

# Fundamental rights and access to justice under EU law – update on key issues

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- Developments in fundamental rights protection
  - The Charter of Fundamental Rights
  - EU accession to the ECHR
  - Recent fundamental rights case law
- Access to justice under the EU Treaties:  
Article 263(4) TFEU

- Incorporation as integral part of EU law
- Equal status to Treaties: Art 6(1) TEU
- Consistent interpretation with ECHR: Article 52(3) (but EU law can go further)
- Substantive scope considerably wider than ECHR

- Article 51(1) CFR “only when implementing EU law”
- Interpreted widely: “within the scope”: see C-617/10 Akerberg Fransson, 26 February 2013; C-418/11 Texdatasoftware GmbH 26 September 2013.
- Situations outside scope: Case C-466/11 Curra, [2012] ECR I-nyr, para. 26.
- Not “horizontally” applicable vs private individuals: C-282/10 Dominguez, 24 January 2012.

- Relevant rights in competition proceedings:
  - Art 7 (= Art 8 ECHR)
  - Art 16 (freedom to conduct a business)
  - Art 17 (= A1P1 ECHR)
  - Art 41 (right to good administration)
  - Art 47 (right to effective remedy and to fair trial)
  - Art 48 (presumption of innocence; respect for rights of defence)
  - Art 49(3) (proportionality of criminal penalties)

- Has Art 41 led to Commission/OFT reforms to procedures?
  - e.g. Commission *Best Practices for the conduct of proceedings concerning Articles 101 and 102 TFEU* (right to an oral hearing; state of play meetings);
  - e.g. OFT ‘procedural adjudicator’

- Due process rights
  - Article 6 ECHR post-*Menarini*: *KME Germany*, *Posten Norge*, *Otis*, *Schindler*
  - Procedural fairness: ‘gisting’ and access to evidence: *BMI Healthcare*; *Ryanair*
- A1P1 and the proportionality of remedies: *BAA v CC*; *Ryanair*

# Due process rights



- Art 6 ECHR; Art 47 CFR
- ‘Old’ CJEU/GC language:
  - “review of complex economic appraisals by the Commission is necessarily limited to checking whether the relevant rules on procedure and on the stating of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers”
- *Menarini*: review court must have ‘full jurisdiction’; “the power to vary on all points...the contested decision”

# Due process rights (2)



- ‘New’ language (*KME, Chalkor, Otis*)
  - “this does not mean that the EU Courts must refrain from reviewing the Commission’s interpretation of information of an economic nature. Those courts must, among other things, not only establish whether the evidence relied on is factually accurate, reliable and consistent but also ascertain whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn”; the Courts cannot use the Commission’s margin of discretion “as a basis for dispensing with the conduct of an in-depth review of the law and the facts”

# Due process rights (3)



- NB *Posten Norge* (EFTA Court):
  - “the submission that the Court may intervene only if it considers a complex economic assessment to be manifestly wrong must be rejected”
- But:
  - “The fact that the Court is restricted to a review of legality precludes it from annulling the contested decision if there can be no legal objection to the assessment of the ESA, even if it is not the one which the Court would consider to be preferable”

# Due process rights (4)



- AG Mengozzi in MasterCard (30.1.14)
  - This remains a “delicate issue”
  - “Scope of the case law on marginal review has been significantly reduced, as a consequence of the gradual criminalisation of EU competition law”
  - Scope of the CJEU’s recent dicta “not yet clear”
  - Whilst a literal interpretation of *Menarini* suggests legality control is insufficient, the ECtHR’s approach is very flexible: look at what the review court does in practice
- GCEU continues to use ‘old’ language

- A1P1 and the proportionality of remedies
  - *BAA v Competition Commission*
    - CC enjoys a wide margin of discretion
    - Margin is reduced “to a limited extent” where the remedy is a very intrusive one
  - *Ryanair v Competition Commission*

- Procedural fairness: fair consultation, ‘gisting’ and access to evidence
  - Access to data rooms: *BMI Healthcare v Competition Commission*
    - A “high level of specificity” is required when disclosing the “gist” of the case to answer
    - Terms of access to data room were unfair: prevented parties from making proper response
  - *Ryanair v Competition Commission*

- Burden of proof under Art 101(3)/s.9
  - Art 2 of Reg 1/2003: legal burden (cf *RCA*)
  - Burden is onerous (e.g. *MasterCard*)
  - *Salabiaku v France*: confine presumptions “within reasonable limits”
  - Domestic criminal law: if legal burden is imposed on D, consider compatibility with Art 6(2) ECHR

# An unresolved issue (2)



- Four important factors:
  - Seriousness of the penalty imposed by statute
  - Whether the facts that D is required to establish to make good the defence are exclusively within his own knowledge
  - The seriousness of the social evil at which the offence is directed
  - Whether the burden placed on the accused relates to an essential element that involves the moral blameworthiness of the accused

# An unresolved issue (3)



- Application of the four factors to Art 101(3):
  - Seriousness of potential financial penalties (but not deprivation of liberty)
  - Facts not exclusively within D's knowledge: Article 101(3) not a subjective test
  - Are cartels a social evil? And non-cartel conduct?
  - Is Art 101(3) an essential element of the offence (involving moral blameworthiness)? Hard to apply this criterion
- Might need an Article 267 reference if raised in domestic proceedings

# Access to justice: annulment actions



<i>Ancien régime</i>	The new order
Article 230(4) EC: individuals needed to be “directly and individually concerned”	Article 267(4) TFEU: exception for “regulatory acts” not entailing implementing measures
<i>Plaumann</i> test: individual must be differentiated from all others	What does “regulatory act” mean?
AG Jacobs in <i>UPA</i> ; ECJ does not follow	Early case law: <i>Microban</i> and <i>Inuit</i>
<i>Jego-Quééré</i> : ECJ crushes CFI revolt	Implications for <i>TDW</i> case law?

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