

Due process in competition cases: A step forward by the ECJ

December 2011

Introduction

The unique features of the European Commission's competition proceedings, where the Commission acts as investigator, prosecutor and maker of decisions on guilt or innocence, have long been controversial. Due process problems have received more attention as fines in competition cases have increased greatly in recent years. The controversy intensified with the advent of the Lisbon Treaty in December 2009. Part of the disquiet of the legal profession was that EU Courts exercised limited judicial review: in a number of competition cases they did no more than verify whether the Commission had acted within its ascribed powers and followed its own fining Guidelines. Recent judgments by the European Court of Human Rights (including *Menarini* and *Primagaz*) confirm its growing interest in competition law matters.¹ White & Case lawyers and others have written articles on this problem.²

On 8 December 2011, in its judgments in Cases C-386/10 P *Chalkor v Commission*, C-389/10 P *KME v Commission* and C-272/ 09 P *KME v Commission*, the European Court of Justice ("ECJ") pronounced on the level of judicial review which the General Court of the European Union ("GC") must carry out when reviewing Commission decisions in competition cases. Although the ECJ rejected the appeals, it did not endorse the limited judicial review frequently applied by the EU courts and to the contrary prescribed rigorous standards of judicial review.

The Factual Background

The Commission had imposed fines on several companies for their participation in cartels on the markets of copper industrial tubes and copper plumbing tubes. KME was fined under both decisions. Halcor was fined under the copper plumbing tubes decision, despite its very limited involvement. The companies appealed to the GC, which upheld KME's fines in full, but reduced Halcor's fine by 10%, finding that the Commission had infringed the principle of equal treatment.

Halcor then appealed to the ECJ, arguing that the GC had deferred to the Commission's discretion rather than reviewing its fine on the merits, in a manner consistent with the European Convention of Human Rights ("ECHR") and the Charter of Fundamental Rights ("CFR"). Halcor argued that the GC had followed the wrong judicial standard when it said:

For further information on this alert please do not hesitate to contact:

Ian Forrester, Q.C.
Partner, Brussels
iforrester@whitecase.com
+32 2 239 25 36

James Killick
Partner, Brussels
jkillick@whitecase.com
+32 2 239 25 52

Assimakis Komninos
Partner, Brussels
akomninos@whitecase.com
+32 2 239 2555

Stratigoula Sakellariou
Associate, Brussels
ssakellariou@whitecase.com
+32 2 239 2616

This document is prepared for the general information of our clients and other interested persons. It is not, and does not attempt to be, comprehensive in nature. Due to the general nature of its content, it should not be regarded as legal advice.

We believe this information will be of interest to you. However, if you do not wish to receive further similar information about events or legal issues from White & Case, then please e-mail unsubscribe@whitecase.com.

¹ See previous Client Alert: [Revised Mandate for Hearing Officers and New Best Practices for Antitrust Proceedings](#)

² Please see also [Due Process in EC Competition Cases: A Distinguished Institution With Flawed Procedures](#); [Due Process in Competition Proceedings](#); [This is not the time to be tinkering with Regulation 1/2003](#); [A Bush in Need of Pruning: The Luxuriant Growth of Light Judicial Review](#); and [A Challenge for Europe's Judges: The Review of Fines in Competition Cases](#).

“It is therefore for the Court to verify, when reviewing the legality of the fines (...), whether the Commission exercised its discretion in accordance with the method set out in the Guidelines. (...) In areas where the Commission has maintained a discretion (...), review of the legality of those assessments is limited to determining the absence of manifest error of assessment.”

(KME made partly parallel arguments reflecting its greater involvement in the challenged behaviour.)

The ECJ Judgments

The ECJ dismissed the appeals. It found that Halcor's arguments had been properly addressed on the merits by the GC, and that the offending language was merely an “*abstract and declaratory description of judicial review*”.

The cases will be however remembered for having implicitly criticised previous cases where the EU Courts exercised a deferential standard of review, and for setting out what is the appropriate standard of judicial review that the EU courts should apply.

The ECJ rejected the notion of light judicial review even in cases of complex economic assessments:

“whilst, in areas giving rise to complex economic assessments, the Commission has a margin of discretion with regard to economic matters, that does not mean that the Courts of the European Union must refrain from reviewing the Commission’s interpretation of information of an economic nature. Not only must those Courts establish, among other things, whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it.”

On fines, the ECJ restated the factors to be taken into account when assessing the duration and gravity of anticompetitive conduct. It held that fining Guidelines are merely rules of practice. The Courts are not bound by them, but they must review the Commission's methodology in light of the evidence put forward by the appellant. In carrying out such a review:

“the Courts cannot use the Commission’s margin of discretion – either as regards the choice of factors taken into account in the application of the criteria mentioned in the Guidelines or as regards the assessment of those factors – as a basis for dispensing with the conduct of an in-depth review of the law and of the facts.”

Conclusion

The judgments, while disappointing for the companies involved, can be seen as a larger victory against the unworthy practice of deferential judicial review. They confirm that the unique processes by which Commission decisions are taken is subject to robust and rigorous judicial review by independent judges and that the GC should carry out a merits review of law and facts which meets the requirements of the CFR, and the ECHR.

Worldwide. For Our Clients.

38 Offices. 26 Countries.

White & Case LLP
Avocats-Advocaten
rue de la Loi, 62 Wetstraat
1040 Brussels
Belgium
Telephone: +32 2 239 16 20
Facsimile: +32 2 219 16 26

www.whitecase.com

In this publication, White & Case means the international legal practice comprising White & Case LLP, a New York State registered limited liability partnership, White & Case LLP, a limited liability partnership incorporated under English law and all other affiliated partnerships, corporations and undertakings.