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GERHARD DANNECKER*

Investigations in European antitrust law**

ABSTRACT: The Commission is responsible for investigating cartel law violations and imposing fines on companies. The investigations are carried out in an administrative procedure in which the facts of the case must be investigated in compliance with the rule of law. Here, fundamental rights must be guaranteed. In this respect, the jurisdiction of the ECJ still shows deficits, as it is based on the assumption that human rights belong exclusively to human beings. When legal persons are fined, they must be granted the guarantees of constitutional law.

KEYWORDS: Corporate fines, EU antitrust sanctions, Investigations of the Commission in cartel cases, Applicability of human rights to companies.

1. The European Union's preliminary proceedings under the law on fines

The European Union does not have its own criminal law in the classical sense. However, fines can be imposed on companies in antitrust law if cartel agreements are made, a company abuses its dominant market position or legal violations are committed in connection with merger control.[1] De lege ferenda, the imposition of fines should also be introduced for legal violations by gatekeepers such as Google, Facebook, etc.[2]

The responsibility for conducting antitrust proceedings lies with the European Commission, which conducts the investigations and imposes fines the companies.[3]

Judicial control is exercised by the Court of Justice, the Court of First Instance and the European Court of Justice.[4] Although it is possible to review both the findings of fact and the application of the law, both courts limit their judicial examination to questions of law.[5] In this respect, there is no effective legal protection by the courts.

Based on ECHR jurisdiction, fines imposed on companies are criminal law in a broader sense.[6] The criminal law guarantees of the ECHR apply to this and do so already in the pre-trial proceedings. But not all human rights guarantees are recognized. The ECHR jurisprudence is based on the assumption that human rights belong exclusively to human beings.

2. The conduct of the proceeding by the Commission

Commission antitrust proceedings usually start with a so-called dawn raid, i.e. "at dawn" without notification.[7] The companies concerned and, in some cases, the employees' private residences are searched to find evidence of cartel violations such as price fixing or market sharing between competitors. In doing so, the Commission is entitled to rely on the national search regulations as the legal basis. It must adhere to these when carrying out the search.[8]

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* Senior professor, Prof. Dr. Dr. h.c., Institute of German, European, and International Criminal Law and Procedure, University of Heidelberg, Germany, gerhard.dannecker@jurs.uni-heidelberg.de.

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[1] Emmerich and Lange, 2021, p. 12.
[2] Paal and Kumkar, 2021, p. 809; Jovanovic and Greiner, 2021, p. 678.
[3] Dannecker and Schröder, 2021a, p. 407.
[4] Dreher and Kulka, 2018.
[5] Bueren, 2012, p. 363.
[6] *Jussila v. Finland* App. No. 73053/01, 23 November 2006. Art. 43.
[7] Dreher and Kulka, 2018; Miersch and Israel, 2017, p. 89.
[8] Seitz, Werner and Lohrberg, 2007.

Antitrust authorities conduct investigations of all companies concerned at the same time. On the one hand, the companies are not to warn each other. On the other hand, equal opportunities for leniency programs are to be maintained. A person who declares his or her willingness to cooperate to the antitrust authority may, under certain conditions, be granted complete immunity as a principal witness if he or she is the first one to agree to cooperate.[9] Subsequent declarations of willingness to cooperate can only lead to reduced fines (bonuses). Whether this is successful depends in particular on how quickly a company reacts.[10] Bonus requests are often made during the ongoing search. In addition, the company must show consistent cooperation.

In many cases, an investigation is only initiated after a company has made use of the leniency program and uncovered a cartel. This reflects the use of the leniency program as a method of uncovering antitrust violations.[11]

The Commission may ask companies to provide information necessary to detect antitrust violations.[12] If companies do not comply with such a request, they cannot be forced to admit to an infringement. However, they are obliged to answer questions of fact and to submit documents, even if the respective information can be used to provide evidence of an infringement by the companies concerned or by other companies. Furthermore, incorrect or incomplete information is punishable by a fine.[13]

The Commission may interview any person who has pertinent information and record their statements.[14] The Commission's investigators may also, in the course of an investigation, impose a seal for the time necessary for this purpose.[15] As in general, the duration of the sealing should not exceed 72 hours.[16] The investigators may request any information related to the inspection and they are authorized to enter any premises where business documents may be located, including private residences.[17] In the latter case, a court decision of the Member State is required, serving as an anticipatory legal check and limiting the investigating authority's power.[18]

Legal consequences of an antitrust investigation include an order to desist,[19] generally, the imposition of a fine,[20] claims for damages by competitors and consumers due to excessive cartel prices[21] and compensation of the sanctioned company against the responsible individual persons.[22]

A certain corporate strategy that is ideal with regard to the fine proceedings may, in retrospect, turn out to be failed in the overall picture. Thus, a leniency application can minimize the risk of a fine and at the same time significantly increase the risk of damages. In some cases, the antitrust authority can only prove a legal violation on the basis of the confession of a leniency witness. The cartel authority's findings are in principle binding on the civil court in any follow-on damage claim by virtue of statutory order.[23] This is an exception, as in Germany courts are generally not bound by the decisions of other courts.

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[9] Dreher and Kulka, 2018, p. 1751; Dittrich, 2012.
[10] Miersch and Israel, 2017, p. 60.
[11] Dannecker, 2004, p. 361.
[12] Bischke and Neideck, 2020.
[13] Miersch and Israel, 2017, p. 115.
[14] Sura, 2018.
[15] Miersch and Israel, 2017, p. 69.
[16] Sura, 2018.
[17] Miersch and Israel, 2017, p. 64.
[18] Ibid.
[19] Lettl, 2021.
[20] Ibid.
[21] Becker and Kammin, 2011, p. 503.
[22] Degner, 2021.
[23] Schmidt, 2017, p. 330.

3. The arrangement of the proceeding as an administrative procedure

The antitrust investigation is an administrative procedure conducted by the Commission. It is therefore not a criminal investigation. At the end of the procedure, there is an official prohibition decision and, if necessary, the imposition of a fine on the companies.[24]

In general, the principles that govern the administrative procedure apply. However, since fines are penalties in the broader sense, the criminal law guarantees must be respected.[25]

The main procedural rules are found in Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. Mentioned there:

- The respect of fundamental rights of defence.
- The burden of proof for antitrust violations: The authority has the burden of proving the infringement in accordance with the relevant legal requirements. It is up to the companies or business associations wishing to invoke justification against a finding of infringement to provide evidence, in accordance with the relevant legal requirements, that the conditions for such justification are met.
- The right of the undertakings concerned to be heard by the Commission.[26] Third parties whose interests may be affected by a decision should be given the opportunity of submitting their observations beforehand, and the decisions taken should be widely publicised.[27]
- While ensuring the rights of defence of the undertakings concerned, in particular, the right of access to the file, it is essential that business secrets be protected. The confidentiality of information exchanged in the network should likewise be safeguarded.
- The principle *ne bis in idem* applies.[28]
- *Nemo tenetur*, the prohibition of self-incrimination, does not apply to companies in principle, according to the ECJ. However, there is also no obligation to make a confession.[29]

4. Procedural guarantees

According to the Commission and the Court of Justice, Regulation 1/2003 respects fundamental rights and is consistent with the principles enshrined, in particular, in the Charter of Fundamental Rights of the European Union.[30]

According to German Federal Constitutional Court, national constitutional criminal law guarantees must be applied in addition to the ECHR and EU fundamental rights if the national law is not fully determined by European Union law on the basis, primarily, of the fundamental rights of the Basic Law. This applies even in cases where the relevant provisions of domestic law serve to implement European Union law. The application of the fundamental rights of the Basic Law as the primary standard of review is informed by the assumption that European Union law, where it affords Member States latitude in the design of ordinary legislation, is generally not aimed at uniformity in fundamental rights protection but allows for fundamental rights diversity. This leads to the presumption that the application of the fundamental rights of

[24] Breit, 2014.
[25] Dannecker and Schröder, 2021b, p. 423; Völcker, 2017, p. 44.
[26] *Hoffmann-La Roche v Commission* C-85/76, 13 Februry 1979, para 9.
[27] *Ismeri Europa v Court of Auditors* C-315/99 P, 10 July 2001, para 31.
[28] *Limburgse Vinyl Maatschappij and Others v Commission*, C-238/99 P, 15 October 2002, para 59. and *Toshiba Corporation and Others*, C-17/10, 14 February 2012, para 94.
[29] Bardong and Stempel, 2020.
[30] Völcker, 2017, p. 47.

the Basic Law simultaneously ensures the level of protection of the Charter of Fundamental Rights of the European Union. An exception to the assumption in favour of fundamental rights diversity in cases where Member States are afforded latitude in the design of ordinary legislation, or a rebuttal of the presumption that the application of the Basic Law's fundamental rights simultaneously ensures the level of fundamental rights protection of the Charter, should only be considered if there are specific and sufficient indications therefor.[31]

5. Conclusion: The European Union's antitrust investigations as an example for investigations under national law? – 10 theses

1. The administrative antitrust proceeding falls short of the standards of a criminal proceeding despite the recognition of the guarantees of criminal law.
2. Examples of inadequate recognition of criminal law guarantees in fines against companies include:
   - Recognition of irrefutable rules of evidence
   - Negation of *nemo tenetur* for companies
   - Statutory notification obligations despite the threat of a fine (e.g., in relation to company turnover, which is relevant for the setting of fines)
   - The right to be heard as only a formal principle
   - The renouncement of the principle of orality as an achievement of the enlightened criminal process
   - Limitation of the judicial control to the justifiability of the administrative decision
   - Prohibitions of use as evidence are formally determined.
3. Already the initiation as well as the implementation of sanction proceedings constitutes an infringement of fundamental rights, which is subject in particular to the principle of proportionality.[32]
4. The necessity of terminating the proceeding may result from the principle of proportionality.
5. In general, it must be ensured that fundamental rights and human rights are also respected in the investigation procedure.
6. The Federal Constitutional Court is right when it examines all guarantees - human rights as well as EU and national constitutional guarantees (Judicial Decision "Vergessen II").[33]
7. The European Union's antitrust procedural law is not suitable to be adopted as a legal transplant into Member States' national legal systems.
8. On the contrary, Member States' antitrust procedural rules give reason to reconsider the Commission's procedure with regard to the rule of law![34]
9. At the same time, a look at the investigative proceedings under antitrust law makes it clear that a general procedural law theory based exclusively on legal philosophy is inadequate and is not a sufficient foundation for the questions to be solved. This requires the inclusion of sociological, psychological and cultural contexts. This becomes particularly clear if one understands the trial maxims and guarantees as "condensed experiences".
10. It is the strength of the law that sociological and psychological findings are not directly taken into account, but that legal principles are developed based on empirical findings, but which are generalized and must be observed in criminal proceedings.

[31] *Recht auf Vergessen I*, 1 BvR 16/13, BVerfGE 152, 152, 6 November 2019.
[32] Dittert, 2017, p. 290.
[33] *Recht auf Vergessen I*, 1 BvR 276/17, BVerfGE 152, 152, 6 November 2019.
[34] Völcker, 2017, p. 48.

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