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I. INTRODUCTION

In its *Menarini* ruling, the European Court of Human Rights ("ECtHR") held that fines imposed by the Italian antitrust authority for the violation of competition law are criminal charges and that, consequently, the requirements of Article 6 of the European Convention of Human Rights ("ECHR") apply. However, ECtHR did not consider it incompatible with Article ECHR that these fines were adopted by an administrative authority and not an "independent and impartial tribunal established by law," because, in the view of the ECtHR, it was sufficient that the Italian courts exercised a full review—and not just a legality control—of the fining decisions.

In *Schindler*, the Court of Justice of the EU ("CJEU"), referring to the *Menarini* ruling, used essentially the same reasoning in finding that the EU's system of antitrust enforcement is not contrary to Article 47 of the Charter—and hence Article 6 ECHR. Referring to its earlier ruling in *Chalkor*, the CJEU observed that the EU courts review both the facts and the law and have the powers to assess the evidence, to annul the contested decisions, and to alter the fine. It further held that, when reviewing the legality of a Commission decision imposing fines for violation of the EU's competition rules, the EU courts cannot use the Commission's discretion, either as regards the choice or the assessment of the factors used to set the fine, as a ground for not conducting of an in-depth review of the facts and the law.

Much has—and can be—said about the merits of both *Menarini* and *Schindler*. The purpose of this short note, however, is not to enter into that debate but rather to comment on some specific issues related to the judicial control by the EU courts of the European Commission's decisions imposing fines for infringements of Articles 101 and 102 TFEU. Indeed, it seems fair to say that, as a result of *Menarini* and *Schindler*, the compatibility of the EU system of antitrust enforcement with Article 6 ECHR and Article 47 of the Charter depends on the degree of judicial control exercised by the EU courts. In this respect, the work of the General Court is of particular importance because it is the sole "independent and impartial tribunal" assessing the evidence relied on by the Commission in establishing an antitrust infringement and setting a fine.

II. THE CHAHIER DES CHARGES FOR THE GENERAL COURT

First, one could characterize the CJEU's findings in *Schindler* and *Chalkor* as an *ex-post* justification of a system that has failed to ensure adequate judicial review, or as instructions by the CJEU to the General Court to increase the level of judicial review, or as both. In any event, what matters is that, in the future, the General Court does indeed carry out an in-depth review of

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the facts and the law and, in particular, of whether the evidence put forward by the Commission does indeed prove the alleged competition infringement. Also, in appeal judgments, the CJEU must ensure that the judicial review carried out by the General Court meets the requirements of *Schindler* and *Chalkor* and rigorously quashes any judgment where the General Court failed in its task; for example, by referring to the Commission's discretion as a reason for only pursuing a limited review.

As regards the latter point, both in *Schindler* and in *Chalkor*, the CJEU considered it as irrelevant that the General Court, when reviewing the Commission's fine calculation, started from the incorrect assumption that the Commission enjoyed wide discretion when deciding on whether to grant a company a reduction of the fine for cooperating with the Commission and that, therefore, the General Court's assessment of the Commission's decision was limited to establishing whether the Commission had manifestly gone beyond the boundaries of its discretion. According to the CJEU, the application of an incorrect standard of review was irrelevant because, in the CJEU's view, the General Court had, in fact, carried out an in-depth review.

While it is correct, in principle, that the degree of judicial review actually carried out is more important than the label given to it, the findings of the CJEU are highly problematic. If the General Court explicitly states that its review is limited to assessing whether the Commission had manifestly exceeded a wide margin of discretion, it must be assumed that this affects the degree of judicial review actually exercised. Therefore, a finding that the General Court exercised a strict in-depth review of the Commission's evidence—even though it stated that the Commission enjoys wide discretion—would require a detailed assessment of all arguments put forward by the applicant and the Court's response to them. The CJEU failed to do that but simply asserted that the General Court did carry out a full review.

III. THE END OF THE COMMISSION'S DISCRETION?

Both *Schindler* and *Chalkor*, but also *KME*, were cases where the applicants had challenged "only" the determination of the amount of the fines but not the finding of an infringement. The finding by the CJEU that the EU judiciary cannot use the Commission's discretion as a ground for not conducting of an in-depth review of the facts and the law explicitly referred to the choice and assessment of the factors used to set the fine. But what about the finding of the infringement itself which, after all, is the very prerequisite for the imposition of a fine?

The Courts, traditionally, have granted the Commission a wide latitude as regards the assessment of complex economic or technical matters. I would submit that following *Menarini* and *Schindler*, the EU courts must also carry out a full review of the Commission's assessment of complex economic matters, if this assessment forms the basis of a finding of an infringement for which the Commission has imposed a fine. The EU's system of antitrust enforcement could not be considered compatible with Article 6 ECHR or Article 47 of the Charter if the Courts were to (continue to) allow the Commission wide discretion in this regard. The discretion then would not be exercised by an independent and impartial tribunal and would not be subject to a sufficient degree of judicial control.

It is true that in many hard-core cartel cases the issue of discretion does not arise, because the only question is whether or not there was an agreement. However, the Commission increasingly looks beyond hard-core cartels into cases where, in order to show the existence of an agreement or concerted practice, so-called plus factors, including the actual effects of the investigated conduct on the market, are relevant. These analyses typically concern complex economic matters.

Importantly, full judicial review in this context does not mean that the Courts can decide instead of the Commission or alter the Commission's decisions. Outside of the assessment of the fine, the Courts cannot do this—they can only fully (or partially) annul the decision. However, this limitation does not mean that they cannot undertake an in-depth review of the Commission's findings, nor that they must—or should—allow the Commission wide discretion.

IV. HAVING TO BREAK SERVE

Despite all the rhetoric about full judicial review, a company challenging a Commission decision before the General Court remains at a fundamental disadvantage. In fact, challenging such a decision is akin to playing a tennis match with the opponent, the Commission, having serve all the time.

To begin with, the first thing that the judges read in a case is the Commission's decision. Of course, a decision by a public authority finding an infringement and imposing a fine carries significant weight and inevitably directs the thinking of the judges. The applicant must then prove to the Court that the Commission got it wrong; for example, because the evidence relied on by the Commission is insufficient to support its allegations. To make matters more difficult, the Commission not only has the first word, but also the last word, both during the written procedure and the oral hearing. Compare that to a system where an enforcement authority goes to court with an indictment, then has to prove its case to the judges, with the accursed having the last word.

Moreover, because the Court does not redo the investigation carried out by the Commission, it will only hear those arguments and evidence that the applicant has put forward or has asked the Commission to produce. Also, in principle, the applicant may not supplement the pleas and evidence submitted in the initial application at a later stage. The fact that the initial application must be submitted within a relatively short period of a little over two months puts the applicant at a further disadvantage. Indeed, in several cases the courts refused to hear an argument on the ground that it had not been properly set out in the initial application. And to make things worse, the courts also try to limit the number of pages that an applicant can submit.

Particularly troubling is the General Court's general reluctance to hear witnesses. In many cartel cases, the Commission relies to a great extent on the evidence provided by amnesty or leniency applicants. While in some cases there is a significant body of documentary evidence, in others statements by witnesses play a key role. However, neither at the Commission nor before the Court is there an opportunity for the company's lawyers to cross examine such witnesses; in fact, it is not even assured that the Commission itself will question the witness.

In the recent *Duravit* judgment, the General Court stated it is within its sole discretion to decide whether or not to hear a witness and that the parties have no right to examine a specific witness (although they can, and should, formally request that a specific witness is heard). While it

is not possible to opine on the basis of the information contained in the *Duravit* judgment whether, in that particular case, there was indeed no need to hear the witnesses, I would submit that in order to ensure compliance of the EU's antitrust enforcement system with Article 6 ECHR and Article 47 of the Charter, the General Court should err on the side of caution and, if there is the slightest indication that hearing a witness may help the applicant, call the witness.

V. CONCLUSION

It needs to be seen, whether, and how, the EU Courts, and in particular the General Court, will intensify the judicial control of the Commission competition law decisions, in particular those imposing fines. It is only a matter of time before an aggrieved company will bring a case before the ECtHR challenging the EU's competition enforcement regime as being incompatible with Article 6 ECHR. The outcome of that case will likely depend on the depth of the judicial review actually exercised by the European Union—provided, of course, the ECtHR confirms *Menarini* and does not hold that a system where fines of several hundreds of millions of Euros are imposed by an administrative authority and not by an independent and impartial tribunal is generally incompatible with Article 6 ECHR.