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9th ASCOLA Conference Warsaw 2014 on
PROCEDURAL FAIRNESS IN COMPETITION PROCEEDINGS

Competition law enforcement: administrative versus judicial systems

Daniel Zimmer

CENTRE FOR ANTITRUST AND REGULATORY STUDIES, UNIVERSITY OF WARSAW
Warsaw, 26 – 28 June 2014

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Competition Law Enforcement: Administrative versus Judicial Systems

Daniel Zimmer*

I will place the focus of my contribution on the topic of procedural justice, and especially with the question of whether the principle of issuing an administrative decision, the dominant principle in European official competition-law enforcement, should be maintained – or whether it seems appropriate to shift to the US-American principle, found at least in the procedures of the Department of Justice, that the administration itself has no decision-making power when prosecuting a violation, but must instead procure a court decision.

The background of the discussion to be held here is a serious charge that has been levelled at the procedure as implemented for example by the European Commission: at its core, this charge holds that in the European administrative procedure – as in many other, analogously designed procedural rules – the investigator, prosecutor and decision-maker is one and the same person – a fact that rules out the possibility of taking a fresh, unbiased perspective to reach an objective decision. Interestingly, this discussion has long spread beyond the specialised audience of legal journals. The British weekly magazine "The Economist" opined in February 2010 in an article:

"Critics, whose concerns have increased with the ferocity of the sanctions imposed, say that by acting simultaneously as investigator, prosecutor, jury and sentencing judge, the commission is denying defendant firms the basic right to be heard by an impartial tribunal. They are right."[1]

The question of whether the procedure of the European Commission – and perhaps also that of other competition authorities that hand down administrative decisions – should or must be changed, has several dimensions: one legal, one empirical (can it be proven that public administrators decide differently in cases that they themselves have investigated?) and lastly, a behavioural-science dimension (what are the psychological bases for reaching a decision; when must we assume that decision-makers are biased?).

Legal evaluation

This contribution deals least with the legal evaluation of the administrative procedure. It seems remarkable how much has been published on this issue in Europe, how much effort put into it. The core question here, above others, is whether and under which conditions an administrative

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[1] "Prosecutor, judge and jury – Enforcement of competition law in Europe is unjust and must change", The Economist, 18 February 2010.

procedure is compatible with Article 6(1) of the European Convention on Human Rights. This provision reads:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

At the centre of the issue stands, first, the question of whether the fines imposed by the Commission in this matter are – especially due to their sheer enormity – criminal penalties, which would require the proceeding in question to meet higher due-process standards – and especially whether a judicial-style proceeding is necessary in order to impose whichever penalties are called for.[2]

The second question being debated is to what extent – assuming that the million-euro fines are indeed of a criminal-law nature – the fact that the administrative decision is subject to judicial supervision alleviates the charge that an administrative decision as such involves a prosecutor and a decision-maker who are, initially, one and the same person.

My topic, however, is not the compatibility of the current system with higher-ranking law such as the European Convention on Human Rights, but the comparison and evaluation of sanctioning systems, as well as ideas on how to improve them.[3]

Empirical data

For this reason, I will first turn to the empirical aspect of the topic: Is it possible to observe bias among real-life legal decision-makers? In 1996 a practising competition lawyer published a study in which he examined to what extent decisions taken by the European Commission that had been challenged by the parties were upheld by the European courts. The analysis shows that in the majority of cases a court reversed or modified the Commission's decision for one reason or another. The author of the study concluded that the Commission procedure is questionable, and that the system as such is fundamentally in need of reform.[4] This reasoning is sound, and yet the results of this study could reveal a different conclusion: if parties are so often successful in achieving a

[2] Cf. *Wouter P.J. Wils*, The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EG Antitrust Enforcement: A Legal and Economic Analysis, World Competition 2004, 201 et seq.; *Donald Slater/Sébastien Thomas/Denis Waelbroeck*, Competition Law Proceedings before the European Commission and the Right to a Fair Trial: No Need for Reform?, European Competition Law Journal, 2009, 97 et seq.; *Jürgen Schwarze/Rainer Bechtold/Wolfgang Bosch*, Rechtsstaatliche Defizite im Kartellrecht der Europäischen Gemeinschaft. Eine kritische Analyse der derzeitigen Praxis und Reformvorschläge, 2008, S. 75 et seq. See for an evaluation of Swiss law under Article 6 (1) ECHR the recent decision of the Swiss Federal Court in the *Swisscom* case of 24.2.2010 – B 2050/2007 (comment by *Andreas Heinemann* in jusletter 21.6.2010).

[3] A decision of the European Court of Human Rights in the case *Dubus/France* of 11.9.2009 (case 5242/04) suggests – in contrast to earlier judgments – that administrative proceedings with a penal character require independent decision-taking already in the initial proceeding.

[4] *Frank Montag*, The Case for a Radical Reform of the Infringement Procedure under Regulation 17, European Competition Law Review 1996, 428 et seq.

reversal or modification of decisions before a court, then this would in any case suggest that court-enforced legal protection can be easiliy achieved, so that the charge of a breach of fundamental state-of-law principles appears in a weaker light.[5]

At any rate, there is a further academic study supporting the thesis of the bias of such competition-law decision-makers who were previously involved in investigation and prosecution. This study is a statistical analysis of decisions made by the US-American Federal Trade Commission that was carried out by an (economist) employee of the FTC and a professor of economics.[6] To understand the results, one must know the following background:

In the US, there are on the federal level two competition authorities, the Department of Justice, and the Federal Trade Commission. The Department of Justice generally does not have the authority to issue orders to companies that in its opinion have committed cartel offences. Instead, the agency must bring an action before the competent federal court in order to have a company ordered, say, to refrain from certain conduct. This is a system that I will in what follows refer to as the *judicial system*. The other competition agency, in contrast – the Federal Trade Commission, whose area of competence partly overlaps with that of the Justice Department – has under certain conditions the authority to issue orders itself. The proceeding before the FTC is quite complex. If a consent agreement cannot be reached, the FTC, consisting of five Commissioners, may decide to issue an administrative complaint. That complaint initiates a proceeding before a so-called administrative law judge, that is, a person employed by the FTC who takes on the task within the administrative procedure. The decision of this administrative law judge can then be challenged by both the company concerned and the bureau of the FTC. In this case, the proceeding does not however go to an external court, but back to the FTC, that is, to the collegial body of the five Commissioners. Only this second decision by the FTC as a collegial body can later be disputed before a federal court.

The study I would like to report on referred to the stage between the first and second decisions of the FTC as a collegial body in merger cases: the first decision, with which the Commission decreed not to allow a merger, and to bring the case before an administrative law judge, and the second, in which it decided whether to follow the judgment of the administrative law judge. In the first of these two decisions, one can see the FTC as a kind of investigative agency; in the second, it plays the role of a court of appeal that is reviewing the decision of the administrative law judge.

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[5] Cf. *Alexander Italianer*, Safeguarding due process in antitrust proceedings, Fordham Competition Law Institute Annual Conference on International Antitrust Law and Policy Session on "Enforcers' perspectives on international antitrust" Thursday 23 September 2010, p 8 (http://ec.europa.eu/competition/speeches/text/sp2010_06_en.pdf).

[6] *Malcolm B. Coate/Andrew N. Kleit*, Does it matter that the prosecutor is also the judge? The administrative complaint process at the Federal Trade Commission, Managerial and Decision Economics 19 (1998) 1 et seq.

It is not always the case that the FTC is made up of the same personnel for the second decision as it was for the first. The proceeding before the administrative law judge alone often takes several years, and by the time the case is re-decided by the FTC, a number of the Commissioners, who are appointed by the US president, may have changed.

The study of interest here referred to seventy merger proceedings conducted by the FTC between the 1950s and the early 1990s. The first column lists the number of Commissioners who participated in *both* decisions. The second shows the percentage of cases in which the second decision completely corresponds, in content, to the first.

Where two of the Commissioners were the same in both proceedings, the original decision was upheld in 58% of the cases; if three were the same, it was upheld in 87% of the cases. If the Commission that reached the final decision was completely or almost completely, i.e. four-fifths, identical with the original Commission, however, there was not a single case of divergence from the original Commission decision to prohibit a merger.

The numbers would suggest a bias in those people who are called upon to decide a case with which they have had previous contact.[7] It seems remarkable that all the cases in which four or even five of the Commissioners participated in the original decision came to the same conclusion after the proceeding before the administrative law judge as beforehand, whereas an FTC made up of different people arrived at a different evaluation in a significant portion of the cases.[8]

Behavioural Sciences

So much for empirical data – which perhaps suggest, but do not prove, that people who have worked in investigation and prosecution are not impartial when it comes to deciding a case. I would like to approach the problem with you from yet another angle: the economic sciences are in flux – moving perhaps more quickly than the legal sciences. Since the 1990s, economists have increasingly been discussing and studying how humans really behave – and why they behave that way. Behavioural economics is the key term here. The conclusions to be drawn in the legal field, then, are a matter of behavioural law and economics.

What can modern behavioural economics contribute to the topic put before us on the design of proceedings in antitrust law enforcement? Behavioural economists have looked at, among other things, the way decision-making processes come about, including those over a period of time. The psychological problem of cognitive dissonance has long been studied. Cognitive dissonance refers to the uncomfortable situation of a person with a clash of cognitions – that is, conflicting perceptions or opinions. The problem of such an internal conflict is often solved by the person's

[7] The title of the study seems to suggest this conclusion „Does it matter that the prosecutor is also the judge?".
[8] The authors of the study offer various explanations for its results: See *Malcolm B. Coate/Andrew N. Kleit* (supra note 6) at p 9.

granting precedence to the position he or she first adopted. It is unpleasant for many people to question decisions they have made. It can aggravate the situation when the original decision has been announced, and reasons for it given, externally.[9]

Even independently of this first possible explanation why people often prefer to continue along a path already chosen, there is an explanation for the fact that decisions are often upheld by the original decision-maker, and less often revised. With the term of confirmation bias, psychologists and economists describe the tendency to give more weight to facts that confirm one's own expectations – and conversely, to attach less importance to facts that seem to contradict one's own expectations.[10]

What does all of this tell us about our topic? The conclusion is: it is all too human for decision-makers who in a first situation have evaluated a factual circumstance in a certain manner to stick to their original assessment even after a proceeding has been held, such as a hearing and the gathering of evidence.[11] The civil-service teams of competition-law authorities should not take this assessment personally – the behavioural sciences indicate to us that it is indeed not a personal, but rather a "superpersonal", an immanently impersonal problem. The flaw, when one and the same person is biased in a second decision about the same case, is to be found not within the person, but within the procedure.

Conclusion

What can we conclude from all of this for our topic: as regards the design of competition-law enforcement in the variant of administrative enforcement, thus public enforcement? There are – roughly – three options: The first consists in staying generally within the system of administrative decisions, though certainly while doing away with the notion that this system generates completely objective administrative decisions.

In doing so, one would in effect decide in the way it seems the Japanese legislature will be deciding: there as well, there has been a legal-policy discussion about the requirement of due process in competition-law administrative proceedings; currently a legislative project is pending in parliament.[12]

The reform will probably not do away with the system of administrative decision by the Japanese Fair Trade Commission, but merely reinforce the position and the possibilities for legal protection of the concerned parties. Thus, within the administrative procedure there is to be, for

[9] See, for the problem of cognitive dissonance, *Leon Festinger*, A Theory of Cognitive Dissonance, 1957.
[10] Cf. *Mark Snyder/William B. Swann, Jr.*, Hypothesis-Testing Processes in Social Interaction, Journal of Personality and Social Psychology 36 (1978) 1202 et seq.
[11] *James S. Venit*, Human All to Human, in: *Claus-Dieter Ehlermann/Mel Marquis* (editors), European Competition Law Annual 2009: The Evaluation of Evidence and Its Judicial Review in Competition Cases.
[12] Antimonopoly Bill Amendment Act, as introduced on 12.3.2010 by the Japanese cabinet into parliament.

example, the right to the constant presence of one's attorneys, and – with respect to confidential information – the so-called lawyer's privilege, and the Tokyo District Court is to provide for effective legal protection against orders from the JFTC.

In my opinion, the concept of the administrative procedure can remain in discussion: one could retain the basic fundaments of the present system on the EU level – while accepting the possibility that within a competition authority the eagerness of the personnel and repeated handling of a case may stand in opposition to complete objectivity in reaching a decision. For such deficits in the system there are possibilities of legal protection, and if these appear to be insufficient – as it might have been the case in the past in Japan – then this will be the place to apply corrections to the system.

Still, one could say that being able to go to court is not in fact sufficient compensation for an imperfect administrative procedure. Court protection is expensive; courts would perhaps only confirm the injured party's position after years of proceedings, so that at least in the interim there would already be – possibly irreversible – damage done. And in the end, depending on its concrete design, court protection is in turn an imperfect means of protection, for instance when – as is the case when decisions of the European Commission are reviewed – the courts in their assessment of complex economic situations limit themselves to testing whether the rules of procedure and admissibility have been observed, whether the facts have been appropriately stated, and whether there has been no obvious error in processing the case and no abuse of discretion.[13]

When these deficiencies are tallied up, one could decide to give up the system of administrative decisions and – option 2 – go to the opposite extreme, the judicial system. One model for this system could be, for instance, the new Austrian law. The competition authority here cannot issue any intervening orders, but must go to court.[14] The ancestor of this judicial system is, of course, US-American law. I have already mentioned that the Department of Justice cannot independently issue prohibition orders, but must file a suit with a federal court. This is also true when the Department of Justice carries out merger-control proceedings.

Here – in merger control – the drawbacks of the judicial system become especially visible, however. Precisely here, the parties rely particularly on a quick and clear clarification of the legal situation. They want to merge now, not in three years, when a judicial assessment has been achieved. From an economic perspective as well, it seems most urgent to rapidly achieve an unequivocal legal situation in merger cases, considering that the advantages to the economy of re-structuring measures can come about only when mergers are completed.

[13] Thus recently summarised by the ECJ, decision of 2 September 2010, Case No. C-399/08 P, *Commission v. Germany*, para. 97.
[14] See for the procedure §§ 26-49 of the Austrian Competition Act.

With good reason, therefore, other legal regimes are hesitant, at least with regard to merger control, to follow the example of the Department of Justice procedure. The Swiss government, which is planning a radical reform of its competition law procedure, indeed intends to introduce the judicial system in its prosecution of cartels and abuse, but not in its control of mergers.[15]

Even outside the area of merger control it seems doubtful to me that European Union law should take steps towards the judicial system – for example, in cartel prosecution or abuse control by the EC. The system suits the development of the law and the legal culture of the USA, because there private enforcement of antitrust law – and thus enforcement requiring the filing of a lawsuit – has always been in the foreground. The administrative system of enforcement, in comparison, may appear to be an appendix that takes the same legal form – to the extent that it is carried out by the Department of Justice – as the more common private law suit.

A general disadvantage of the judicial system seems to me to consist in the fact that a greater number of cases than in the administrative system are brought before courts of law. This not only leads to delays, but an obligatory court proceeding also presents other drawbacks: at least it can be a disadvantage to the enforcement process when a court cannot guarantee the same level of professional specialisation as exists within the competition authorities. Due to precisely such difficulties, the European Union courts, when dealing with complex economic facts, limit their assessment to examining whether the bases for the findings – the fact-finding procedure, for example – appear correct. Now, if judges who have thought of themselves more as generalists than as specialists up to now – and this is my impression of the EU's jurisdiction – will in future be expected to hand down a final opinion in every single case in which the competition authority decides to intervene, then this would presuppose a transition to a different type of jurisdiction – to a system in which the courts themselves would undertake an assessment of even complex economic facts. This does not seem to me to suit the existing court system of the European Union. Even in Austria, the cartel court, which decides on applications of the federal competition authority, is a court created especially for this type of proceedings. This is likewise to be the case in Switzerland, where a special federal competition court is to be set up.

Without a specialised court system, I am afraid the transition to the judicial system would bring with it a loss of significance for competition law and competition policy. We must imagine the situation that would occur more and more frequently after switching to the judicial system: a specialised competition authority, in order to obtain, say, a prohibition order, would have to convince a not particularly specialised court that its (the authority's) own – even economic – assessment of the case is correct in every aspect. The unspecialised court would be faced with the

[15] Draft Bill for a revision of the Federal Act on Cartels and other Restraints of Competition.

submissions of, on the one hand, the specialised authority, and on the other, the just as specialised representatives of the companies. This may be an appropriate situation when a previous order is under legal review. But if the bar is set just as high for a first-time issue of such an order, it seems to me that this must naturally result in a decrease in the intensity of prosecution.

This brings me to the third option: the possibility of further developing the administrative system.

If it is seen as a failing of the existing administrative system that the same individuals investigate, prosecute and decide, then this should be our point of departure in order to design the system in a more compelling way: The functions of investigation and prosecution, on the one hand, and decision-making on the other, would – as has been suggested by one author or another for European law – have to be separated. To clarify, let us take the example of the proceedings conducted by the European Commission: The responsibility for investigation and prosecution could, as it has so far, be given over to a case team. The case team works on the case up to the formulation of a statement of objections. Then a different team takes over: the team responsible for preparing the Commission decision. This team would treat the case team and the companies involved as parties in its proceeding. It would conduct a hearing procedure, collect evidence if necessary and finally formulate a decision proposal for the Commission.[16]

It would appear especially important to effectively separate this team that prepares the decision from the case team, or more generally: from the directorate-general of competition. In organisational terms, it would make sense to place the decision-preparation team near the president of the Commission. In spatial terms such a separation would be important as well, so that no atmosphere can develop – during regular common lunches in the same bureau cafeteria, for instance – that would be conducive to a coordination of the work of the case team and the decision-preparation team.

One might well ask what would be gained by this solution, as opposed to a transition to the judicial system. The procedure sketched out here could lead to similarly expeditious decisions as the Commission has issued up to now. Admittedly, the successive occupation of two teams will take more time than that of just one working group. But the procedure could still produce much quicker results than in an obligatory court proceeding. Courts are independent, and one dimension in which their independence is expressed is that of time: courts decide on their own organisation and scheduling. In contrast, different time demands could be made of a unit set up within the same authority.

[16] Cf. for a proposal of this kind *Kai-Uwe Kühn*, Reforming European Merger Review : Targeting Problem Areas in Policy Outcomes, Journal of Industry, Competition and Trade, 2:4 (2002), 311, 351 et seq. (in the context of European merger control); more recently *Ian S. Forrester*, Due process in EC competition cases: A distinguished institution with flawed procedures, The European Law Review 34 (2009), 817 et seq.

After all, a procedure that separates the functions of investigation and prosecution, on the one hand, and decision-making on the other, while in principle adhering to the administrative system, seems to combine the advantages of both systems – the administrative and the judicial system – in a sensible way: It avoids the problems of a particular bias of decision-makers due to a former occupation with the same case, and it allows for an expeditious decision by a specialized body.