





*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*

- 1<sup>st</sup> 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?*

