

Witness Hearings In Competition Cases - The Silver Plastics Judgment

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On 22 October 2020, the European Court of Justice (ECJ) confirmed in *Silver Plastics* that the General Court (GC) is not bound to accept a request for the examination of witnesses when it has sufficiently proven that an undertaking took part in an anti-competitive agreement.

Executive Summary

- The ECJ has confirmed that there is no absolute right to obtain the attendance of witness(es) before the EU Courts. The ruling is in line with precedents from the European Court of Human Rights (ECtHR).
- In particular, there is no violation of the right to a fair trial and the principle of equality of arms by refusing to hear a witness if the examination is not relevant and necessary for the outcome of the case.
- The judgment is also a reminder of how the EU and US antitrust enforcement procedures are at odds. In the US, a vital constitutional provision is the criminal defendant's right to confront and cross-examine the prosecution's witnesses at trial.

Background

In 2015, the European Commission (EC) fined eight manufacturers and two distributors of retail food packaging trays over €115 million for cartelistic conduct. The cartellists fixed prices and allocated customers of polystyrene foam or polypropylene rigid trays.

Silver Plastics challenged the EC's decision before the GC, who dismissed the appeal in its entirety. According to the GC, the EC established to the requisite legal standard that Silver Plastics had taken part in a single and continuous infringement in North-Western Europe.

In its appeal, Silver Plastics mainly argued that the GC erred in law by failing to hear "Mr W" - an ex-employee of Linpac, the immunity applicant - as a witness.

The judgment

The refusal to summon a witness does not violate the right to a fair trial

Silver Plastics argued that the GC violated the right to a fair trial (Article 6 ECHR and Article 47, second paragraph, and Article 48(2) of the Charter of Fundamental Rights of the European Union), in so far as the GC confined itself to taking into consideration statements made by Mr W, without summoning him in order to hear him in person as a witness.

The ECJ confirmed that the GC has an unfettered discretion to determine whether the need to examine the witnesses is relevant and necessary for the outcome of the case. Since the GC ruled that the EC had sufficiently demonstrated that Silver Plastics had participated in a cartel - based on evidence that Silver Plastics was able to rebut - there was no need to ask Mr W to testify before the Courts. Additionally, the GC relied on other evidence to show that the statements made by Mr W were barely credible, thus removing the need to summon him as a witness before the GC. It is also noteworthy - although this is not discussed before the ECJ - that Silver Plastics had originally requested the EC to hear Mr W as a witness almost seven years after the immunity application of Linpac. Needless to say, during that time the EC had gathered sufficient other evidence to demonstrate that Silver Plastics had taken part in the cartel, making the testimony of Mr W superfluous.

It follows that there is no absolute right to obtain the attendance of witnesses before the EU Courts when the administrative procedure, taken as a whole, has given the accused person an opportunity to challenge the findings against it.

There is no absolute right to cross-examination

Silver Plastics argued that Mr W should have been examined in person since he was the main incriminating witness in the proceedings.

The ECJ highlighted the lack of logic in Silver Plastics' reasoning: since Mr W was not heard by the GC, it could naturally not qualify as an incriminating witness. Further, the ECJ noted that the only written statements taken into account by Mr W by the GC were those submitted by Silver Plastics itself.

The ECJ also noted that the statements, although made by Mr W, were attributed to its employer - Linpac - and only Linpac was to be held liable for those statements. Therefore, Mr W could not be considered an incriminating witness.

Finally, the ECJ ruled that Silver Plastics had the opportunity to obtain further statements from Mr W, which it did by organising two meetings between Silver Plastic's lawyers and Mr W after the EC decision was issued to clarify certain aspects of the case. Those additional statements were part of the file before the GC and duly taken into account by the GC. On that basis, the GC could validly refuse to hear Mr W as a witness.

Refusing to hear a witness does not breach the principle of equality of arms

Silver Plastics argued that the principle of equality of arms commanded the GC to hear Mr W and other witnesses.

One more time, the ECJ points to the lack of logic of Silver Plastics' reasoning. Since the GC did not hear the witnesses put forward by the EC, it cannot be criticised by not having heard the witnesses put forward by Silver Plastics. No party was put at an advantage compared to the other. On that basis, there was no breach of law by the GC for refusing to hear Mr W as a witness.

What the ECtHR says about hearing and cross-examination of witnesses in competition law cases

The hearing and cross-examination of witness have been the subject matter of two recent cases before the ECtHR. Both give support to the ECJ findings in *Silver Plastics*.

In *SÁ-Capital Oy v. Finland*, the applicant company complained that it had not had a fair trial as it had been ordered to pay penalty payments in competition law proceedings on the basis of hearsay evidence but without being able to examine or have examined the persons at the origin of this evidence.

The ECtHR found that the proceedings as a whole had been fair: the Finnish Supreme Administrative Court had explained the relevant domestic and European Union law, and had taken account of Article 6 ECHR regarding the right to a fair trial. The evidence had been open to challenge by the applicant company, which had had the possibility to submit its own evidence to rebut that of the prosecution. The applicant company had thus been able to exercise its right of defence. In conclusion, given the complex nature of competition cases, the way in which the domestic court had gathered evidence from witnesses had been appropriate and the applicant company had been able to test those submissions.

Similar to *Silver Plastics*, the procedure taken as a whole allowed the applicant company to sufficiently defend itself, making the hearing of a witness superfluous.

In *Produkcija Plus v. Slovenia*, the applicant alleged that Articles 6 (fair trial) and 13 ECHR (right to an effective remedy) had been breached on account of the lack of an oral hearing and the lack of opportunity to be heard and have witnesses examined on its behalf in proceedings concerning the imposition of a fine for the obstruction of an inspection and proceedings concerning a violation of competition rules. The applicant company alleged that the four witnesses, who had been present at the premises on the day of the alleged obstruction, would prove that the applicant company had not obstructed the inspection or refused to cooperate with the officers.

The ECtHR reiterated that an oral, and public, hearing constitutes a fundamental principle. The Slovenian Supreme Court is the first and only tribunal to examine the applicant company's case, it was required under Article 6 ECHR to examine not only legal aspects of the case but to review the facts on which the applicant company's punishment was based and which the applicant company disputed. However, the Slovenian Supreme Court did not hear the evidence requested by the applicant company and, despite the applicant company expressly requesting that a hearing be held, the Slovenian Supreme Court neither acknowledged the request nor gave any reasons for not granting it. On that basis, the ECtHR found a violation of Article 6 ECHR.

The ECtHR's finding that there was a violation of the right to a fair trial is unsurprising: there was an absolute failure to hold an oral hearing. Clearly, this was not analogous to the situation in *Silver Plastics*.