administrative decision must have « the power to quash in all respects, on questions of fact and law, the challenged decision » (Janosevic 81, 82)
  - not restricted to points of law but may also extend to factual issues, including the assessment of evidence (Janosevic, 82, and many others)
  - may not decline jurisdiction (Veeber No 1 v Estonia, Zumtobel v Austria, Kingsley v United Kingdom)
- Does not require that the Court has a power to replace the administrative decision with a new one. Fischer v Austria; Fehr v Austria; Potocka v Poland; Kingsley v United Kingdom (58: “quash..and either the decision will be taken by the review court or the case will be remitted for decision by the same or a different body”);
  - Confusion between « unlimited jurisdiction » in 261 TFEU (vs pure annulment review) and « full jurisdiction » required under Article 6 ECHR.

→ Annulment proceedings as conceived in the treaty (263-264-266 TFEU) are Article 6 compliant (see AG Sharpston, KME C-272/09, 69-70)
Judicial Review

- « Complex » economic and technical assessments. « Manifest error » standard.

- Judicial self-restraint on certain matters is not exceptional. “Sufficiency of review” doctrine under ECHR.
  - Bryan v United Kingdom (1995) (findings and inferences “neither perverse nor irrational”),
  - ECHR Comm’n: X v. United Kingdom (1998); Stefan v United Kingdom (1997): Privy Council could set aside any finding “not supported by any evidence or which is perverse or irrational”.
  - U.S. Deferential “substantial evidence” standard of review of administrative agency rulings (“more than a mere scintilla of evidence, but [...] less than a preponderance”, see, e.g., Young v. Apfel, 198 F.3d 260 (10th Cir. 1999)
  - Swisscom (and case law of Swiss highest Federal Court).
Judicial review in Practice

- Judge them not by their words, but by their deeds
  - Excruciating review on facts and law
  - GC often ready to examine new evidence for the defence (cf Bistrovic v Croatia - expropriation proceedings: full jurisdiction does not require court to examine new facts (53); civil case applying same « full jurisdiction » standard as under criminal heading (51)
  - Unlimited jurisdiction as to fines (probably not required under ECHR)

- Only principled criticism is helpful
  - Is judicial review « good » only when we win?

- Is the bush truly growing?
  - Rote reminder of applicable case law in judgments vs effective application of the supposedly lenient standard
  - Read decisions, read judgments
Facts are facts

« The Courts were and are perfectly well qualified to assess whether the Commission reached a reliable conclusion on questions such as the ones I have listed »
(I. Forrester, « A Bush in Need of Pruning »)

• Did Mr Smith attend a meeting in the Grand Hotel after the trade association meeting on January 13, 1999?
• Does the report of Mr Dupont to his boss about a call to Mr Smith prove that both Smith and Smith’s company were agreeing prices with Dupont’s company?
• Were prices and discounts set neutrally on the basis of market forces, or were they intended to achieve an anticompetitive end?
• Did a pattern of dealing, notorious in the market place, alter the seller’s written terms of contract by including an implied export ban in its standard terms?
• Would a large increase in parallel trade reduce companies’ earnings with a detrimental impact on their research activities?
• Was there a plausible explanation for the observed similarity in terms of price changes?
Musings on Judicial review

- The better judgment is a speedy one, and one where the Court fully embraces your position and positively finds that it is the correct one.
- For the Commission too.
- ECSC model: entire case file forwarded to the Court
Concluding thoughts

- Old debate resurfaces every few years. As a matter of law, system is not objectionable
- Things have indeed changed. We've come a long way:
  - Decisions much better reasoned, level of detail
  - Statute of limitations
  - Full access to file; right against self-incrimination
  - Introduction of the Hearing Officer and development of its role
  - Peer review panels, CET
- A careful and prudent institution; arguably risk-averse; with a proven track record, taking very few decisions after long investigations; with internal processes that make room for pro-defense input at each and every step and guarantee that only solid decisions are taken
  → cases tend to stand up in court, and that is a good thing
- Increasingly focusing on very serious infringements in large markets, and taking on very powerful companies
  → fines tend to be high in absolute and aggregate figures
- Understandably, not the ideal state of affairs for everybody. Self-serving criticism vs principled criticism.
Bibliographic references


