

Due process in antitrust matters before the General Court

AIIA Antitrust Seminar Panel Discussion
Amsterdam
07/02/2017

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Overview

I. Structural imbalance?

II. Review of facts

III. Fundamental Rights

IV. ECN+ vs. national constitutional laws

I. Structural imbalance?

- Commission releases decision: „monolithic act of law“
 - No restrictions as to the length and complexity of the decisions
 - Informations from all cartelists including leniency statements
- Decision has to be challenged before the Courts:
 - No ex officio and de novo review of the allegations (unlike in some member states, e.g. Germany); review limited to pleas
 - Restrictions on length of application and subsequent written submission
 - Limited time for oral pleadings
- Is challenging factual assumptions of the Commission a „probatio diabolica“?
 - Commission's decision of e.g. 700 pages to be challenged on 75 pages before the GC
 - Can this be effective?

II. Standard of Review

- Courts define high standards of due process for EU antitrust law *in abstracto* (e.g. ECJ C-389/10, paras. 118 et seqq. – KME).
- Yet, how is the handling of cases done *in praxi*?
 - Reluctance of the Courts to make full use of measures of inquiry (Sec. 2 RProcGC)
 - Hearing of witnesses hardly ever “deemed necessary” in terms of Art. 93(1) RProcGC/tendency to rely on the Commission’s file (see e.g. CFI T-144/07 et al. para. 152 et seqq. - Elevators and Escalators).
 - SCCI may help the Commission to close evidentiary gaps (CFI T-101/05 et al. - BASF).
 - Reluctance to grant parties a right on coherent factual assessment in different cases relating to the same infringement (ECJ C-625/13 para. 42 - Villeroy & Boch). Conflict with *in dubio pro reo*?

III. Fundamental Rights

- Courts commit themselves to EU Charter of Fundamental Rights
- Antitrust Fines imposed on undertakings generally fall within the scope of the EU Fundamental Rights (Articles 47 to 49 of the Charter).
- However, legal protection in antitrust cases is often fragile
 - In dubio pro reo vs. AKZO-presumption
 - Transfer of burden of proof on undertakings for legal exemption in Art. 2 Reg. 1/2003
 - Nulla poena sine lege vs. imposition of fines by legal analogy (Outokumpu)

IV. ECN+ vs. national constitutional laws

- What is tolerated by the EU Courts in terms of constitutional principles/fundamental rights does not necessary comply with national constitutional laws
- Examples:
 - 10%-rule
 - EU-Law: considered as a mere cap in Art. 1/2003
 - Germany: German Federal Supreme Court: such an interpretation breaches the principle of nulla poena sine lege. 10% rule in Art. 81 ARC must be interpreted as an ultimate sanction only to be applied in the most severe cases, not as a mere cap.
 - Burden of proof for legal exemption in Art. 101(3) TFEU
 - EU-law: Burden of proof shifted to the parties by Art. 2 Reg 1/2003
 - Germany: German Government has declared that no shift of burden of proof takes place before German authorities/courts in antitrust fine proceedings

Thank you for your attention!

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