

The architecture of competition law authorities

Prof. Dr. Jacques Steenberghe
director general

ESRC Annual Summer Conference
7 June 2013

the catalogue of archetypes (1)

- The inquisitorial models
 - The integrated models:
 - Institutionally embedded in entity with broader powers: e.g. European Commission,
 - Organised as an autonomous legal entity: e.g. the Bundeskartellamt,
 - The dual structures (separate entities for investigations and decisions):
 - e.g. the Belgian authority under the 1991, 1999 and 2006 acts
 - The semi integrated models (separation of investigation and decision powers):
 - No separate bodies in institution but different teams involved in investigations and drafting of decisions: e.g. the envisaged reform of the OFT?

the catalogue of archetypes (2)

- With a distinction between the investigating and decision bodies within the authority: e.g. the French Autorité, the Belgian authority under the 2013 act (and quid about the Dutch ACM?).
- The prosecutorial models:
 - Bringing cases before a specialised tribunal:
 - E.g. the Irish and Swedish authorities,
 - Bringing cases before common courts,
- Mixed models:
 - Deciding without and referring to a court for (criminal) sanctions:
 - e.g. the present OFT model,
 - Quid cases referred to the Competition Committee?

the catalogue of archetypes (2)

- The prosecutorial models:
 - Bringing cases before a specialised tribunal:
 - E.g. the Swedish authority,
 - Bringing cases before common courts,
- Mixed models:
 - Deciding without sanctions and referring to a court for sanctions:
 - e.g. the present OFT model,
 - Quid the Competition Committee?

Independence

- Who should be independent:
 - The decision of cases,
 - The opening of cases,
 - The direction of investigations,
- In inquisitorial models:
 - Institutional independence and separation of functions,
 - The (first instance) decision and remedies on appeal (Art. 6 ECHR: *Menarini*),
- Independence and accountability
 - Quid about the discussion of priorities with government – or parliament?

Legality and legitimacy

- Legality: Art. 6 ECHR: *Menarini*.
- Is legality sufficient for legitimacy?
- If not, what more is needed in inquisitorial models:
 - Are internal reviews (e.g. peer reviews) sufficient?
 - Can they be sufficient if made transparent – and if so, what is the cost in terms of efficiency?
 - Is a distinction between the investigating team and the drafting team a solution?
 - Are only dual or semi-integrated inquisitorial models offering the required legitimacy (together with prosecutorial models)?

Legitimacy and efficiency

- The two objectives are not incompatible:
 - A lack of legitimacy is not efficient,
 - A lack of efficiency jeopardises legitimacy,
- Are prosecutorial models efficient?
 - Does the answer depend on the answer to the question whether the judge receives the investigation as well as the procedural file, and whether he can conduct/order his own investigation?
 - Does the answer depend on the availability of a specialised court?
- Are the conclusions the same for dual authorities?

Some other issues

- Available resources:
 - Affect independence and effectiveness,
 - Dual structures tend to be expensive while prosecutorial models result in ‘burden sharing’,
- Interim relief: quid in dual and prosecutorial models?
- Merger control options require a balancing of available resources, the choice between mandatory and voluntary notifications, thresholds and the availability of a truly simplified procedure.

Conclusions

- No one-size-fits-all model,
- The option for a prosecutorial model depends on the first place on the availability of an appropriate court or tribunal,
- Dual structures tend to be more resource intensive and require a careful definition of the file-flow and the role of the decision making body,
- In inquisitorial models it is advisable to organise a separation between the investigation and decision powers, but there are many ways to achieve that goal.