





EU enforcement construction



Commission as master of the procedure



Leniency application



Hearing



Enforcement building under attack



Together stakeholders can keep it up





Outline

- Is system compatible with the law? (*not*; is another system better?)
- Which system? EU competition law sanctions procedures
- Which elements:
 - Commission procedure
 - Fact-finding / appraisal of evidence / adjudication
 - Hearing
 - Formal decision-making
 - Appeal
 - Review standard
 - Procedure



Fundamental rights in context

- Basis for position in ECtHR case law
 - Criminal or not criminal? Core of criminal or not?
 - Impartial body or not impartial?
 - Judicial review or new investigation?

- ECtHR case law has to be read in context
 - Approach is result-oriented and proportionate
 - Fundamental rights case law: “Practical principles” ensuring due process

- Can due process objections to EU regime be remedied in existing system?
 - Problem of current system may be formalism. That cannot be remedied by formalistic approach (to fundamental rights).



Commission procedure – Investigation, Hearing and Evidence

- Use of investigative measures by Commission
 - Challenge statements
 - Specific focus on collecting and examining exculpatory evidence
- Tunnel vision (i.e. problem of partiality)
 - New team after SO (like in the Dutch system)
- Allow access to replies SO and organize “inter-active” hearing as part of investigative phase on that basis (allow parties time)
- ECJ judgment in *Coppens* (charge concerning one single infringement can in fact be charge of various infringements) may compel “phased” decision-making process in (some) cartel cases
- Main challenge: deconstructing formalistic application of considerations in *T-Mobile* (object), *ANIC* (SCI), *SuikerUnie* (publicly distancing), *AkzoNobel* (presumption of parent liability), etc. and mechanical application Fining Guidelines



Commission procedure – Decision-making

- Objections
 - Commission is body of politicians
 - Commission is political body
 - Commission members will not have seen parties or heard or read the evidence and defence
- Observations
 - Role of commissioners too limited or too extensive?
 - Where does decision-making take place in practice?



European Courts – Standard of Review

- In sanctions procedures it is a “full review” (a review by a court with full jurisdiction). No deference to Commission’s conclusions (*Microsoft* is admittedly problematic but see *Posten Norge*).
- Implications of system of judicial review
 - Parties launching the appeal have to identify what is wrong with the Decision
 - It is not necessarily more burdensome to attack existing final Decision than to defend against a broader charge before a tribunal
- General Court has to examine the arguments and to test the Commission findings and supporting evidence very critically (and from the basis of the presumption of innocence)
 - General Court was able and willing to do so (in some cases): Unipetrol, Low & Bonar, Stempher, Aalberts Industries



European Courts – Procedure

- Start: Formal equality of arms at appeal stage but on unlevel starting basis (i.e. extensive file, extensive Decision, years of investigation and decision-making)
- Limitations flowing from time limits and constraints on submission
- Full review v Commission focus on admissibility within ECJ system
- Examining value of evidence within written procedure
 - No second round?
 - Measures of organization; focused debate (witnesses)
- Application of Commission Fining Guidelines by Courts in the exercise of their full jurisdiction (see ECJ in *Coppens*)?



What is difficult to resolve

- 1st Instance decision by non-impartial body
 - No hearing of parties before decision-making persons
 - The impartial body reviews lawfulness pre-existing decision
 - No suspensory effect appeal
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- Unsatisfactory (for some) but not incompatible with ECtHR case law



*Way forward:
Together reforming practice within the existing system?*

