



Freshfields Bruckhaus Deringer

UKAEL London

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Fundamental Rights in EU Competition Cases

A practitioner's perspective

Dr. Martin Klusmann

Freshfields Bruckhaus Deringer LLP



Overview

Four selected topics to be covered:

- A. Overview of fundamental rights issues in recent competition cases
- B. How can fundamental rights arguments be raised and when will they be considered by EU Courts?
- C. Do the EU Courts' procedural rules meet the Charter standard?
- D. „Menarini in Reverse“: Can Strasbourg and/or national constitutional courts review EU Court decisions?



A. Fundamental Rights as the European Courts see them

ECtHR
Menarini
27 September
2011

- Standard is that allegations of fact and law have to be considered by a court reviewing a cartel fine. This follows from Art. 47 of the Charter (or Art 6(1) ECHR).
- Query whether this would have to include a right of the court to re-adjust sanctions.

ECJ
KME/Chalkor
8 December
2011
C-272/09P
C-389/10P
C-386/10P

- Art. 263 TFEU provides generally for a review of the legality of a COM decision.
 - Art. 31 Reg 1/2003 provides that the European Courts' jurisdiction is unlimited, i.e. comprises both factual and legal review. → Arguably compliant with Menarini.
- but:**
- ECJ assumes no obligation for EU courts to investigate lawfulness of an appealed COM decision ex officio.
 - It is for the applicant to put forward and substantiate grounds of appeal.



A. Fundamental Rights as the European Courts see them

Quinn Barlo
30 November
2011
T-208/16

- Court must undertake a comprehensive review of whether there is an infringement and the applicant has to get the benefit of the doubt, in particular in competition cases leading to fines.
- However, the Commission may still use its rebuttable presumption of participation. If it is established that the applicant took part in a meeting in which manifestly anti-competitive conduct was discussed, the defendant has to prove:
 - that he did not take part in the discussion.
 - that he openly distanced himself publicly from the conduct, and
 - that he did not take into account its conduct in the market information exchanged in the meeting.

No change of the substantive test results from Menarini. ECJ and EGC and COM argue it is sufficient that the courts can review facts and law to meet Art. 47 standard.



B. What does it take to have Fundamental Rights considered before the EU Courts?

- AG Kokott thinks:**
- No obligation for EU courts to consider Fundamental Rights ex officio (like ECJ Chalkor, para. 89).
- (Spanish Raw Tobacco Case, 12 January 2012, C-628/10P)**
- Fundamental Rights already applied since 2004. Lisbon Treaty brought no changes in 2009.
 - If the initial grounds of appeal did not set out specifically a violation of Fundamental Rights (such as Art. 48/49 ECFR), the argument is barred and cannot later be considered in court proceedings – Art. 48 para 2 EGC Rules of Procedure.
 - An assumption of liability which is based on a 100% shareholding (only) does not violate Art. 48/49 ECFR. Neither does the application of such assumption to the detriment of a defendant violate the principle of guilt (Art. 48 I) nor of proportionality (Art. 49).



B. What does it take to have Fundamental Rights considered before the EU Courts?

AG Kokott (continued):

- Prima facie assumptions are permissible as long as they are rebuttable. Quasi-criminal liability can be based on a shareholding if there is an economic unit.
- Joint and several liability based on shareholding is fair since this has no bearing on the amount of the fine.
- Principle of Proportionality of a fine has to be argued in detail, otherwise not to be considered by EU courts.



B. What does it take to have Fundamental Rights considered before the EU Courts?

Other Cases?

ICI
T-214/06
5 May 2012

- Art. 41 I of the Charter can be violated by unduly long proceedings.
- A case which has taken 7 years and 4 months from its opening to the first court hearing and 5 years and 9 months in court before the oral hearing was held, of which 4 years and 5 months passed after written procedures were closed and until the Oral Hearing took place, is not unduly long.



B. What does it take to have Fundamental Rights considered before the EU Courts?

Knauf
C-407/08
1 July 2010

- Art. 47 of the Charter guarantees efficient judicial review. This means that grounds of appeal must not be deemed waived even if the underlying arguments had not been raised in the administrative stages of the case before the COM. This also follows from Art. 52 (1) of the Charter.

ThyssenKrupp
Elevators
C-407/08 P
1 July 2010

- No increased penalties for recidivism if the first infringement was committed by a different entity and the second entity was not charged with an SO re. the first infringement at the time. (Art. 41 Charter argument in substance)

Solvay
C-109/10
C-110/1025
October 2011

- Art. 41 II lit a) and b) of the Charter can be violated if the rights of defence re. access to file are not complied with.
- This is the case if the Commission has lost files before readopting a cartel decision and can thus no longer offer defendant access to lost files.



C. Fundamental Rights and Procedural Rules before the EU Courts

Are the applicable rules of procedure compliant with Art. 41 of the Charter?

EGC

- No ex officio full review of facts, law or discretion.
- No transfer of the administrative file of the COM to the Court, WYSIW the EGC gets (used to be different for ECSC cases).
- 2 briefs per party only, limited to 50 / 25 pages.
- No possibility to refer to annexes to substantiate grounds of appeal – case and arguments need to be set out in main body of briefs.
- No hearing of witnesses or taking of expert evidence.
- Written hearsay evidence is the rule (corporate whistleblower documents).
- No cross-examination of witnesses at any point of a cartel case.
- 15 minutes of pleading time; will be extended upon application to a maximum of 30 minutes, often less.
- Strict rules on preclusion of new arguments.



C. Fundamental Rights and Procedural Rules before the EU Courts

EJC

- 1 brief per party, only 15 pages.
- Review limited to mistakes in law made by EGC.
- No hearing unless applied for.
- 15 minutes of pleading time.



D. Menarini “in Reverse”: Can the ECHR review EU court decisions which do not sufficiently protect fundamental/constitutional rights?

ECHR Case law until now suggests:

EU review standard is compliant with ECtHR (Bosphorus v. Ireland, paras 165 and 155) but the test is:

- Is there a “manifest deficiency” of an ECJ decision?
 - no adequate examination of fundamental rights
 - too restrictive interpretation of individual rights
 - wrong interpretation of ECHR guarantees
 - **Individual complaint** could already work now.
- After EU accession → clear case under Art. 6(2) TFEU.
“Strasbourg after Luxembourg”



D. Menarini “in Reverse”: Can national courts review EU court decisions which do not sufficiently protect fundamental/constitutional rights?

Bundesverfassungsgericht

- Institutional Fundamental Rights apply to legal entities and individuals alike.
- ECJ judgment is “official act”. Not only German official acts count but also EU acts, BVerfG in its “Maastricht” decision of 2001, 7th finding.
- Competence to review if supra-national body has exercised delegated rights/powers and alleged violation arises therefrom.
- Immediate effect of EU-delegated act on holder of Fundamental Rights – this is the case for EU decisions imposing fines.



D. Menarini “in Reverse”: Can national courts review EU court decisions which do not sufficiently protect fundamental/constitutional rights?

Bundesverfassungsgericht has issued a revocable waiver to review EU acts in its “Solange” and “Solange II” case law:

“No review as long as there is a largely comparable guarantee of fundamental rights on the supranational level.”

The substantive test is: “Core violation” has to be demonstrated, either procedurally, or on the merits, or both.

No obligation to decide. Bundesverfassungsgericht can accept or reject applications with or without reasoning.

