

AG Sharpston voices opinion on the standard of judicial review over fines in cartel cases

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In an Opinion delivered on 10 February 2011, Advocate General ('AG') Sharpston of the European Court of Justice ('ECJ') considered the nature of the review which the General Court of the European Union ('General Court') must carry out when exercising its unlimited jurisdiction over fines imposed by the European Commission ('the Commission') in cartel cases.

The AG concludes that:

- the procedure whereby fines are imposed in cartel cases falls under the 'criminal head' of Article 6 of the European Convention on Human Rights ('ECHR');
- however, that procedure differs from the 'hardcore' of criminal law, with the result that the criminal-head guarantees of Article 6 ECHR do not apply with their full stringency;
- as a result, it is compatible with Article 6(1) ECHR for cartel fines to be imposed at first instance by the Commission, even though it is not an independent and impartial tribunal established by law, as the General Court can, and did in this case, exercise full jurisdiction over such fines.

I. Factual background

In a decision of 16 December 2003, the Commission imposed a fine of EUR 39.81 million on KME for its participation in a cartel on the copper industrial tubes market. That fine was upheld in full by the General Court in a judgment delivered on 6 May 2009.

KME subsequently appealed the General Court's judgment to the ECJ. In addition to the claims that it already made before the General Court, KME claims that the General Court breached its fundamental right to full and effective judicial review by failing to examine thoroughly and closely its arguments and showing a biased deference to the Commission's discretion.

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II. AG Sharpston' assessment of KME's argument

First, the AG states that she has “*little difficulty*” in concluding that the procedure whereby fines are imposed for breach of the EU competition rules in cartel cases falls under the ‘criminal head’ of Article 6 ECHR. She bases this, *inter alia*, on the stigma such fines entail, on the severity of maximum penalty that can be imposed (up to 10% of worldwide annual turnover), and the fact that the intention of such fines is explicitly to punish and deter (paragraph 64 of the Opinion).

She then argues, however, that this procedure differs from the hard core of criminal law as defined by the European Court of Human Rights (‘ECtHR’), with the result the criminal-head guarantees of Article 6 ECHR do not apply with their full stringency. In particular, this means that it may be compatible with Article 6(1) ECHR for criminal penalties to be imposed, at first instance, by an administrative body which does not itself comply with the requirements of that provision, provided that the decision of that body is subject to subsequent control by a judicial body that can, and does exercise, full jurisdiction (paragraphs 67 and 69 of the Opinion).

In that regard, she considers that the ‘unlimited jurisdiction’ conferred upon the General Court as regards appeals against cartel fines generally meets this requirement of full jurisdiction as the General Court has unlimited jurisdiction to cancel, reduce or increase the amount of a cartel fine, with no restriction as to the type of grounds (of fact or law) on which it can be exercised.

She also notes that the question may arise as to whether the General Court has, in fact, adequately exercised such full jurisdiction in a particular case (paragraphs 70 and 71). However, after verification, the AG considers that in this case, the General Court did adequately exercise its full jurisdiction.

She therefore recommends that the ECJ dismiss KME's appeal.

III. Conclusion

On the one hand, it is to be welcomed that the Opinion expressly recognises that the procedure whereby fines are imposed for breach of the EU competition rules in cartel cases falls under the ‘criminal head’ of Article 6 ECHR, something which has generally been resisted by the Commission.

On the other hand, it is disappointing that the Opinion concludes, without providing any real explanation in support of such a position, that this procedure falls outside of the ‘hardcore’ of criminal law as defined by the ECtHR, with the result that the criminal-head guarantees of Article

6 ECHR do not apply with their full stringency. The Opinion does, however, stress that the adequacy of the General Court's review is to be assessed on a case-by-case basis.

Moreover, the Opinion leaves open the important question of whether the General Court effectively exercises full jurisdiction over findings of infringement as opposed to cartel fines. In that regard, it is unclear whether the limited nature of the judicial review which the General Court exercise over the Commission's complex technical and economic appraisals is compatible with the requirement under Article 6 ECHR that the decisions of an administrative body like the Commission, is subject to subsequent control by a judicial body exercising full jurisdiction.

It will therefore be interesting to see what position the ECJ will take when it hands down its judgment, which can be expected within the next 3 to 9 months. Other cases which present related matters are also pending before the European Courts so the KME case is unlikely to be the end of this matter.

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