Introduction

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Procedural rights are an essential tool for guaranteeing that the rule of law is respected in competition cases. This applies both in merger cases, where the competition authority needs to clear the merger before it takes effect (*ex ante* cases), and in infringement cases, where the competition authority sanctions an infringement that already took place (*ex post* cases). In both cases, stakes for the undertakings are high. The clearance (or non-clearance) of a merger determines the future profit-making ability of an undertaking. In infringement cases, sanctions tend to be severe, which may be reflected in share value and may have an impact on the image of the undertaking. Differences in procedural rights may hamper international cooperation between competition authorities.[1] Moreover, weak or non-existing procedural rights may have an impact on the readiness of international undertakings to enter the market in question.

In Europe, the subject of procedural rights in competition cases is considered of high importance and has therefore been studied widely.[2] The issue is also touched upon in the main competition law textbooks. However, competition law is rapidly evolving and given the EU's intended accession to the European Convention on Human Rights, the issue deserves renewed attention. Moreover, many of the

[1] *Cf. infra*, contribution by M. Albers.

[2] See, e.g., Anderson and Cuff (2011), Andreangeli (2005), Andreangeli (2008), Bellamy (2012), Bronckers and Vallery (2011), Giannakopoulos (2004), Lenaerts and Vanhamme (1997), MacCulloch (2006), Nazzini (2005), Tran Thiet (2010), Wils (2004, 2011, 2012, 2014) and Veenbrink (2015).

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C. Cauffman, Q. Hao (eds.), *Procedural Rights in Competition Law in the EU and China*, China-EU Law Series 3, DOI 10.1007/978-3-662-48735-8_1

existing publications point out deficiencies in the system,[3] which means that there is a need for reflection on and for improvement of the system.

In China, the recently introduced Anti-Monopoly Law (AML) and its implementing rules contain only limited information on the defendant's rights of defence[4] and procedural rights have not yet been thoroughly studied by competition law scholars. However, if one reads publications about the AML carefully and with a focus on procedural rights, one can find certain elements about the presence and/or absence of certain of these rights,[5] about existing uncertainties and deficiencies[6] and about the awareness of the need for such rights.[7] Although it is widely accepted that China's competition law closely follows the EU model, the actual enforcement of the Chinese AML has featured recurring problems not typically present in the EU, resulting from the under-protection of the procedural rights in Chinese administrative proceedings in general and in competition law in particular.

In this book, EU competition law is to be understood as the rules of competition law enacted at the level of the European Union. In addition, the EU Member States have their own national competition laws. With regard to the relationship between EU competition law and the competition laws of the EU Member States, a distinction is to be made between the substantive rules of competition law and the enforcement of these rules.

The EU is exclusively competent for the enactment of substantive rules of competition law relating to conduct which affects trade between the Member States (Article 3(1)(b) TFEU). The Member States may only adopt rules in this field in so far as the EU empowers them to do so. In this regard, a distinction is to be made between conduct falling within the scope of Article 101 of the TFEU (collusive behaviour) and unilateral conduct falling within the scope of Article 102 of the TFEU (abuse of dominance). Indeed, the application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 101(1) of the TFEU or which are covered by a Regulation for the application of Article 101(3) of the TFEU or which individually fulfil the conditions of Article 101(3) of the TFEU. However, Member States are not precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings (Article 3(2) Regulation 1/2003).

The enforcement of EU competition law is a joint responsibility of the European Commission, the National Competition Authorities (NCAs) and the national courts. Enforcement by the European Commission and the NCAs takes place in the public interest (public enforcement); enforcement by the national courts takes place within

[3] See, e.g., Forrester (2009) and Venit (2009).

[4] Kallay (2008).

[5] See, e.g., Emch and Hao (2007) and Han and Wang (2014).

[6] See, e.g., Han and Wang (2014); Harris (2014).

[7] Zhang and Zhang (2010).

the context of a dispute between two parties relating to their subjective rights and private interests (private enforcement). When enforcing EU competition law, the NCAs apply their own procedural rules and sanctions within the boundaries of the principles of equivalence and effectiveness. The principle of equivalence means that rules that apply in case of infringement of EU competition law must not be less favourable than those governing similar domestic actions. The principle of effectiveness means that the national rules and procedures must not render the enforcement of EU competition law virtually impossible or the exercise of rights conferred by Union law excessively difficult.[8] The same applied traditionally for the national courts. However, recently, a directive has been adopted which harmonises certain rules relating to the private enforcement of EU and national competition laws.[9]

This book will only deal with the procedural rights that apply in proceedings before the EU Commission.

As for China, since the AML and its implementing regulations contain rather limited references to procedural requirements and little basis for the protection of parties' procedural rights, the general administrative law in China should apply in competition cases. However, so far no administrative decision by the AML enforcement authorities has ever been challenged at court since the law became effective in 2008. The interpretation of the AML as to public enforcement, including procedural requirements, has been totally up to the three agencies (NDRC, SAIC and MOFCOM). Each agency has adopted its own ministry-level rules applicable to procedures during its respective law enforcement activities. For example, the three agencies apply different sets of rules regarding the imposition of administrative penalties. NDRC has to follow the Regulations on Administrative Penalties Regarding Price-Related Infringements as amended in 2010. MOFCOM must apply the Commerce Administrative Penalty Procedure Regulation issued in 2012. SAIC has its own Procedural Rules concerning the Imposition of Administrative Penalties by Industry and Commerce Administrative Authorities, which became effective in 2007. This means that the AML enforcement authorities may well understand and treat procedural rights differently, which might be particularly problematic for the enforcement activities of the NDRC and SAIC, which share the competence to enforce the AML, with their division of power based on whether the infringements are price-related or not. As it often happens, a case of monopolistic agreement or abuse of dominance involves both price-related and non-price-related activities. Parties' procedural rights are therefore subject to a degree of uncertainty, as they depend on which agency handles a case after inter-agency negotiation if any question as to jurisdiction arises.

[8] See, e.g., Case 33/76, *Rewe* v *Landwirtschaftskammer Saarland*, [1976] ECR 1989, para 5; Case 45/76, *Comet* v *Produktschap voor Siergewassen*, [1976] ECR 2043, para 13 and 16.

[9] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, O.J. L 349, 5.12.2014, pp. 1–19.

As a result, the actual rules governing procedures and procedural rights in China's anti-monopoly administrative proceedings are those adopted by individual AML enforcement agencies. There is a clear need to guarantee that those rules comply with the general principles and requirements of the Chinese administrative law and to harmonise the rules adopted by different agencies. However, with the court still yet to play any role, and the weak coordination between the three AML agencies, no mechanism is in place or to emerge soon to achieve effective harmonisation of those rules. Throughout this book, the discussion of procedural rights in China, therefore, has to focus on those fragmented agency-specific legal rules, analysed in light of the agencies' enforcement record and the general administrative law of China.

A limitation to the scope of the book is that it focuses on the procedural rights of defendants in infringement proceedings and of the notifying parties in merger proceedings. Procedural rights of claimants and third parties will only be dealt with incidentally.

Within these limits, the book attempts to provide an overview of the similarities and differences between procedural rights in competition cases in the EU and China, to determine the most important negative effects of potential differences and to formulate suggestions to overcome these.

The book is structured as follows. The first two contributions give a general introduction into the EU and Chinese competition laws, respectively, paying attention in particular to the substantive rules of competition law. The next two contributions provide an overview of the procedural rights of the notifying parties in merger cases in both legal systems under survey. They are followed by two contributions dealing with the procedural rights of defendants in infringement cases. The next contribution provides an international perspective on enforcement procedures that differ between legal systems. These chapters are followed by a "horizontal", simultaneous comparison of the EU and Chinese rules on procedural rights in competition cases. The final chapter draws comparative conclusions and makes a number of suggestions for improvement.

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