

Kluwer Competition Law Blog

Upcoming judgment in case C-17/10 Toshiba and Others to shed light on the question of parallel proceedings within the ECN

Jindrich Kloub (DG Competition, Belgium) · Tuesday, February 7th, 2012

On 14 February, the Court of Justice will deliver a ruling on a [preliminary reference](#) by a Czech Regional Court in Brno, which is likely to provide welcome guidance on the issue of parallel proceedings within the ECN and the principle of ne bis in idem.

The case concerns the legality of the Czech NCA's [decision](#) against the Gas Insulated Switchgear cartel, which was also sanctioned by the European Commission's [decision](#) of 24 January 2007.

The Gas Insulated Switchgear cartel and its prosecution in Europe

The nearly world-wide GIS cartel, uncovered in 2004, involved various well-known European and Japanese undertakings (ABB, Alstom, Areva, Fuji Electric, Hitachi, Japan AE Power Systems, Mitsubishi Electric Corporation, Schneider, Siemens, Siemens Austria). It operated from at least 1988 until the Commission's inspections on 11 May 2004. A number of competition authorities investigated the cartel. These included, at the EU level, the Commission in its capacity as the competition authority for the European Economic Area (EEA), and, at the national level, the [Hungarian](#), Czech and [Slovak](#) NCAs.

The Commission held that the cartel constituted a single and continuous infringement of Article 81 EC [now 101 TFEU] covering the whole EEA and lasting between 1988 and 11 May 2004. The fine of over EUR 750 million remains one of the highest ever imposed on a single cartel. The Czech proceedings, initiated in August 2006, long after the Commission's May 2004 inspections, were concluded by a decision of 7 February 2007, sanctioning the cartel under national law for the period of July 2001 to March 2004. The fine of nearly EUR 37 million is the highest ever imposed by the Czech NCA.

The questions before the Court of Justice

Upon appeal, the Czech Regional Court in Brno annulled the Czech NCA's decision on account of lack of competence and violation of the principle of ne bis in idem. The Czech NCA appealed against this ruling to the Czech Supreme Administrative Court, which set aside the Regional Court's judgment.

Subsequently, reflecting a marked difference of opinion between the Supreme Court and the Regional Court, the latter submitted the following contested questions to the Court of Justice:

- Was the Czech NCA competent to penalize the GIS cartel for the period pre-accession where the

Commission has already initiated proceedings under Regulation No 1/2003?

- By doing so, did it infringe the principle of ne bis in idem?

AG Kokott rendered her [opinion](#) in the case in September 2011, holding that:

- A competition authority of a Member State is competent to penalize, under national law, the effects of a cartel on its territory in a pre-accession period, even if the Commission penalized the same cartel under EU competition rules, and
- Imposing sanctions on such a cartel by the NCA does not violate the principle of ne bis in idem, provided that any fines previously imposed by the Commission were not based on the same consequences.

Implications of the upcoming ruling

Most importantly, the Court of Justice is to clarify the questions surrounding the meaning and application of the principle of ne bis in idem in the context of the ECN. These arise not only in the somewhat specific context of NCAs imposing fines under national law for pre-accession periods against cartels, which are also dealt with by the Commission. Perhaps more importantly, they are particularly relevant in the case of parallel proceedings by two or more ECN authorities against the same cartel or in relation to other competition law infringement. The question of what constitutes “idem” (same facts), potentially precluding the imposition of further significant fines, will be crucial in such cases. According to AG Kokott, in such cases the “idem” involves (i) the duration of the infringement and (ii) the territory covered by its effects as established in the relevant decision.

The ruling is also likely to deal with the temporal scope of EU substantive and procedural rules as well as with the relationship between Articles 3(1) and 11(6) of Regulation 1/2003 and the consequences of initiation of proceedings under Article 11(6) of Regulation 1/2003 by the Commission on the ability of NCAs to apply national law to the same conduct.

Disclaimer: The views presented in this post are strictly those of the author and as such should not be regarded as stating an official position of the European Commission.

To make sure you do not miss out on regular updates from the Kluwer Competition Law Blog, please subscribe [here](#).

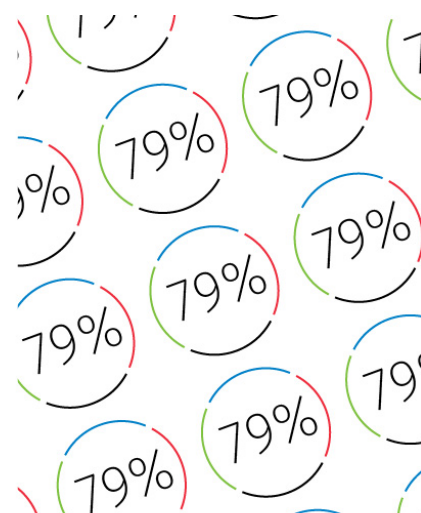
Kluwer Competition Law

The **2022 Future Ready Lawyer survey** showed that 79% of lawyers are coping with increased volume & complexity of information. Kluwer Competition Law enables you to make more informed decisions, more quickly from every preferred location. Are you, as a competition lawyer, ready for the future?

Learn how **Kluwer Competition Law** can support you.

79% of the lawyers experience significant impact on their work as they are coping with increased volume & complexity of information.

Discover how Kluwer Competition Law can help you.
Speed, Accuracy & Superior advice all in one.



2022 SURVEY REPORT
The Wolters Kluwer Future Ready Lawyer
Leading change

This entry was posted on Tuesday, February 7th, 2012 at 1:46 pm and is filed under [Source: OECD">Antitrust](#), [Source: OECD">Cartels](#), [Source: OECD">Competition](#), [European Commission](#), [European Union](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can skip to the end and leave a response. Pinging is currently not allowed.