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“The enforcement of EU antitrust law by the Commission and the judicial protection against illegal Commission antitrust decisions by the EU Courts: In Need of Repair? And How?”

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Civil and Administrative
Proceedings
v.
Criminal Proceedings

I.

The nature of the EU-antitrust proceedings

The procedural requirements for criminal proceedings are much stricter than those for civil and administrative proceedings

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Interdependency between the nature of law and the procedural rules as well the institutional framework within which the law is applied

Administrative proceedings

Merger control (Reg. 139/2004): Commission declares notified proposed merger compatible or incompatible with Internal Market

Antitrust proceeding pursuant to Reg. 17: Commission issued Negative Clearances and Exemptions from antitrust prohibition

But:

Art. 15 (2) Reg. 17:

The Commission may by decision impose on undertakings or associations of undertakings fines of from 1000 to 1 000 000 units of account, or a sum in excess thereof but not exceeding 10 % of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently: (a) they infringe Article 85 (1) or Article 86 of the Treaty

However (Hoffmann-LaRoche 1979):

129 By virtue of article 87 of the treaty the council had to adopt the necessary regulations or directives especially with a view to ensuring “compliance with the prohibitions laid down in Article 85(1) and in Article 86 by making provision for fines and periodic penalty payments”. In pursuance of this provision it adopted Regulation no 17 of 6 February 1962.

Article 15(2) whereof provides that the Commission may by decision impose on undertakings or associations of undertakings fines up to a maximum fixed by that Article if they either intentionally or negligently infringe Article 85(1) or article 86 of the Treaty. On the other hand under **Article 2** of the same Regulation: “Upon application by the undertakings or associations of undertakings concerned, the Commission may certify that, on the basis of the facts in its possession, there are no grounds under Article 85(1) or Article 86 of the Treaty for action on its part in respect of an agreement, decision or practice.”

However

Article 3 - Regulation 17

1. Where the Commission ... finds that there is infringement of Article 85 or Article 86 of the Treaty, it may by decision require the undertakings or associations of undertakings concerned to bring such infringement to an end.

2. ...

3. Without prejudice to the other provisions of this Regulation, the Commission may, before taking a decision under paragraph 1, **address to the undertakings or associations of undertakings concerned recommendations for termination of the infringement.**

Art. 15 (2) Reg. 17 – Art. 23 (2) Reg. 1/2003
steadily rising amounts of the fines:

- DYESTUFFS-Cartel (1962) 50 000 U.A.
- Hoffmann-La Roche (1976) 300 000 U.A.
- 1979 a new policy intended to increase the general level of fines (Pioneer 4 350 000 U.A.)
- 1989 Guidelines (likely fines: above ECU 20 million)
- 2006 Guidelines (“These Guidelines revise those adopted in 1998, with a view to increasing the deterrent effect of fines.” IP/06/857)
- 5/12/2012 Commission fines producers of TV and computer monitor tubes € 1.47 billion

Art. 15 (2) Reg. 17
(absolute limit +/- 5 000 000)

v

Art. 23 (2) Reg. 1/2003
(no absolute limit)

Art. 15 (4) Reg. 17

Decisions taken pursuant to paragraphs 1 and 2 shall not be of a criminal law nature.

Art. 23 (5) Reg. 1/2003

Decisions taken pursuant to paragraphs 1 and 2 shall not be of a criminal law nature.

EFTA-Court, Rs. E-15/10, Urteil v. 18.4.2012 - Posten Norge/ESA, Rn. 88:

“... having regard to the **nature of the infringements** in question and to the potential gravity of the ensuing penalties, it must be held that the proceedings at hand fall, as a matter of principle, within the **criminal** sphere for the purposes of Article 6 ECHR (compare the European Court of Human Rights *A. Menarini Diagnostics S.R.L. v. Italy*, no 43509/08, §§ 38 to 44, 27 September 2011; see furthermore the Opinion of Advocate General Sharpston in Case C-272/09 P *KME Germany and Others v Commission*, judgment of 8 December 2011, not yet reported, point 64).”

1st intermediate conclusion:

Commission proceedings pursuant to Art. 23
Reg. 1/2003 are criminal in nature.

II.

The compatibility of the Commission's antitrust proceedings with the fundamental rights

Criminal sanctions may be imposed by an administrative body which does not itself comply with the judicial fundamental rights, provided that the decisions of that body are subject to subsequent control by a judicial body that has full jurisdiction and does in fact comply with those requirements. If this is the case, the competition law procedure as a whole is compatible with the judicial fundamental rights (see, referring to Article 6(1) ECHR, the Opinion of Advocate General Sharpston in *KME Germany and Others v Commission*, point 67; compare *A. Menarini Diagnostics S.R.L. v. Italy*, cited above, § 59).

My understanding:

Criminal sanctions may be imposed by an administrative body which does not itself comply with the **judicial fundamental rights applicable to criminal Court proceedings**, provided that the decisions of that body are subject to subsequent control by a judicial body that has full jurisdiction and does in fact comply with **those** requirements.

Question:

Which fundamental rights apply to proceedings of an administrative body that imposes criminal sanctions?

1st Argument:

In criminal antitrust proceedings, the Commission must not combine the functions of prosecutor and judge.

This argument cannot any longer be rejected pointing to a “misunderstanding of the nature” of the Commission antitrust proceedings (CoJ 100/80 to 103/80 Musique Diffusion).

A prosecutor, even an administrative prosecutor, taking the final decision, can never be “**impartial**” within the meaning of the fundamental rights (right to good administration / a fair trial).

EU-Charter of Fundamental Rights

Article 41 (1) : Every person has the right to have his or her affairs handled **impartially** ...

Article 47 (2) : Everyone is entitled to a fair and public hearing within a reasonable time by an independent and **impartial** tribunal

Convention for the Protection of Human Rights and Fundamental Freedoms

Article 6 (1): „... everyone is entitled to a fair and public hearing within a reasonable time by an independent and **impartial** tribunal ...“

ECtHR, Dubus v. France - 5242/04
Judgment 11.6.2009

“ ... lack of any clear distinction between the functions of prosecution, investigation and adjudication - the applicant company might reasonably have had the impression that it had been prosecuted and tried by the same people - decision of the Commission, which, in its various capacities, had brought proceedings against it, notified it of the offences and imposed the penalty ...”

Conclusion of the ECtHR: The applicant's doubts about the Commission's **impartiality** were justified because of the lack of any clear distinction between its different functions.

2nd Argument:

In criminal antitrust proceedings, it is the decision maker itself, i. e. the Commission, who has to hear and to appreciate the defence; the Commission may not “out-source” this procedural requirement to its Services, i.e. DG Competition.

The decisions are taken by the Commissioners,
“none of whom ... is likely, in an antitrust
proceeding, to have read all the evidence and
arguments or attended the hearing.”

Temple Lang, Three Possibilities for Reform of the Procedure of the European Commission in Competition Cases under Regulation 1/2003, CEPS Special Report, Nov. 2011 p. 197, 198.

EU-Charter of Fundamental Rights

Article 41 (1) : Every person has the right to have his or her affairs handled ... **fairly** ...

Article 47 (2) : Everyone is entitled to a **fair** and public hearing within a reasonable time by an independent and impartial tribunal

Convention for the Protection of Human Rights and Fundamental Freedoms

Article 6 (1): „... everyone is entitled to a **fair** and public hearing within a reasonable time by an independent and impartial tribunal ...“

**OECD Country Studies (2005), European Commission
– Peer Review of Competition Law and Policy, p. 63:**

„No other jurisdiction in the OECD assigns decision-making responsibility in competition enforcement to a body like the Commission.”

3rd Argument:

The Commission uses criminal antitrust proceedings in order to regulate the markets.

For the Commission, antitrust is part of its overall economic policy. Antitrust, merger control and control of state aid to industry are tools to achieve **policy goals** defined by the Commission.

While in an administrative context this may be legal, in criminal proceedings the policy goals are defined exclusively by the legislator. In particular, the use by the Commission of possible criminal antitrust fines as a powerful incentive for companies to agree to “remedies” (settlements) which “lie at the core” (Director General *Italianer*, 5/12/2012) of the Commission competition law enforcement, constitute an **infringement of the prohibition of misuse of powers.**

2nd intermediate conclusion:

The Commission's functions in criminal antitrust proceedings of prosecutor and judge, its absence during the antitrust proceedings as well as its utilitarian use of criminal antitrust proceedings for political purposes, constitute an infringement of the fundamental right to good administration.

III.

The effectiveness of the judicial protection against illegal Commission antitrust decisions imposing criminal fines.

Given that the Commission imposes criminal sanctions in proceedings which do not itself comply with the **judicial fundamental rights, applicable to criminal Court proceedings**, its decisions have to be subject to subsequent control by a judicial body that has full jurisdiction and does in fact comply with **those** requirements.

A judicial administrative review does not comply with this requirement.

Judicial protection against criminal antitrust fines imposed by the Commission

CoJ, EG v Otis, C-199/11, judgment of 6/11/2012:

63 The review provided for by the Treaties ... involves review by the EU Courts of both the law and the facts, and means that they have the power to assess the evidence, to annul the contested decision and to alter the amount of a fine. The review of legality provided for in Article 263 TFEU, supplemented by the unlimited jurisdiction in respect of the amount of the fine, provided for in Article 31 of Regulation No 1/2003, therefore meets the requirements of the principle of effective judicial protection in Article 47 of the Charter (see, to that effect, *Chalkor v Commission*, paragraph 67).

Judicial protection against criminal antitrust fines imposed by the Commission

Problem with the case law of the EU-Courts on their own effective judicial protection against criminal antitrust fines imposed by the Commission:

nemo iudex in sua causa,

i.e. the compatibility of the EU-Courts proceedings in criminal antitrust cases with the fundamental rights has to be assessed by an independent (Constitutional) Court.

Judicial protection against criminal antitrust fines imposed by the Commission

Administrative judicial procedures pursuant to Art. 263 TFEU

EFTA-Court, Rs. E-15/10, judgment of 18/4/2012 - Posten Norge/ESA, paragraph 96:

This case-law [assessment of complex economic circumstances by the EU-Courts] must be seen against the background of the **limitation of the Court's powers of review** which is **inherent in the concept of review of legality** The object of an action for annulment is only to review the legality of acts adopted by ESA. The analysis of the pleas in law raised in such an action has neither the object nor the effect of replacing a full investigation of the case in the context of an **administrative procedure**. This is the reason for which the Court, when conducting its review of ESA's decision, must not substitute its own assessment of complex economic circumstances for that of ESA (C-441/07 P, paragraph 67; C-525/04 P, paragraph 57; C-399/08 P paragraphs 84 and 87).

Judicial protection against criminal antitrust fines imposed by the Commission

The exercise of unlimited jurisdiction

CoJ, Commission v Coppens, C-441/11 P, judgment of 6/12/2012, paragraph 80:

“ ... it is for the Court, in the exercise of its unlimited jurisdiction ..., to assess for itself the circumstances of the case and the nature of the infringement in question in order to determine the amount of the fine (Case 322/81 Michelin v Commission [1983] ECR 3461, paragraph 111), ...”.

However, the object of an action for annulment is only to review the legality of the act in question adopted by the Commission, **on the basis of the pleas of the applicant**. The analysis of the pleas in law raised in such an action has neither the object nor the effect of replacing a full investigation of the case. Moreover, the **Commission fining Guidelines** are, as a general rule, guiding the EU-Courts in their exercise of their unlimited jurisdiction.

Effective judicial protection against criminal antitrust fines imposed by the Commission ?

- Actions brought before the Court do not have suspensory effect
- Proceedings before the EU Courts are *inter partes*.
- The defence against the Commission decision to be brought within two month, no other pleas are admissible.
- Commission decision is presumed to be legal.
- Scrutiny limited to manifest errors of assessment.
- Exercise of unlimited jurisdiction lacks legal framework and therefore, consistency.
- Restricted application of the principle of *non bis in idem*.

3rd intermediate conclusion:

The judicial protection against criminal antitrust fines imposed by the Commission is not effective.

Final conclusion:

The enforcement of EU antitrust law by the Commission and the judicial protection against illegal Commission antitrust decisions by the EU Courts, needs repair!

But how ?

Either,

the current procedural and institutional set up is kept, then the Commission has to give up its powers to impose criminal fines for antitrust infringements;

Or,

the legislator limits the functions of the Commission to those of a prosecutor, and sets up a judicial instance to which the Commission may address a request to punish undertakings / associations of undertakings for infringements of the EU antitrust prohibition rules.



Thank you very much for your kind attention!