The handle http://hdl.handle.net/1887/43422 holds various files of this Leiden University dissertation.

**Author:** Beumer, A.E.  
**Title:** De publieke handhavingsprocedures van het mededingingsrecht in het licht van de mensenrechten  
**Issue Date:** 2016-10-04
The public enforcement procedures of competition law in view of human rights

Summary

Several reasons, the refuge the administrative fine has taken in competition law, the all-in-one enforcement system where the Authority Consument & Markt (ACM) acts as the investigative and sanctioning body and the extensive investigative powers of the ACM, give reason to call into question the compatibility of public enforcement procedures of competition law with human rights. Case law of the administrative court illustrates that legal protection may fall short, because, for example, no full access was granted to the file of the ACM, the ACM internal independence is insufficiently guaranteed or no caution was given. Because of these developments, the following research question is central to the study.

To what extent are the public enforcement procedures of competition law in the Netherlands in conformity with the fundamental procedural rights deriving from the ECHR and EU law?

This study shows that procedural reinforcements are desirable in view of various fundamental procedural rights laid down in Articles 6 and 8 of the ECHR, 41, 47 and 48 Charter (and the procedural rights which apply as general legal principles within the European legal order). The dissertation comprises three parts. The first, theoretical part is about the history of the public enforcement of competition law, the current powers and procedures of the ACM and the relevant fundamental procedural rights. The second part deals in three case studies with the following basic procedural rights: the right to get access to the file, the right to be heard and the right to interrogate witnesses. The third part connects the impediments to possible solutions which have emerged from the case studies. This summary describes the main findings and recommendations of this study.

Procedures and legal protection

In the first part of the thesis, the various fundamental procedural rights are discussed and the effect of these provisions on public enforcement procedures in the Netherlands relating to the prohibition of cartels and the abuse of power (under Articles 6, 24 and 101 Competitive Trading Act, 102 TFEU). A distinction is made between the different procedures the ACM can deploy in case of an apparent infringement: penalty procedures, leniency procedures, commitment procedures and order procedures (an order subject to an incremental penalty and an independent order). In principle, a different level of legal protection should apply for each form of enforcement – a differentiated legal protection level will then be the starting point.

Based on the three Engel criteria, the classification of the offense under domestic law, the nature of the offense and the nature and severity of the punishment, the
ECtHR and the ECJ have decided that there is an element of prosecution in penalty procedures. This conclusion means that in principle the full legal protection package applies (Article 6 ECHR and, in addition to Article 47, also Article 48 Charter). However, in the case of Jussila, the ECtHR distinguished between matters concerning hard-core criminal law and matters in the periphery of the criminal law. As far as this latter category is concerned, the criminal law guarantees do not always apply within its full stringency. Competition cases are explicitly mentioned as examples of cases in the periphery of criminal law. The question is whether this qualification is correct. Depending on the circumstances of the case, namely the degree of stigmatising effect of the sanction, one could argue that a hard-core criminal charge is at stake. In other penalty procedures more focussed on settlement (for example the leniency procedure), a milder level of legal protection would seem obvious. In these procedures, the parties involved confess their participation in the infringement and assist in the investigation in exchange for a lower penalty. Offering a complete legal protection package is redundant in these procedures. The dissertation suggest that the Jussila distinction developed by the ECtHR can play a part in these kind of procedures. One option is to introduce a procedural waiver which is declared voluntarily and unambiguously by the party involved and accompanied by an (additional) penalty reduction. In addition to a sanction, the ACM can issue a restorative sanction (a periodic penalty payment, an independent order (binding instruction)) or declare a commitment binding. In those cases, the minimal legal package consisting of the legal guarantees included in Article 6 section 1 ECHR and Article 47 Charter should apply, with the difference being that Article 6 section 1 ECHR applies only to commitment requests that are not submitted voluntarily.

After Chapters 1 to 3, where different legal protection levels are proposed for the various enforcement procedures, Chapter 4 deals with the extent to which an all-in-one enforcement system, where the ACM conducts the investigation and imposes the penalty itself, is in accordance with fundamental procedural rights. ECtHR case law, and up to a certain level this can also be derived from ECJ case law, shows that the permissibility of the all-in-one enforcement system depends on the question whether the administrative body is independent and impartial. If this isn’t the case, then in principle a complete assessment by the court can restore the lack of independency and impartiality. In the first part of Chapter 4, it is determined that the penalty task assignment, the lack of own personnel and insufficiently extended *Chinese Walls* are signs that ACM can insufficiently guarantee its independence and impartiality. These voids cannot, however, be completely restored by the administrative court. Firstly, the court assessment is not complete at all points. After all, the administrative court assesses the decision by the administrative body and doesn’t take a new decision. The administrative court relies upon the analyses by the administrative body for all grounds that are not adduced. The ACM also has a certain discretionary power in cases which require complex economic analyses. The court assessment and the procedural guarantees in the decision phase in these situations act as communicating vessels: the more the administrative court relies upon the conclusions by the administrative body, the more the decision phase must meet the procedural guarantees of Article 6 ECHR.
This is part of the reason why it is important that the decisions phase runs fairly. Secondly, there are different matters which argue in favour of the continued effect of Article 6 ECHR in the administrative decision phase, namely (1) the moment when the protection of Article 6 ECHR starts running, namely the moment when someone knows that an action will be brought against him/her, (2) the administrative body’s duty to come to a careful decision, (3) the relationship between presumptions of law (on which administrative bodies’ can base themselves) and the sufficient guarantee of rights of defence, and (4) the impossibility to sometimes restore the lack of legal protection with the administrative court. In this study, these arguments lead to the conclusion that there should be a fundamental right to a fair administrative process.

Assessment by means of case studies and recommendations

Next, by means of three case studies, the Chapters 5 to 7 assess to what extent the ACM decision procedures are in accordance with the right to a fair trial. Subsequently in chapter 8, recommendations are made which meet certain impediments. The first case study deals with the right to be heard: the right of parties to give a verbal defence during a hearing. In relation to the hearing, it has been noted that this procedure is generally in line with the ECHR and the Union law, provided the deciding authority is present at the hearing. In competition procedures, this is the ACM Executive Board. Though a hearing is the starting point and therefore also the practice of the ACM, the ECtHR has decided that a hearing isn’t necessary in cases which fall in the periphery of criminal law. Specifically, in leniency procedures one could wonder whether an oral hearing is needed or whether the case be handled fully in writing.

During the hearing, the right to interrogate witnesses should exist in conformity with the conclusions from the third case study. This obligation should apply to situations where the ACM used witness statements in establishing the infringement. According to the ECtHR, the term ‘witnesses’ includes also the other infringing parties. This means that statements from leniency applicants, for example, may be a reason for the ACM to allow interrogating these leniency applicants. The right to interrogate is however not absolute: a justified limitation to this may possibly depend on the importance of the statement for the outcome of the procedure and the presence of compensating measures.

The second case study is about the right to get access to the file, which covers both access to the statement of objections as well as the relevant documents. With regard to the statement of objections, the dissertation indicates that the limited obligation to publish such a statement (only for penalties of €340 and higher) and the sometimes limited translation of this could be contrary to Article 6 ECHR. The choice whether to grant access or not to the file is a difficult one as this decision often requires deliberation between different fundamental interests: the interest of disclosure (i.e. the rights of the defence) versus the interest of secrecy (on account of confidentiality issues) of documents. Essentially, ACM should grant access to all inculpatory and exculpatory documents. This is why the ACM supplies all the documents it considers relevant to the case. The ECtHR has confirmed that authorities (such as the ACM) can compose a
file themselves, provided they comply with a (brief) substantiated request to grant access to documents which were initially not added to this file. Making the requirement to state reasons too high, something which has happened in the past, is consequently contrary to Article 6 ECHR. With respect to non-punitive procedures, it suffices when the ACM grants access to only those documents relevant for establishing the infringement. An important requirement imposed by the ECtHR is the requirement that the refusal of the prosecuting authority not to grant access to confidential documents should be reviwise by an independent and impartial court which checks the appropriateness of the decision and is granted access to all documents in order to do so. Article 8:29 of the General Administrative Law Act provides a separate procedure for the confidentiality of documents. Although this procedure has been found 'ECtHR proof' (in the context of a non-punitive procedure), it’s the question whether it is desirable that the court deciding on the case can’t take the confidential documents into consideration when the parties don’t give permission to do so. This procedure is in conflict with the principle that the court has to pass judgment knowing all the facts. A possible solution is in working with confidentiality spheres where a limited group of people has access to the confidential documents.

Suggestions and conclusions

The impediments indicated briefly in the Chapters 4 to 7 lead to the broader question of whether the ACM is still suitable for punitive action. As well as discussing the specific recommendations for the case studies, Chapter 8 deals with this question.

The answer to it is affirmative. First of all, the ACM has the economic expertise to trace and punish competition infringements. This is why tracing and punishing infringement cases has priority with the ACM. Given the time when competition law wasn’t actually criminally enforced under the Economic Competition Act, it’s the question whether competition cases are expedient enough to be enforced by the Public Prosecutor. Secondly, most procedural impediments can be resolved with a number of operational internal changes. The effectiveness of the procedures is strengthened by working with a tailor-made legal protection package. The room the ACM gets in order to decide whether or not to deploy certain procedural rights can be obviated by turning major process decisions – i.e. the decisions not to interrogate witnesses, not to grant the right to remain silent, not to grant a hearing or to grant limited access to the file – into decisions which can be appealed. These decisions when appealed can initially be assessed by an Objections Advisory Board which needs to be (re)established. Any infringement found of a fundamental right to legal proceedings should lead to exclusion of the evidence (possibly resulting in quashing the decision) or to compensation of damages. One reason to decide to transfer the administrative enforcement of competition law to criminal law enforcement is the presence of specific investigative methods which can simplify investigating cartel infringements. Further investigation into the necessity for these investigation methods and who should receive these investigative powers (ACM itself?) is required. A hypothesis is that a stronger legal protection package (as proposed in this dissertation) offers scope for a stronger
investigation system. The study suggests that, from the point of view of the fundamental defence interests of parties involved, strengthening the legal protection in competition procedures has priority.