Enhancing case decision-making: some blue sky thinking from a rainy island

Philip Marsden

Introduction

Voltaire's Dr Pangloss[1] was wrong. This is not the 'best of all possible worlds'. Everything can be improved. That is one of my fundamental beliefs. Relentless forward progress. I have been asked to provide some reflections on the European Union's antitrust procedures under Regulation 1/2003[2] from a United Kingdom perspective. Can anything be learned from British antitrust procedures? One thing we do know in the UK, especially in terms of competition law, at least, is that every ten years Her Majesty's Government, in its wisdom, does a review and fundamentally changes either our institutions or laws. Such changes may not need to be this frequent, as they always involve a great deal of distraction for competition officials and time that could be better spent on enforcement. Nevertheless, the changes to the UK system always come from some loud sustained complaint that competition law enforcement in the UK has been riddled with confirmation bias,

1 '*Candide, ou l'Optimisme*', by François-Marie Arouet, more commonly known as Voltaire, first published in 1759.

2 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 (Text with EEA relevance), Official Journal L 001 , 04/01/2003 p 0001–0025.

or too convoluted, or duplicative, or not fast or targeted enough.[3] There is also a tendency to throw our institutions onto larger 'bonfires of the quangos' that see the abolition of numerous public bodies deemed wasteful,[4] all in the name of an ever more efficient system.

Fortunately, the competition law of the EU and its institutions are not buffeted with such decennial political winds. Nevertheless, EU officials have enough regulatory humility to recognise that some things can indeed be improved, and there is a regular stream of consultations on reforms of regulations, exemptions and guidelines.[5] These reforms do not rock the legal and institutional foundations of EU competition law. There are no revolutions in Brussels, where the European Commission's competition directorate-general[6] is located, or Luxembourg, where the Court of Justice of the European Union (CJEU) is located, that is for sure. The EU administrative enforcement regime and system of decision-making is firm and, indeed, immovable. This article questions whether nothing can really be improved in terms of decision-making procedures at the EU level. Perhaps improvements in decision-making procedures could be a preamble to a further modernisation of EU competition law – a new Regulation 1/2023, perhaps updating the 20-year-old Regulation 1/2003? In that case, and in the absence of a formal UK place at the EU table since the UK's withdrawal from the EU, my offering is merely to review whether recent changes in the UK to move to '*enhanced* administrative decision-making' may help improve EU competition law and, indeed, help it keep pace (or catch up?) with some clearly revolutionary business developments.

Rule of law reflections on legal process, perception and reality

The procedures of administrative decision-making in EU competition law has been an area ripe for debate. There have been criticisms that the Commission has too much power, rights of audience at the investigation stage are limited, and judicial review more limited than in other regimes.[7] These criticisms are voiced in particular when non-EU representatives appear at oral hearings without the presence of the decision-maker, and appeal rights are limited to manifest errors of assessment. One wonders why defendants even bother

3 *Reforming competition and consumer policy* (Department for Business, Energy & Industrial Strategy, 20 July 2021); *Review of the UK's Competition Landscape*, National Audit Office (March 2010); Competition Act 1998.

4 See for example: https://en.wikipedia.org/wiki/2010_UK_quango_reforms.

5 See Public Consultations published by the Directorate General for Competition, available at https://ec.europa.eu/competition-policy/public-consultations_en.

6 European Commission and its competition directorate are used interchangeably, unless specified.

7 I Forrester, 'Due process in EC competition cases: A distinguished institution with flawed procedures', *European Law Review* 34(6):817–843 (December 2009).

requesting an oral hearing before the Commission, let alone appealing decisions to the European General Court. I note two Commission responses to these criticisms: one response is welcome, and this refers to the various improvements institutionally within the Commission's competition directorate-general to increase due process, checks and balances, quality assurance, devil's advocates, hearing officers, the independent Chief Economist and team,[8] and many more. These primarily go to improving the robustness of the eventual decision. They do not offer true impartiality, or independence, however, while adding time to the process. Another Commission response to criticism is related to the first, but hints more of legal sophistry than any change. This is to review the various requirements of the rule of law (an eminently EU concept dating back to Aristotle and Plato), then base assessments of EU decision-making in human rights terms and thus find, in effect, 'nothing to look at here, move along.' This response says, 'look at all the many new and varied checks and balances, and by the way, note that the courts have judged the administrative system to provide sufficient guarantees of the rights of defence, [9] if not access to the actual decision-makers in any case, and sufficient judicial review'. These legalistic arguments, particularly those propounded over the years by hearing officers and members of the Commission's own Legal Service, deserve far more scrutiny. [10] The argumentation appears impeccable, clean and elegant. It is very hard to disagree with, legally. However, while legally attractive, these defences do not seem to address the reality of a lack of due process. It is indisputable that there is no independent decision-making structure within the Commission (because the competition directorate investigates, prosecutes and prepares the decision), there is certainly no genuine oral hearing (because it does not take place before the decision-maker), there is no access to the decision-maker (because the decision-maker is, formally, the College of Commissioners), and the judicial review provided is certainly not what any jurisdiction would consider a 'full merits' appeal, even if the court thinks its review suffices.[11] The defences appear to argue that yes, the Commission is prosecutor, judge and executioner, but 'don't worry, we have sufficient checks on ourselves within the administrative system',

8 W Wils, 'Fundamental Procedural Rights and Effective Enforcement of Articles 101 and 102 TFEU in the European Competition Network,' *World Competition*, 43/5 (December 2019).

9 W Wils, 'The Compatibility with Fundamental Rights of the EU Antitrust Enforcement System in Which the European Commission Acts Both as Investigator and as First-Instance Decision Maker', *World Competition: Law and Economics Review*, Vol 37, No 1 (2014).

10 W Wils, 'EU Antitrust Enforcement Powers and Procedural Rights and Guarantees: The Interplay between EU Law, National Law, the Charter of Fundamental Rights of the EU and the European Convention on Human Rights', *World Competition, Vol. 34*, No 2 (2011).

11 D H Ginsburg and T M Owings, 'Due Process in Competition Proceedings', *Competition Law International* Vol 11 No 1, (April 2015).

and 'our final decision-makers at the College are independent because they don't know anything about the case and haven't seen the evidence or heard the parties'. So we need not ask *Quis custodiet ipsos custodes?* The process guards the guardians, even as it fails the parties.

As such, and as a proponent of effective competition law enforcement, I worry about a lack of legitimacy in EU administrative decision-making. Such a problematic system may have its benefits, of course. Cases may get settled or resolved through the commitments process under Article 9 of Regulation 1/2003 more readily, as defendants recognise that hearings and appeals are not really what they seem, so it is better to cut their losses and do whatever the Commission asks. Officials and the Commission's Legal Service may remind us that settlement and commitments are in the hands of the defendants, and not requested by the Commission. But this only shows again a preference for legal sophistry, rather than an acceptance of what really happens in such cases. Of course, the EU courts may finally turn on the Commission at some point and say the existing due process guarantees really are not sufficient. But that seems unlikely: precedent laid down, in the EU courts in particular, where dissenting opinions are not allowed, is difficult to dislodge. And, even if all is well, and the legal sophists are correct, there is one thing they cannot deny: antitrust decision-making takes too long and for this reason is coming under increasing criticism.

A timely decision is also a fundamental guarantee of the rule of law, no less important than independent and objective decision-making itself. Justice delayed, after all, is justice denied. It can also mean fairly ineffective justice, particularly when fast-moving business developments outpace competition law remedies. This concern is what has motivated, in part, a movement towards different legal methods to address 'gatekeeper' issues in digital markets. It is here that real institutional and procedural experimentation is needed within the Commission, to ensure fair, effective, and efficient enforcement. Often it appears that change is not possible within such a firm legal and institutional foundation. This may be true but, if so, it would be a real shame, and may indeed further threaten the legitimacy and effectiveness of Commission decision-making. To show that it is possible to 'enhance' administrative decision-making, without undermining foundational legal underpinnings, I will briefly introduce some recent changes in the UK.

'Enhanced administrative decision-making' in the UK

Britain has long been a proponent of the rule of law, whether as far back as Blackstone, through to Dicey or most recently, Lord Bingham.[12] The rule of law is a firm foundation of British law, and spreads far and wide,[13] including all the way to the arcane and little-known world of competition law. It is no surprise, then, that issues of independent, timely and robust decision-making dominated the consultations leading up to the merger of the UK's Office of Fair Trading and the Competition Commission to create the Competition and Markets Authority (CMA) in 2014. Concerns had been raised[14] about whether the merger itself, and the decision-making structures preceding and following it, complied with best practice under the rule of law. Would it be compatible, for example, with the right to a fair hearing to have the same body act as investigator, prosecutor and adjudicator?

The possibility was mooted of moving from an administrative system to a prosecutorial system, with the CMA (and sectoral regulators with concurrent antitrust powers) presenting the case for finding an infringement before the Competition Appeal Tribunal (the UK's specialist competition court of first instance), which would rule on the outcome. Instead, the UK government decided to embed an *enhanced* administrative approach to antitrust enforcement, involving improvements to the speed of the process and the robustness of decision-making. the government recorded the Office of Fair Trading's intention to implement changes to decision-making in antitrust cases to increase the robustness of decisions and reduce any perception of confirmation bias by introducing collective judgment in decision-making, along with separation between responsibility for the investigation of the case and for the final decision within the CMA (and sectoral regulators). The CMA's Rules were amended to include a requirement that one decision-maker – the senior responsible Officer (SRO) – will oversee the case team's investigation, from deciding whether to initiate proceedings to deciding whether to issue a statement of objections, but a second collective decision-maker (a case decision group, or CDG) would take over once the statement of objections had been issued. The SRO must not be on the CDG and the CDG itself must comprise at least two individuals – usually three, including at most two enforcement staff and one independent panel member – drawn from the panel of independent members appointed by government to the CMA for the express purpose of making independent decisions (and having no enforcement responsibilities at the enforcer). Such panel members already sat on market investigation references and Phase 2 merger decisions.

---

12 T Bingham, *The Rule of Law*, Penguin (2010).

13 See, for example, Prof P Craig, 'The Rule of Law', paper submitted to the UK House of Lords, Constitution - Sixth Report, Session 2006-0.7

14 'Businesses to face powerful new Competition and Markets Authority', *BCLP* (March 2012).

Other regulators with concurrent competition powers followed suit. The Office of Gas and Electricity Markets (Ofgem) formed its Enforcement Decision Panel (EDP), which currently numbers seven members. Final antitrust decisions are taken by a panel comprising two EDP members plus one senior member of Ofgem staff. In this way, Ofgem has adopted the rigour of bringing in completely separate decision-makers to take the final decisions on antitrust enforcement activities. The Civil Aviation Authority draws on Ofgem's EDP for its own antitrust decision-making. The Financial Conduct Authority and Payment Systems Regulator have created a Competition Decisions Committee (CDC) Panel. Antitrust enforcement decisions following the decision to issue a statement of objections are taken by three people drawn from the CDC Panel – this time with no involvement of staff members. These concurrent regulators have all adopted decision-making procedures at least as robust and rigorous as those of the CMA and, arguably, stronger. Another comparator is that of the Bank of England, which has a competition objective, secondary to its prudential objective, and which has no concurrent antitrust powers but nevertheless saw the value of an independent and collective panel. It thus formed the Enforcement Decision Making Committee (EDMC), which fulfils the same function of independent collective review as in the concurrent regulators.

Is it really the case that including such a collective decision-making system within the European Commission is not justified, or even not possible, legally? Does anyone genuinely believe that the current enforcement system at the European Commission' competition directorate-general complies with the rule of law and human rights obligations that every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union? Legal sophists may be satisfied, but both perception and reality of decision-making would warn against being so blasé. Checks and balances within the Commission's competition procedures there may be, and procedural oversight, but there is no independent (ie, impartial) decision-making, no access to the decision-makers themselves and delays are rife. The UK's enhanced administrative system guarantees impartiality, access and timeliness. The independent case decision groups or various panels run the case from statement of objection to finding of infringement or non-infringement; these decision-makers review all pleadings and are available to parties through oral hearings, and they are obliged to maintain the pace of the case. Not having other enforcement duties at the Authority, they are not delayed or distracted by other work.

The Digital Markets Act – an opportunity for procedural modernisation and experimentation

The most substantive recent proposal for modernisation of matters usually related to competition law enforcement is the Digital Markets Act (DMA). Here, the primary focus is not so much to speed up enforcement so as to catch up with anti-competitive business developments, but to get ahead of the problems through ex ante pro-competitive regulation. Similar enforcement regimes in telecoms and other regulated industries in any jurisdiction usually involve a separation between a compliance or supervision function, and an enforcement function. In such models, the compliance function engages frequently with the relevant firms, to ensure from the start that business models and practices comply with the relevant regulations and obligations. A very much secondary enforcement function is there to deal with violations – and, given the exante nature of such a regulatory regime, is very much focused on providing impartial, fair and expert decisions in as quick a manner as possible.

Since the DMA is a complement to ex post competition law enforcement, it is unlikely to affect the core work of the Commission's competition directorate-general. However, it provides an opportunity for the Commission to actively consider new enforcement methods that could achieve the aims of the DMA through whatever body will enforce the DMA. Separately, I have proposed a stand-alone platform compliance panel to ensure the day-to-day compliance of gatekeeper business models and practices with the exante rules of the DMA.[15] This body could also provide timely guidance to business, particularly with respect to 'where safe is'. However, it will also be necessary to also have a rapid enforcement function to deal with and to correct violations. The traditional ex post administrative enforcement mechanisms of the Commission do not seem well-suited to this role, even in a world where DMA violations would be viewed as 'by object' offences. Questions of interpretation will inevitably arise, and the markets and practices involved will be complex. To tie down the evaluation of such obligations to the current ex post system would likely overwhelm the Commission's capacity and lead to backlogs at the Courts as well. There will also likely be the usual procedural and human rights challenges and complaints, particularly if the DMA system retains the current enforcement model of no access to decision-makers, let alone impartiality of decision-makers. Why bother adopting such a system when it will only be tested on such obvious grounds and thus delay proper enforcement in the meantime? It would also seem wise to ensure that the evaluators of disputes in such markets have a degree of relevant expertise with the practices or sectors at issue. There is, therefore, no time like the present to consider experimenting with decision-making.

15 P Marsden, R Podszun, *Restoring balance to digital competition – sensible rules, effective enforcement.* Konrad-Adenauer-Stiftung (2020).

The platform complaints panel

Another proposal would be to introduce a platform complaints panel that works as an adjudicator for disputes relating to exploitation or exclusion by digital platforms. Such a panel should draw on decision-makers from within the Commission, but with guaranteed independence from the prior development of the case itself, ideally with experience in the sectors affected, and offer a rapid remedy to violations by a gatekeeper. While sophists would likely protest that the Commission cannot delegate its decision-making, it need not be a delegation – it is but an insertion of a due process step in the decision-making structure, which decision would then still be ratified by the College – as now, but with the obvious benefit of having provided a proper oral hearing, review of the evidence, and testing of all sides of the case. What is the alternative? Continue as now – with the obvious failings? Or send more cases to the court? The judiciary would be quickly overwhelmed. Rely on an arbitration mechanism set up by the gatekeeper (self-regulation of sorts) – not likely! Surely it would be best to have an independent panel to adjudicate on the claims.

Upon direction by the platform compliance unit, certain platforms with gatekeeper status would be obliged to appear and direct written pleadings and oral representations to such a panel. In this regard, I recommend a standing panel of independent adjudicators, supported by staff from the Commission's directorates-general for competition and communications networks, context and technology (DG CNCT), and with powers to decide on complaints brought by private parties where an allegation of a breach of the rules is made. This platform complaints panel would operate swiftly, primarily relying on a paper-based adjudication mechanism with strict timelines, with the only operating principle being to identify whether a platform is in violation of the rules, identify any objective justifications, and order corrective measures if necessary to restore competition. Given the panel's expertise and independence, appeals from its decisions could be according to the current standard of manifest error of assessment, but would more appropriately be under the judicial review standard of reasonableness. They must necessarily be swift, given the exante approach intended in the DMA. A typical example may be that a supplier of goods on a marketplace complains that the platform does not disclose transaction data as required in a possible exante rule. The platform complaints panel would look at the case and order a quick remedy for the parties.

If an independent collective panel system is adopted as a move towards enhanced administrative decision-making, as in the UK, one could imagine membership of such panels coming from independent national experts, whether from competition authorities, regulators, academy or industry, all appointed

for a fixed term by, say, the Competition Commissioner or the College of Commissioners. Actual working staff from the competition directorate-general and likely DG CNCT would of course support the investigation, as occurs in the UK. Concerning markets, legal, economics and remedies expertise, it would be beneficial to have secondments from Commission directorates-general relevant to the sector being investigated.

Conclusion

This contribution offers some thoughts on how EU administrative decision-making procedures could be enhanced and has explored some models recently adopted by competition and related authorities in the UK. There will always be readers who say that no such evolution is necessary at the EU level and the current system is adequate to all challenges. However, it is my firm belief that cases are getting more and more complex, and taking longer and longer. If a move to more 'by object' approaches to cases continues in competition law and is complemented by exante pro-competitive obligations on digital gatekeepers, it seems wise to prepare the administrative decision-making process to handle such matters rapidly, impartially and fairly. Collective decision-making by independent panel members is one way of achieving this, as typified by UK developments. There will be many others. I look forward to continued debates on the necessity and means of modernising and enhancing our important enforcement methods – after all, everything can be improved. And sometimes, some things must be improved.

Author bio

Philip Marsden has been working on competition law, fintech and fast-moving consumer goods matters for over 30 years, in private sector, government and academic roles. For over a decade, Philip was a member of the Board of the UK Office of Fair Trading, then Inquiry Chair at the Competition and Markets Authority, where he decided on Phase II mergers, market investigations and antitrust cases. Currently, Philip is Professor of Law and Economics at the College of Europe, Bruges and Deputy Chair of the Bank of England's Enforcement Decision Making Committee, and case decision-maker at the Financial Conduct Authority and the Payment Systems Regulator. In 2018, the Chancellor appointed Philip to the Treasury's Digital Competition Experts Panel, writing the *Unlocking Digital Competition* report. In 2020, he co-authored, with Prof Dr Rupprecht Podzsun, an influential report on behalf of the German Presidency, entitled *Restoring Balance to Digital Competition: Sensible Rules, Effective Enforcement.*

Additional reading:

P Marsden, 'Checks and balances: EU competition law and the rule of law', *Competition Law International* (February 2009).

P Marsden, R Podszun, *Restoring balance to digital competition – sensible rules, effective enforcement*, Konrad-Adenauer-Stiftung (September 2020).