DUE PROCESS IN EU COMPETITION PROCEEDINGS

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About the Author

Ivo Van Bael obtained his law degree at the University of Louvain in Belgium. He also studied at the University of Bologna Law School and at the University of Michigan Law School where he received the degree of Master in Comparative Law.

Ivo Van Bael started to practice law in New York in the sixties. As a junior associate he was part of a team defending, among others, a client in the electric turbine price fixing case and in the tyres, batteries and accessories (TBA) bundling case. This early experience gave him a head start in Brussels when the European Commission was adopting its first antitrust decisions.

Ivo Van Bael has acted as counsel in a number of landmark cases, such as United Brands, BP, Pioneer, Michelin, IBM, Woodpulp, AKZO, Cartonboard, Benetton (Eco Swiss), Boeing/McDonnell Douglas and Enso/Stora.

He has been teaching for many years at the College of Europe (Bruges) and at the University of Amsterdam Law School. He has lectured for two years at the University of Tokyo Law School.

Ivo van Bael has written several books and numerous articles in the field of competition and trade law.

Ivo Van Bael has been active in both the International Bar Association (IBA) and the American Bar Association (ABA): he has been Chairman of the Antitrust and Trade Law Committee of the IBA and Chairman of the Task Force on the European Community of the ABA.

List of Abbreviations

AAA	Administrative Arrangement on Attendance
CFI	Court of First Instance
DG	Directorates-General
DOJ	Department of Justice
EC	European Community
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
ECN	European Competition Network
ECSC	European Coal and Steel Community
EEA	European Economic Area
EFTA	European Free Trade Association
ESA	Surveillance Authority
FTC	Federal Trade Commission
HHI	Herfindahl-Hirschman Index
ICN	International Competition Network
NAAT	No Appreciable Affectation of Trade
NCA	National Competition Authority
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal
SAA	Stabilisation and Association Agreement
TEC	Treaty establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organization
VAT	Value Added Tax

Preface and Acknowledgement

Due process in EU competition proceedings is a hot topic in the ongoing debate on antitrust enforcement in Europe.

The proceedings before the Commission are known to be inquisitorial in that the Commission combines the roles of prosecutor and judge. The Commission proceedings are also reminiscent of Kafka in that the defendant's fate is sealed at an 'ex parte' meeting of the Commission, acting as a collegiate body. Both findings are reported in a Peer Review undertaken by the OECD in 2005. According to this Report:

> ... some explicit separation between the investigative and decision-making functions may be inevitable, to secure judicial confidence in the quality of the Commission's decisions.
>
> No other jurisdiction in the OECD assigns decision-making responsibility in competition enforcement to a body like the Commission. With [25] members, the Commission is too large to effectively deliberate and decide fact-intensive matters. Realistically, the Commission defers increasingly to the Competition Commissioner, providing some high-level policy control over the Competition Commissioner's initiatives.
>
> ... when the Commission decides a matter, it has typically not heard directly the case against the proposed decision. No Commissioner, including even the Competition Commissioner, will have attended the hearing. All depend on briefings from staff, and there is no *ex parte* rule or other control on contacts between investigating staff and the Commissioners who decide the matter. There is no initial adjudicator that is fully independent of the investigative function.

These critical comments of the OECD have fallen on deaf ears. In recent speeches, both Commissioner Almunia and Director-General Italianer firmly oppose the

view that the Commission as an administrative agency is unable to guarantee the same procedural safeguards as a judicial system.[1] Consequently, they are unwilling to consider any major structural change to the current institutional structure and competition enforcement system.

It is submitted, however, that a recent judgment of the European Court of Human Rights calls for an immediate stop of the Commission's exercise of the dual role of prosecutor and judge if it is to meet the Convention's right to a fair trial. This recent judgment[2] does, indeed, mark the end of earlier jurisprudence according to which an administrative agency, for reasons of efficiency, was allowed to both prosecute and sanction offences, as long as its decision remained subject to an appeal before an impartial tribunal, enjoying unlimited jurisdiction.

Already under this earlier jurisprudential rule of the Court of Human Rights, it was questionable whether the standard of review applied by the European courts in appeal proceedings could be said to truly satisfy the requirements of the Convention. Indeed, except for the fines imposed by the Commission, the review carried out by the European courts is limited to the legality of the Commission decision, excluding a review of the merits. Furthermore, in matters involving an assessment of complex economic or technical facts, the European courts feel constrained not to interfere with the Commission's appraisal. Yet, by their very nature, antitrust cases give rise to complex economic or technical assessments. Hence, it is submitted that the European courts' self-imposed limitation on their power to review such appraisals meant that the Commission's decision was not subject to the kind of judicial scrutiny envisaged by the European Convention on Human Rights.

Rather than tackling the issue of due process head-on, the Commission has chosen to 'buy time' by introducing a number of internal checks and balances purporting to improve the administrative decision-making process, such as:

- Peer Review, in order to better control the work in progress of the case team;
- intervention of an economist to prevent legal theory from being applied in a vacuum;
- increased role of the hearing officer on procedural issues.

Admittedly, these reforms are welcome but, unfortunately, more cosmetic than real. For example, the number of officials working for the Hearing Officer is so small that he or she can hardly do more than scratch the surface.

Now that, as a result of the Lisbon Treaty, the EU will accede to the European Convention, the European courts will have no choice but to apply the jurisprudence of the Court of Human Rights. Hence, time has come for a more radical overhaul of the institutional structure. The prosecutorial function needs to be separated from the adjudicative function. It is essential that the EU enforcement process

1. Almunia, 'Due process and competition enforcement', 14th Annual Competition Conference of the IBA, 17 Sep. 2010. Italianer, 'Safeguarding due process in antitrust proceedings', Fordham Annual Conference, 23 Sep. 2010.
2. Judgment of 11 Sep. 2009, *Dubus v. France*, Case No. 5242/04.

be in compliance with the highest standard of interpretation of the Convention rights.[3]

In addition to a revision of the dual role of the Commission as prosecutor and judge, it is submitted that it is also necessary to expand the power of review of the European courts in appeal proceedings. Their review should not be limited to a mere review of the legality of the Commission's decision. It should include a review of the merits as well.[4] Furthermore, it makes little sense to give the European judges an unlimited power to review the sanction imposed by the Commission but not the underlying finding of the infringement. If the judges, when annulling the Commission's decision, have to remand the case back to the Commission so that it can adopt a new decision, a considerable waste of resources and time is involved. In the past it has not been uncommon for some litigation to take more than fifteen years before being finally resolved.

To conclude, the imminent accession of the EU to the European Convention of Human Rights raises important questions about the dual role of the Commission and about the limited power of review of the European courts. These problems of due process are serious and require a fundamental reform of the current procedural set up.

The purpose of this book is to describe the rules of due process as they are being applied today and as they have evolved over the years. Being the author of the chapter on procedure in the Van Bael & Bellis book on EC competition law,[5] I have witnessed all major developments that occurred during the life of the five editions of the book. It shows that rules of procedure are a living material, requiring continuous attention, adaptation and further refinement.

It is hoped that my new book will contribute to this never ending process and that, by the time of a possible second edition, further progress can be reported.

I would like to end this preface by thanking Yvette Hantson for her much appreciated assistance. Her dedication and support proved to be invaluable for the successful completion of this ambitious project.

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3. There is no room for a double standard, depending on whether a human rights issue is decided in Luxembourg or in Strasbourg, as is presently the case, for example, with regard to the right to remain silent.
4. See, e.g., Marsden, 'Checks and Balances: EU Competition Law and the Rule of Law', (2009) 5(1) *Competition Law International* 24: '... do Europeans and others really understand the limited nature of the CFI's review of the Commission's decisions? The CFI is only looking at the adequacy of the decision. Judgments are reported as if they were full appeals; as if a hearing was held of all the issues, witnesses examined, arguments heard in full, in a public forum. The reality of course is quite different. There may the judges' questions – which are starting to grow in significance – but there is no in-depth questioning of officials, witnesses, complainants, and the majority of the work has been done in unavailable written pleadings which are protected from public scrutiny. More could be opened up, and thereby provide greater oversight. How much more credibility would the process have if reporters could genuinely write "today the Court upheld the Commission's decision", rather than what should be: "today the Court found that the Commission was not manifestly wrong"?'
5. The first edition of this work was published in 1987 by CCH Editions Ltd, the fifth edition by Kluwer Law International BV in 2010. With permission from the copyright holder, relevant parts for this fifth edition have been reproduced in this book.

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