

Right(s) of Defence, Access to the File and Fairness in Competition Procedures:

A Reflection on the Judgment of the Court of Justice in Case C-607/18 P

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When applying competition law, competition authorities must comply with the undertakings' 'fundamental' rights and guarantees. The right of defence is commonly understood as a right that unfolds in several dimensions, being the basis of other as important rights such as the right to be heard or the right to access the file. In case C-607/18 P NKT Verwaltung and NKT v Commission, the Court has delivered a fruitful judgment for the debate about fairness in Competition Law procedures.

Keywords: procedural rights; right of defence; access to the file; right to be heard; statement of objections.

I. Introduction

On 14 May 2020, the Court of Justice delivered its final judgment on the action brought by two undertakings against the Commission Decision C(2014) 2139 final, of 2 April 2014¹ (Final Decision), on the thus known *Power Cables Cartel*. In this ruling, the Court decided to partially annul the contested Final Decision on the breach of the Appellants' right of defence².

It is a truism that in competition proceedings, undertakings' rights of defence are probably their major asset against the 'rising' power of competition authorities, being, as well, a perfect example of the importance of procedural rights. Even though its structure is complex, the right of defence has been identified

as common ground for more specific rights, also directed to ensure undertakings' defence as is the case of the right to be heard or the right of access to the Commission's file³. In simple terms, the core of such right(s) requires that the undertaking concerned is able to express its views effectively on the documents and evidence used by the Commission to support its allegation of an infringement. In order to do so, the undertaking shall be offered, at least, three opportunities, during the administrative procedure: *i)* to know which objections are being raised against it; *ii)* 'to examine all the documents in the investigation that might be relevant for its defence'⁴, and, finally, *iii)* 'to make known its views on the truth and relevance of the facts alleged and on the documents used by the Commission to support

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1 *Power Cables* (Case AT.39610) Commission Decision of 2 April 2014, C(2014) 2139 final <<https://ec.europa.eu/competition/>

[ejolade/isef/case_details.cfm?proc_code=1_39610](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62020J0000)> accessed 9 October 2020 ('Final Decision').

2 Case C-607/18 P *NKT Verwaltungs GmbH and NKT A/S v European Commission* (appeal before the CJ) [2020] ECLI:EU:C:2020:385 ('CJ Judgment').

3 This explains the use of the expression 'rights of defence', in the plural form, instead of 'right of defence'.

4 Andreas Scordamaglia-Tousis, 'Part IV The Rights of Defence, 11 An Overview of the Rights of Defence in EU Antitrust Proceedings' in Ekaterina Rousseva (ed), *EU Antitrust Procedure* (OCL 2020), 406.