Due Process Requirements and Competition Proceedings Before the European Commission

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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 Commissionner)
  - Member States, Advisory Committee

« Case team investigates and decides »

- 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.

« No hearing »

- 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.
    - U.S. criminal cases: 90 to 95% plea bargaining (Alschuler, 79 Colum L. Rev. 1, 1979). In antitrust cases (1996-2005) 307 out of 367 (L. Jacobs, 2006)
    - 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?

"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?"

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 assesment 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 Kigdom (1997): Privy Council could set aside any finding “not supported by any evidence or which is perverse or irrational”.
    - Alconbury [2001] UKHL 23, per Lord Slynn; Runa Begum [2003] UKHL 5, per Lord Bingham.
    - 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 judment 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.

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