



Latest developments in EU competition law and fundamental rights: an ongoing tale

Dr Arianna Andreangeli

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## A gift that keeps on giving? Most recent EU Court of Justice case law

### ➤ Some recurring themes...

→ A decision 'within a reasonable time'

→ The presumption of innocence in, inter alia, 'parent/subsidiary liability' cases

→ Equality of the arms, exchange of information and use of documents in evidence

→ Secrecy of leniency documents and implications for the right against self-incrimination

→ Settlements, finality and legal certainty of proceedings

### ➤ ... and some emerging trends?

→ Looking for greater predictability in the application of the EU Charter of Fundamental Rights and of general principles...

→ Aiming to strike the "right" balance between the effective enforcement of competition law and sound standards of due process...

## The right to a decision ‘within a reasonable time’ in ‘composite proceedings’

- Administrative vs judicial stage of EU competition proceedings...
  - Before the EU Commission: no binding deadlines... → what is a “reasonable time”?
    - Depends on the circumstances, the behaviour of the parties and of the EU Commission...
    - When is the right infringed? Assessing the impact of a delay on the exercise of the rights of defence—the idea of “significant difficulties” ... and taking into account the parties’ duty of “diligence”!
    - Remedy?
  - Before the EU Courts: need to consider the complexity, nature of the case and conduct of the parties... also was the General Court “inactive” at any stage?
    - Remedy? Right to seek damages... on the assumption that an ‘unreasonable delay’ → “sufficiently serious breach”!
- The position of the European Court of Human Rights... sufficient convergence?

## Settlement proceedings as the EU competition ‘plea bargaining’ and the “fairness test”

- Settlement proceedings → take care of perhaps less serious cases?
  - An “efficiency shortcut” ....
  - Do they comply with due process principles? The case of infringement decisions adopted after negotiations were interrupted—the Timab appeal:
    - Key factor/benchmark: whether the undertaking(s) engaged in discussions voluntarily...
    - ... and whether they were afforded full hearing rights in the “normal” proceedings;
    - Note: interruption of negotiations → any offer as to the sanctions “falls” → the Commission comes back to enjoying full discretion.
- And the human rights’ test: ‘Scoppola’, ‘Natvlishvili’ and the “trade off” between waiving rights and gaining procedural and sanction related advantages...
  - ... but with limits: “appropriate safeguards” must assist the procedure; no “arbitrariness” on the part of the authorities should occur → outcome or conduct thereof.

Evidence, cooperation and the right against self-incrimination... squaring the circle?

- Leniency documents in the context of EU competition proceedings... secret but not in all cases?
  - Evonik Degussa: drawing a distinction between “factual information” and “information leading to the identification of the whistle-blower...”
  - ... and laying down boundaries as to the scope of the right to “privacy” and to the integrity of one’s reputation.
- The EU Courts’ approach to the ECHR test:
  - Is the offence the “likely consequence” of the person’s behaviour?
  - Time matters...
  - ... and so do the circumstances: of public officials and former KGB officers—the Gillberg and Sidabras cases.

## Evidence, cooperation and the right against self-incrimination... squaring the circle?

- Article 12 of Council Regulation No 1/2003... and its limits!
  - Between the demands of effective enforcement, the impact of the principle of national autonomy and the need to protect the rights of defence of the parties...
  - FSL and documents by the EU Commission from domestic tax authorities... can they be lawfully used as evidence?
  - Article 12 as a tool to regulate the “flow of information” within the ECN... minimum requirement: so long as it is legal under national law...
  - ... but is this solution desirable from a legal certainty standpoint?
- FSL to the ECHR test—the Mihaile judgment and the importance of the strength of the ‘procedural safeguards’ accompanying the transmission and use of exchanged evidence:
  - Nature of the proceedings—whether adversarial or not;
  - Could the individual challenge the use of/inferences drawn from the evidence?
  - Rights of appeal?

## Parent/subsidiary links, presumption of innocence and liability for sanctions—who pays?

- A long-standing principle—the impact of the ‘single economic entity’ concept on the issue of liability for EU antitrust fines...
  - A “derivative” type of liability... → in principle the parent company can benefit from any extenuating factor affecting the subsidiary’s conduct unless the parent had autonomous involvement in the infringement... with some safeguards: entitlement to be informed of the subject matter of proceedings, to be heard and to launch an appeal against the Commission’s decision (AKZO Nobel);
  - Can be rebutted! Toshiba → account must be taken of all circumstances/features of links between the companies concerned/ existence of evidence of ‘public distancing’ → to what extent has ‘decisive influence’ been actually exercised?
  - Greater clarity/predictability?
- Toshiba and AKZO to the ECHR test—the Radio France case: issues of presumption of liability and due process...
  - In principle allowed but without making the right to a fair hearing nugatory...
  - ... but use must be assisted to procedural safeguards, e.g. right to challenge the inferences drawn

## EU Competition enforcement and human rights? Are we there yet? Getting close...

- An ongoing tale in the EU Courts' practice...
- Emerging trends toward “crystallising” a number of safeguards into the fundamental rights' entitlements contained in the EU Charter of Fundamental Rights:
  - The example of the right to a decision ‘within a reasonable time’...
  - ... and efforts toward defining more clearly the presumption of innocence!
- Still, open questions remain...
  - Exchange of information in the absence of common evidentiary rules...
  - Ensuring effective due process entitlements in parent/subsidiary liability cases—the limits of this responsibility as “derivative” ...
  - Settlements—drawing a distinction between voluntary negotiations and “ordinary proceedings”, especially if discussions break down...



Questions, comments?

Thank you!

[a.andreangeli@ed.ac.uk](mailto:a.andreangeli@ed.ac.uk)