COMPETITION LAW AND FUNDAMENTAL RIGHTS: SOME UNRESOLVED ISSUES

Aidan O’Neill QC
GMI Construction Holdings plc

• In *GMI Construction Holdings plc* the CAT was highly critical of the procedures adopted by the OFT in leading evidence in support of their allegations by the use of “flagrantly leading questions” in their interviews with witnesses.
In *AH Willis & Sons Ltd.* the CAT criticised the OFT for seeking to rely upon material contained in notes and transcripts of these interviews as evidence against a third party.
Durkan Holdings Limited and others v OFT

In *Durkan Holdings Limited and others v OFT* the CAT was critical of the OFT for failing to prepare and lodge signed witness statements to allow for proper cross-examination of the evidence contained therein.
Burden of proof

- the CAT ultimately analysed these procedural failings as amounting, in some cases, to a failure on the part of the OFT to meet the burden of proof that rests on it to show that these infringements were in fact committed by the parties so charged, rather than explicitly as fundamental breaches of the parties’ common law rights to procedural fairness or Convention right under Article 6 ECHR to a fair trial
Kier Group plc & Ors v. Office of Fair Trading

- in *Kier* that the OFT’s application of a MDT which was not specifically provided for in their Penalty Guidance “offended the principle of legal certainty as enshrined in Article 1 of Protocol 1 ECHR”
G F Tomlinson Building Limited & Ors v. Office of Fair Trading

• in Tomlinson it was argued that the change in the OFT’s practice from calculating the starting point for penalties on the basis of turnover in the year prior to the end of the infringement to calculating it on the basis of turnover in the year prior to the decision was incompatible with the principles set out in Article 7 ECHR.
Rejection of express ECHR arguments

• In *Barrett Estate Services and others* the CAT expressly noted that for the avoidance of doubt, the OFT’s response to the Convention rights points raised against them “was made without prejudice to the question of whether the imposition of a penalty for collusive tendering is a criminal sanction/penalty for the purposes of Articles 6 and 7 ECHR (which the OFT did not concede).”

• In the event, these ECHR based arguments were rejected as ill-founded in law by the various CATs before which they were argued.
Rejection of parallels with criminal law

In Tomlinson the CAT also rejected the submission that penalties imposed for breach of the Chapter I prohibition were flawed because they were out of proportion to breaches of health and safety law and the offence of corporate manslaughter, holding that such comparisons were “too far removed from the competition regime with which we are dealing to be helpful in assessing the reasonableness of the fines imposed in this or in any other infringement decision under the 1998 Act”

and that

“any search for some overarching principles of fairness or reasonableness across all regimes which impose financial penalties would be an unproductive search [since] ... there is no scheme of rationality which is able to bring the fining regime under the 1998 Act into line with the universe of criminal penalties and imperatives for justice in diverse fields of criminal application.”
Competition law tougher than criminal law

• breaches of competition law resulting in the imposition of penalties intended to “reflect the seriousness of the infringement, and to ensure that the threat of penalties will deter undertakings from engaging in anti-competitive practices” are dealt with more punitively than corporate criminal offences, including those offences resulting in the deaths of individuals
EU opposed to ECHR analysis of competition law

• the reluctance on the part of the OFT – and of the CAT – fully to commit to a Convention (or other fundamental) rights based analysis of competition law reflects the ambivalence at an EU level, both as regards practice of the Commission and in the competition law case law of the CJEU.
Volkswagen v Commission [2003]

• “the effectiveness of Community competition law would be seriously affected if the argument that competition law formed part of criminal law were accepted”
Charter of Fundamental Rights of the EU

• Article 49(3) of the Charter of Fundamental Rights provides that “the severity of penalties must not be disproportionate to the criminal offence”, but this may not be directly prayed in aid in an EU law context so long as the contention is maintained that fines in respect of competition law are not to be regarded as the imposition of penalties for criminal offence.
in Société Stenuit v. France the European Human Rights Commission was unequivocal in finding that the provisions of Article 6(1) in its criminal limb applied to the decision of the French Minister acting under national competition law to impose a fine for breach of national competition law and amounted to the “determination of a criminal charge”. Accordingly, the applicant was entitled to a fair hearing before an impartial tribunal, and the failure to provide such a hearing was a violation of Article 6(1) ECHR.
Jussila v Finland (ECtHR)

- while a claim to tax itself continues to fall outside the ambit of Article 6(1) ECHR, automatic surcharges of even minimal amounts will constitute for Convention purposes a criminal penalty, and so the proceedings resulting in the imposition of such penalties or surcharges will attract the fairness protections set out in Article 6(1) ECHR (though not necessarily the full rigour of the specific protections set out in Article 6(2) and (3) ECHR).
Solvay SA v European Commission
[2011]

• The Belgian undertaking Solvay which was accused, among others, by the Commission of abusing its dominant position on the market for soda ash from 1983 to 1990 has now simultaneously raised parallel proceedings against the Commission before the CJEU and against all 27 Member States of the European Union before the ECtHR relying on the provisions of Article 6 ECHR in the context of an EU competition law matter to complain that it was not granted due access to the file and that, as a result, its rights of defence have been infringed. Solvay also claims that the administrative and judicial proceedings in this case were excessively long. This, it contends, constitutes an infringement of its fundamental right under Article 6 ECHR to have its case adjudicated upon within a reasonable time.
KME Germany AG, formerly KM Europa Metal AG v. Commission [2011]

- Advocate General Sharpston has conceded as follows:
  
  • “[T]he procedure whereby a fine is imposed for breach of the prohibition on price-fixing and market-sharing agreements in Article 81(1) EC [now Article 101(1) TFEU] falls under the ‘criminal head’ of Article 6 ECHR as progressively defined by the European Court of Human Rights.
  
  • The prohibition and the possibility of imposing a fine are enshrined in primary and secondary legislation of general application; the offence involves engaging in conduct which is generally regarded as underhand, to the detriment of the public at large, a feature which it shares with criminal offences in general and which entails a clear stigma; a fine of up to 10% of annual turnover is undoubtedly severe, and may even put an undertaking out of business; and the intention is explicitly to punish and deter, with no element of compensation for damage.”
EU accession to ECHR

• At the time of writing, negotiations were underway between these two European (EU and Council of Europe) institutions, with a view to seeing whether and how the EU – and EU law – could be integrated within the Strasbourg system for the protection of European human rights.
Preliminary reference from ECtHR to CJEU?

• In a Joint Statement from the Presidents of the European Court of Human Rights (Judge Costa) and of the Court of Justice of the European Union (Judge Skouris) issued in late January 2011, it was suggested by the judges that it would be expedient for the contracting parties to make provision in any agreement between the EU and the Council of Europe for a 'flexible procedure' to allow for the prior involvement of the Court of Justice in all cases where an application to the Strasbourg alleges that a provision of EU law is incompatible with the ECHR.

• The two presiding judges seem to envisage the possibility of some kind of 'preliminary reference' down from the Strasbourg Court to the CJEU, in applications from individuals complaining of an incompatibility between EU law and the ECHR, so as to allow the CJEU to exercise an 'internal review' on the issue before the European Court of Human Rights exercises its 'external review' under the Convention.
The show ain’t over ....

• The required European Treaty bases for the accession of the EU to the ECHR are, at least from the perspective of EU law, now in place. But while the CJEU’s initial veto on EU accession to the ECHR may have been removed by these Treaty amendments, any accession Treaty to the ECHR still requires the CJEU’s approval as being consistent with the requirements of EU law. Further, the requirement of unanimity in the Council, the consent of the European Parliament and ratification by each of the Member States before such an accession agreement can be concluded creates a whole new series of potential hurdles within the EU system. And Russia may yet exercise its veto.