

Due Process and Fair Trial in EU Competition Law

Cristina Teleki

*Reviewed by Marc Veenbrink**

1. Introduction

A lot has been written on fundamental rights and competition law. This does not mean, however, that *Due Process and Fair Trial in EU Competition Law* is merely a continuation of an already settled discussion. This book focuses on the interrelationship between the independence and impartiality of the Commission, on the one hand, and the right to effective judicial review, on the other. It provides an in-depth discussion on both aspects and is as such a valuable addition to the current discussion on fundamental rights in EU competition law proceedings.

In this book, it is explained that the amount of independence and impartiality of an administrative authority is intertwined with the manner in which courts should review a decision of an administrative authority. The extensive discussion on these aspects in light of Article 6 ECHR and case law of the European Court of Human Rights (ECtHR) makes this book a worthwhile read for competition law experts. Perhaps it can also provide renewed vigour to the discussion on the right to effective judicial review, which the Court of Justice of the EU (CJEU) has tried to settle with the *KME*,¹ *Chalkor*² and *Schindler*³ judgments.

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¹ Judgment of 8 December 2011, *KME Germany AG, KME France SAS and KME Italy SpA v. European Commission*, C-389/10 P, EU:C:2011:816.

² Judgment of 8 December 2011, *Chalkor AE Epexergasias Metallon v. European Commission*, C-386/10 P, EU:C:2011:815.

³ Judgment of 18 July 2013, *Schindler Holding Ltd and others v. European Commission*, C-501/11 P, EU:C:2013:522. For a discussion on these cases see e.g. Renato Nazzini, "Judicial review after KME: An even stronger case for the reform that will never be", *European Law Review*, no. 4 (2015):

A valuable contribution of this book to existing legal literature is the extensive examination of the requirements of independence and impartiality flowing from the ECHR and the potential weaknesses of the Commission in this regard. Cristina Teleki does not merely mention that the Commission is an investigator, prosecutor and judge, but also explains which aspects might be problematic and provides solutions to address these problematic aspects. A strong statement in this regard (and perhaps even an incentive for reform) is that “[t]he judicial review performed by the EU Courts cannot correct the structural lack of independence of the Commission”.⁴ After the adoption of the ECN+ Directive and the strengthening of the independence and impartiality of national competition authorities, it might be time to have a closer look at the Commission as well.

2. Book

Due Process and Fair Trial in EU Competition Law is divided into four parts. The introductory chapter sets the scene and discusses, amongst others, the methodology used in the book. Part one of the book provides a more theoretical framework, after which part two discusses, amongst others, the concepts of due process and the right to a fair trial. Parts three and four focus, respectively, on the concepts of independence and impartiality and on the right to effective judicial review.

Part One

Part one is split into three chapters. The first chapter mentions the different roles of the Commission and the criticism against these roles. According to Teleki, the political involvement of Commissioners itself might, for example, already be problematic, since it is unclear whether Commissioners might be driven by political motives when they decide to adopt a decision.

Teleki also challenges the notion that competition law is a special domain where different rules might apply. This statement can, however, in my opinion, be nuanced. The ECtHR, for example, has made clear in *Sa Capital Oy* that it is “mindful” that, in competition law proceedings, fines are generally imposed upon corporate entities.⁵ Furthermore, the

490-508; and Fernando Castillo de la Torre and Eric Gippini Fournier, *Evidence, Proof and Judicial Review in EU Competition Law* (Cheltenham: Edward Elgar Publishing, 2017), chapter 6.

⁴ Page 324.

⁵ *Sa-Capital Oy v. Finland* (2019), CE:ECHR:2019:0214JUD000555610, paragraph 78.

ECtHR is also “mindful” of the nature and purpose of competition law proceedings.⁶ This does not necessarily mean that different rules should apply, but the ECtHR did take these aspects in *Sa Capital Oy* into account when determining whether the rights of defence were compatible with Article 6 ECHR. In other chapters, Teleki does explain convincingly why the minimum safeguards regarding impartiality and independence and the minimum safeguards regarding effective judicial review as set by the ECtHR do apply in EU competition law proceedings.

The second chapter explains why due process has played a limited role in EU competition law, whereas the third chapter provides an overview of academic literature on general aspects of human rights and competition law. The final paragraph in chapter 3 discusses briefly some legal literature on fundamental rights in competition law proceedings. According to Teleki, fundamental rights and competition law “have not yet had a deeper conversation”.⁷ There is more and more legal literature in which authors discuss the scope and application of specific fundamental rights in EU competition law proceedings. Nevertheless, the CJEU has, as Teleki also convincingly shows in her book, not always listened to criticism in legal literature defending that a higher fundamental rights standard should be adhered to in EU competition law proceedings. The criticism by Teleki is, thus in itself not that uncommon.

Part Two

The second part of *Due Process and Fair Trial in EU Competition Law* starts with a useful introductory chapter. Chapter 4 describes the practical effect of ECtHR judgments and mentions that case law of the ECtHR slowly developed over time “resist[ing] the moods and fashions of changing times”.⁸ The following chapter deals with the applicability of Article 6(1) ECHR and provides an extensive and useful overview of case law on the notions of “in the determination of civil rights and obligations” and the “criminal charge”. Chapter 6 is, in my opinion, the odd one out. It explains in more detail how case law of the ECtHR develops in a deliberate manner over time due to the influence of academia and the zeitgeist. Furthermore, compliance with ECtHR judgments, and the influence of Member States

⁶ *Ibidem*, paragraph 84.

⁷ Page 78.

⁸ Page 98.

and academia, are discussed as well. The second part of this book is concluded with a short conclusion at the end of chapter 6.

Part Three

Part three also starts with a short, but useful, introduction. This part of the book deals with the independence and impartiality requirements under the ECHR and the application of these principles to the Commission. The first chapter (chapter 7) starts with an explanation of the concept of “administrative state”, i.e. a state where unelected bureaucrats are in charge. The rise of administrative power has led, according to Teleki, to the delegation of powers to independent regulatory agencies. In the remaining part of this chapter, independence requirements for competition law authorities are discussed from the point of view of different international organisations. Teleki explains that, “despite growing general concerns about untamed administrative power and specific concerns about individuals nominated as commissioners, the case for independence of the Commission is rather difficult to make”.⁹ In order to argue that the Commission should be independent, a more in-depth examination of the requirements of independence and impartiality is necessary. The stepping-stone for this analysis is chapter 8, in which both said requirements are discussed in light of ECtHR case law.

Chapters 9 to 12 focus respectively on the structure of the Commission, the procedure before the Commission, the sanctions which the Commission may impose and the powers during an investigation, and, lastly, on the limits to the investigatory powers of the Commission. These chapters provide a good overview of the aforementioned aspects. The last chapter appears to be intended to discuss all the limits on the powers of investigation of the Commission, since it refers to two general rules that limit those powers, namely general EU law principles and the rights of the defence. However, an exhaustive discussion on all the limits of the Commission is lacking. The principle of legal professional privilege, or the requirements flowing from the right of privacy, for example, are not discussed. It is obviously understandable that a selection had to be made. Thus, one should not expect an exhaustive discussion on the limits of the powers of the Commission.

⁹ Page 162.

The final chapter in this part brings all the previous chapters together. Teleki discusses in a detailed manner which institutional and procedural aspects may affect the independence of the Commission at different stages of competition law proceedings. On the basis of this discussion, she identifies four main types of risks:

- *Off-record procedural risks arising from competition law enforcement that takes place outside the regular legal framework or from a lack of procedural rules;*
- *Structural risks resulting from the design of EU competition policy enforcement;*
- *Anonymity risks arising from the anonymity of dg comp case handlers; and*
- *Collegiality risks arising from the collegiate nature of decision-making employed by the EU Commission.”*

For each of these risks, solutions are discussed to mitigate them. This discussion could, in my opinion, be used as a blueprint to address concerns regarding the independence of the Commission. To use an example from the book: collegiality and the lack of dissenting opinions are problematic, since the Commissioners are also politicians. An easily implementable solution proposed by Teleki is to change the procedure and allow individual (and dissenting) opinions. Transparency is important for the independence of the Commission, but also for its accountability.

The third part ends, just as the second part of this book, with a short summary and discussion of the elements examined in the previous chapters. There are, according to the author, “serious risks to independence” of the Commission, which means that competition law proceedings “should be accompanied by deep due process guarantees and in-depth judicial review”.¹⁰

Part Four

The final part in *Due Process and Fair Trial in EU Competition Law* examines the second main aspect of this book, namely the right to effective judicial review. This part, just as parts 2 and 3, starts with a general introduction.

¹⁰ Page 273.

The first chapter in this part (chapter 14) provides, again, a very valuable overview of case law of the ECtHR, but now on the right to effective judicial review. The chapters on ECtHR case law in this book truly show that Teleki has a very strong basis in human rights law. These chapters are therefore valuable for all competition law experts, since they provide a good overview of the status quo with regard to certain ECHR rights. Obviously, the, to competition law experts well-known, *Menarini* case¹¹ is discussed in-depth, but the author provides a broader picture to the right of effective judicial review and does not stop at *Menarini*. This examination of case law leads to the next chapter (chapter 15), in which the author discusses three models of judicial review distilled from ECtHR case law. Judicial review in cases where the administrative authority exercises its discretion should be adjusted in accordance to the facts of the dispute. Teleki distinguishes here between cases involving polycentric issues, cases involving monocentric issues, and cases where the administrative authority has policing powers. The latter situation is obviously applicable to the Commission. Judicial review of the exercise of administrative discretion should, in this circumstance, be full, which, according to the author, includes “the power to hear evidence, the power to quash in all respects and the power to substitute the reasoning of the administrative agency with its own reasoning”.¹²

Chapter 16 focuses on case law on the right of effective judicial review from the CJEU and, more specifically, on the review method of competition law decisions. Teleki discusses the wide margin of discretion left to the Commission on economic matters, but also its margin of discretion when applying different factors to determine the amount of a fine. This deference of the CJEU to the Commission’s powers is, according to the author, not in accordance with the requirements set by the ECtHR.

Chapter 17 brings the chapters in this part together. The author discusses different reasons for the limited review by the CJEU in competition law proceedings. It is, for example, widely accepted that the CJEU imposes a self-limitation when it concerns economic evidence, since the Commission would be better suited to assess that type of evidence. Teleki convincingly shows that this self-limitation by the CJEU could be challenged, since the Treaties do not mention that economic evidence is privileged and

¹¹ *A. Menarini Diagnostics S.R.L. v. Italy*, CE:ECHR:2011:0927JUD004350908.

¹² Page 298.

economists themselves sometimes contest a strong reliance of policy makers on economic evidence.

In her concluding chapter, Teleki mentions some final thoughts on the independence of the Commission and the limited judicial review in competition law proceedings. A separation of functions within the Commission would solve problems under the right to a fair trial. Furthermore, an explanation for the limited judicial review by the CJEU might be found in the role of individual persons within the EU and within the ECHR. According to Teleki, individual persons are central at the ECtHR, but in the EU “individuals continue having limited procedural participatory rights”.¹³

3. Conclusion

Fundamental rights and competition law proceedings are not two separate domains. *Due Process and Fair Trial in EU Competition Law* brings these two areas of law together again. The emphasis on the independence and impartiality of the Commission in relation to the right of effective judicial review is of added value to the discussion on the appropriate level of judicial review in EU competition law proceedings. The thorough discussion on the independence and impartiality requirement under Article 6 ECHR and the application to EU competition law proceedings paints a convincing picture that there might be structural problems with the Commission in this regard. Currently, those structural problems cannot be solved by the way in which the CJEU conducts its judicial review.

Some chapters in this book are quite abstract and could benefit from some more guidance to the reader as to why these elements are discussed. Parts three and four are, however, a welcomed addition to existing literature. The extensive discussion of ECtHR case law and the application of that case law to EU competition law proceedings truly shows the strength of Cristina Teleki and provides, in my opinion, valuable insights for other competition law experts.

Bibliography

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¹³ Page 347.