

DUE PROCESS IN THE ENFORCEMENT OF ARTICLE 102 TFEU

The decisional and enforcement structure in Articles 101-
102 TFEU Cases and the Commission's fining system

Decisional & enforcement structure: Key points in practice

- system of prosecutor and judge puts case-team in difficult position
- defendant is not talking to the decision-maker
- the decision-maker is a political body
- a system which does not respect the “contradictoire” is not only unfair but inefficient

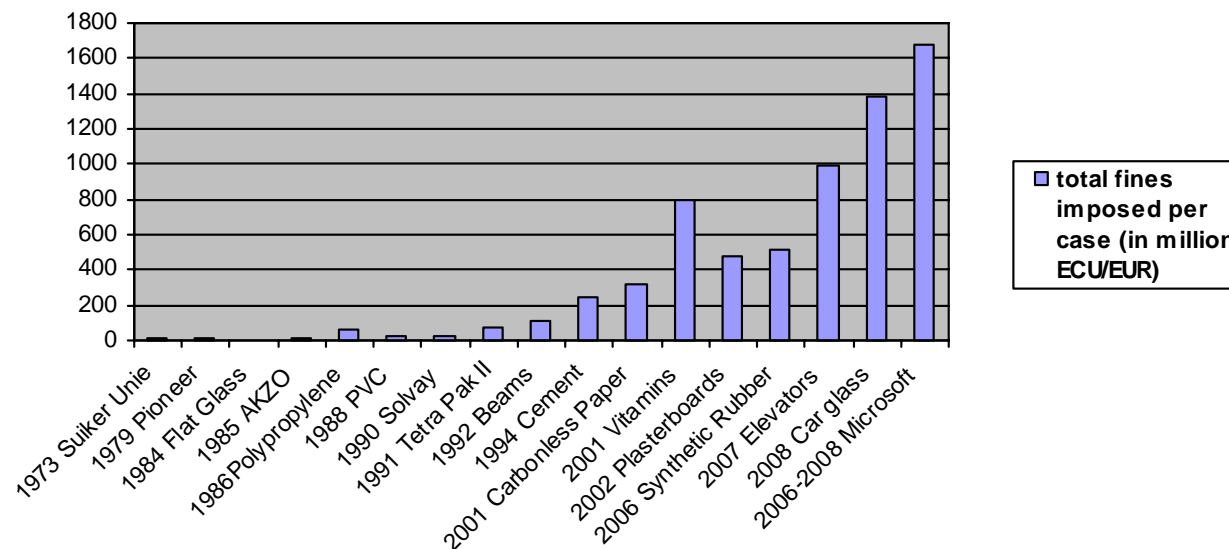
Decisional & enforcement structure: Key points in law

- EU competition law is criminal law;
- Is the current system compatible with right to a fair trial (Art. 6 ECHR)?
- Proposals for change.

1. EU competition law is criminal law

See for instance:

- level of penalties



- increased rhetoric emphasis on deterrence
- presentation of infringements (vocabulary of theft, recidivism, etc)
- public perception
- impact on staff

“criminalisation”

- ECtHR case-law shows that competition law is “criminal” within the meaning of Art. 6 ECHR;
- This is supported even by Commission officials;
- Requirement to respect guarantees related to criminal charges under Art. 6 ECHR.

2. Is the current system compatible with Art. 6 ECHR?

- ECHR case law requires that criminal charges be heard at first instance by an independent tribunal.

→ THE CURRENT SYSTEM DOES NOT RESPECT THIS REQUIREMENT

2. Current system incompatible with Art. 6 ECHR

- Only exceptions are for minor offences (e.g. road traffic violations) and so do not apply;
- Even if exceptions were to apply, ECHR case law requires subsequent full judicial review (i.e. *ab initio* review of facts and law) by an independent tribunal.

→ THE CURRENT SYSTEM DOES NOT RESPECT THIS REQUIREMENT EITHER

Consequences of incompatibility with ECHR: Change the system

- Current system where Commission cumulates role of investigation, prosecutor and judicator must change
- OR as a minimum ECJ must be given powers of full judicial review (i.e. *ab initio* review of all facts and law without deference to a wide margin of discretion of the Commission)

3. Proposals for change

- a) Creation of an independent European Competition Agency;
- b) Give Community courts “full jurisdictional control” over Commission decisions;
- c) Grant decision making power to the Community courts directly (or a judicial panel thereof).

3. Proposals for change

- All 3 options controversial BUT
- All arguably compatible with Treaty:
 - delegation of Commission decisional power could be achieved by legislation;
 - transfer of power to Community courts could be done on basis of Art. 103 TFEU.

Less ambitious reforms

Would not solve incompatibility with ECHR but would improve current situation:

- To formalise and improve of the working of peer review panels;
- To increase the role of the Hearing Officer;
- To increase and formalise the role of the Legal Service and of the Chief Economist;
- To introduce various more limited reforms so as to increase respects for the rights of defence.

Conclusion

System created in 1962 is not adapted anymore to the current situation

This system creates problems both in practice and in law

Wide perception in industry and legal practice that the days have come for a more fundamental overhaul of the current system

Even fundamental reforms are entirely conceivable without changing the Treaty

→ Time for a "Regulation 2 " after "Regulation 1" ?