WHITE & CASE

Commission publishes new Best Practices for antitrust procedures and expands role of Hearing Officer; and Strasbourg court stresses the importance of full merits judicial review of administrative authority decisions imposing competition fines

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On 17 October 2011, the European Commission adopted a package of three measures concerning the procedural rights of parties in antitrust proceedings.

The package is composed of the following:

- Notice on Best Practices for the conduct of antitrust proceedings;
- Revised mandate of the Hearing Officer; and
- Working Paper on Best Practices for the submission of economic evidence.

Though not revolutionary, this package of measures is timely. As fines have increased in competition cases, and particularly since the entry into force of the Lisbon Treaty in 2009, questions have increasingly been raised about the compatibility of the European Commission's procedures for determining guilt or innocence in competition cases and about the appropriate level of intensity of judicial review of Commission decisions exercised by the EU Courts.

The Commission, by introducing these Best Practices, is putting itself in a better position to argue that procedural rights of parties are taken seriously as a general proposition, and more specifically, are duly protected in the administrative procedure.

I. Best Practices for antitrust proceedings and revised mandate of the Hearing Officer

1. Notice on Best Practices for the conduct of antitrust proceedings

The Notice sets out how parties can expect the Commission to conduct the investigation process of antitrust proceedings. Although not primary law, the Notice is authoritative guidance, departure from which would need to be justified by the Commission in a given case.

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Some of the key provisions are as follows:

- The Commission will open formal proceedings as soon as the initial assessment phase has been concluded, to clarify the scope of the investigation and the identity of the parties. This will deal with a longstanding reproach that the proceedings are not formally opened until they are, in reality, already significantly advanced, and the internal view of the case is quite crystallised.

- "State of Play" meetings will take place at key points in the proceedings: shortly after the opening of formal proceedings, at an intermediary stage between the opening of proceedings and the issuing of the Statement of Objections ("SO"), and after the SO. Specific State of Play meetings are also foreseen in commitment proceedings, cartel proceedings, and for complaints in cases where the Commission has formally opened proceedings and intends to reject the complaint. It is hoped that this initiative does not result in the Commission refusing informal meetings at other stages of a proceeding, or restricting the opportunities for meetings in any way.

- Parties will have access to "key submissions" of complainants or third parties, prior to the Commission issuing an SO. This includes the non-confidential version of the complaints and economic studies.

- Key stages in antitrust proceedings such as the opening of a case, the sending of an SO, the closure of proceedings, the adoption of a Decision and the rejection of complaints will be published, either through a press release or an announcement on the Commission's website. (At present, some of these stages are already the subject of Commission information. Discontinued cases are normally included in the Commission's annual reports.)

- The Commission will provide addressees of an SO with an indication of the parameters relevant for the calculation of possible fines. This will not include the actual fine, but elements such as the value of sales affected by the infringement, and the periods of the infringement. This new practice addresses the concern expressed by parties that the calculation of the fine is not transparent. This practice has in fact already been introduced by the Commission.

The Notice applies to pending cases and future cases as from the date of its publication.

2. Revised mandate of the Hearing Officer

The Commission's Hearing Officers hear disputes between case teams and the parties. The revised mandate extends the tasks of the Hearing Officers to cover the investigation phase. Up to now, formally, the Hearing Officers were involved only in the stages of the procedure following the adoption of an SO.

The Hearing Officers will now have the following additional functions:

- They may express a view on whether a document between a company and its lawyers is covered by legal professional privilege (this in fact confirms current practice);

- Parties can call on the Hearing Officers if they feel that they should not be compelled to reply to questions in the investigative phase that might force them to admit an infringement (this also confirms current practice);

- The Hearing Officers may resolve disputes about extensions to deadlines for replying to requests for information issued by the Commission (this also confirms current practice);

- The Hearing Officers may intervene if the Commission fails to inform companies that receive a request for information whether they are potentially suspected of an infringement;

- Parties offering commitments will be able to call upon the Hearing Officers at any time during proceedings in relation to the exercise of their procedural rights.

II. The *Menarini* judgment of the ECtHR

The recent *Menarini* judgment, handed down by the European Court of Human Rights ("ECtHR") on 27 September 2011, is its latest statement on the compatibility of administrative competition law enforcement systems with the European Convention of Human Rights ("ECHR"). The *Menarini* case dates back to April 2003, when the Italian competition authority (*Autorità Garante della Concorrenza e del Mercato*) fined Menarini Diagnostics SLR, a pharmaceutical company, EUR 6 million for price-fixing and market-sharing on the diabetes diagnosis test market.

Menarini appealed the decision before the Administrative Tribunal of Latium, which rejected the appeal. The Administrative Tribunal had full power of review over the competition authority's evaluation of the facts and imposition of the penalty. However, with regard to the legal characterization of the facts by the competition authority, the Administrative Tribunal's control was restricted to verifying the legality of the decision. The Administrative Tribunal could not substitute its own decision for that of the competition authority. Menarini appealed the Tribunal's decision to the State Council on the grounds that the Administrative Tribunal's jurisdiction was limited in this way. The State Council rejected the claims, stating that although the Administrative Tribunal's competence was limited to a control of legality, its powers were compatible with the Italian Constitution because it could examine all the elements of proof relied on by the competition authority. Menarini further appealed to the Corte di Cassazione, which declared the appeal inadmissible.

Menarini then lodged an appeal with the ECtHR, complaining that it had no access to a court with full jurisdiction or to full judicial review of the competition authority's decision.

1. The fine imposed on Menarini was of a criminal nature

The ECtHR found that the fine imposed on Menarini was of a criminal nature. The factors to determine whether proceedings are criminal are: (1) the domestic classification of the offence; (2) the nature of the offence; and (3) the nature and severity of the penalty. As regards domestic classification, Italian law (like EU law) classifies decisions of the competition authority as administrative, not criminal. However, the ECtHR considered that the domestic classification is not determinative. Further, the three criteria are alternative and not necessarily cumulative. As regards the nature of the offence, the ECtHR noted that the application of competition law by a competition authority affecting the general interests of society has previously been held to be criminal in terms of Article 6 ECHR in *Société Stenuit v France* (1992). Finally, the high level of the fine imposed on Menarini and the fact that the penalty is aimed at punishing wrongdoers and deterring others from acting in the same way led the ECtHR to conclude that the fine was criminal.

2. There was no breach of the right to a fair trial

The ECtHR found no breach of the right to a fair trial guaranteed by Article 6 ECHR because Menarini had access to a court with full jurisdiction to hear its case, and the Italian Courts carried out a complete judicial review of the decision of the competition authority. The ECtHR found that it is compatible with the ECHR for administrative authorities to pursue and punish competition law infringements, as long as the person concerned has the opportunity to challenge a decision made against him before a "judicial body with full jurisdiction". That judicial body must have the ability to examine all

questions of fact and law relevant to the dispute before it. In this case, Menarini was able to challenge the fine before the Administrative Tribunal and appeal against the decision of the latter to the State Council. The restrictions on the jurisdiction of the Administrative Tribunal were not considered to undermine its character as a body with full review jurisdiction.

This case gives an interesting insight into the ECtHR's approach towards the compatibility of competition law regimes with the ECHR. There are currently a number of cases pending before the European Courts questioning whether the institutional and procedural framework in which antitrust fines are imposed by the European Commission is compatible with the right to a fair trial embodied in Article 6 ECHR. Although this case clearly indicates that the large fines imposed by the Commission in competition law cases should be deemed criminal, it does not resolve the question of whether the EU system is compatible with Article 6 ECHR. The EU and the Italian systems of appeal are arguably not the same: the European Courts have tended to restrict themselves to a limited judicial check on compliance with the Commission's administrative fining guidelines and policies, which may not clearly reach the requisite level of intensity. The level of review performed in some recent cases by the General Court appears to go further, but it is too early to say if this has now become the normal standard of review.

III. General conclusion

The initiatives with respect to the hearing officer are neither novel nor profound in their importance. They largely conform to existing practice. They do not indicate any radical change in Commission practice. There will not, for example, be any separation of functions within the case team between those who investigate and those who decide, the final decision will continue to be taken by political appointees; there will be no hearing by a decision maker confronted by contrasting views of the facts. The *Menarini* judgment is interesting because it is a recent confirmation of the growing interest of the ECtHR in the topic of competition law procedures; on the other hand it confirms the "soft criminal" approach favoured by some supporters of Commission practice. Several more complex questions lie ahead.

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