



Client Alert

Competition Law

1 October 2013

Giving teeth to the General Court's unlimited jurisdiction to review competition law fines: Advocate General Wathelet's Opinion in Telefónica

The level of fines imposed by the European Commission in competition cases has attracted controversy for more than ten years. The often deferential approach of the European courts to hearing appeals has also been criticised, but in many cases the courts have largely left untouched the Commission's exercise of its discretion in setting fines. In one recent case, *Chalkor*¹, the ECJ indicated some helpful general principles, but the courts have remained unpredictable in how they reviewed Commission fines.² However, the movement towards effective judicial review has received a boost from a remarkable Opinion issued on 26 September 2013 in *Telefónica*.³ Advocate General Wathelet calls on the General Court to exercise fully its unlimited jurisdiction when reviewing the proportionality of fines. The opinion is written in unusually stringent terms.

Irrespective of whether the Court of Justice ultimately follows AG Wathelet's non-binding Opinion in the present case, it confirms the importance of robust judicial scrutiny in light of the European Convention of Human Rights and the Charter of Fundamental Rights especially given the ever increasing level of penalties.

Facts of the *Telefónica* case

On 4 July 2007, the Commission imposed a €151 million fine on Telefónica SA and Telefónica de España SAU ("Telefónica") for having abused their dominant position on the market of broadband internet access from September 2001 to December 2006. According to the Commission, Telefónica imposed unfair prices in the form of a margin squeeze between the high wholesale prices it charged to competitors and the retail prices it charged to its own customers. As a result, the Commission concluded that a low competing provider of broadband that was just as efficient as Telefónica was faced with the choice of either exiting the market for retail broadband access in Spain or incurring losses.

Telefónica appealed the Commission decision before the General Court ("GC"), which dismissed its appeal on 29 March 2012. Telefónica then brought a further appeal before the Court of Justice, arguing that the GC

For more information on the topics discussed in this alert, please contact:

Ian S. Forrester, QC
Partner, Brussels
iforrester@whitecase.com

James Killick
Partner, Brussels
jkillick@whitecase.com

Dr. Assimakis Komninou
Local Partner, Brussels
akomninou@whitecase.com

Pontus Lindfelt
Partner, Brussels
plindfelt@whitecase.com

Jacquelyn MacLennan
Partner, Brussels
jmaclennan@whitecase.com

Mark Powell
Executive Partner, Brussels
mpowell@whitecase.com

Axel Schulz
Partner, Brussels
aschulz@whitecase.com

Kai Struckmann
Local Partner, Brussels
kstruckmann@whitecase.com

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.

This Client Alert is protected by copyright. Material appearing herein may be reproduced or translated with appropriate credit.

¹ Case C-386/10 P, *Chalkor v Commission*, 8 December 2011.

² See for instance: Wouter Wils, *The increased level of EU antitrust fines, judicial review, and the European Convention on Human Rights in Current developments in European and international competition law*, 17th St. Gallen International Competition Law Forum ICF 2010 / 2010, v. 12, p. 159-205 or Ian S. Forrester, *A challenge for Europe's judges: the review of fines in competition cases in European Law Review* 2011, v. 36, n. 2, April, p. 185-207.

³ Case C-295/12 P, *Telefónica SA and Telefónica de España SAU v Commission*.

erred in defining the relevant product market and in concluding that it held a dominant position. As regards the fine, Telefónica argued that the GC infringed the principle that penalties must fit the offence, and the principles of proportionality and equal treatment.

In his Opinion, AG Wathelet dismisses Telefónica's arguments related to market definition and dominance as either inadmissible or unfounded. Nevertheless, he urges the Court of Justice to quash the GC's judgment because, in his view, the GC did not conduct a full judicial review of the amount of the fine imposed by the Commission.

The General Court's obligation to exercise fully its competence of unlimited jurisdiction for the review of fines

Since the GC has **unlimited jurisdiction with regard to fines**, it has the power to substitute its own decision for that of the Commission, not only confirming or annulling fines, but also increasing or reducing their amount. However, AG Wathelet goes further and finds that **the Charter of Fundamental Rights and the ECHR case-law require the GC to carry out its own independent assessment of the fine**.⁴ Whereas in many judgments the European Courts have been reluctant to second-guess the Commission's assessment on grounds of proportionality, the AG considers that *"the General Court is required to exercise to the full extent its competence of unlimited jurisdiction when assessing the proportionality of the fine"*.⁵ In other words, AG Wathelet explains, the GC has to determine whether the fine is adequate and proportionate:

*"In competition law proceedings, the application of the principle of proportionality means that the fine imposed on an undertaking should not be excessive compared to the objectives pursued by the Commission and that its amount should be proportionate to the infringement, taking notably account of its gravity. For that purpose, the General Court must examine all the relevant elements, such as the undertaking's conduct, its role in the establishment of the anticompetitive practice, its size, the value of the concerned goods, the profit gained from the infringement as well as deterrence and the risks that such infringements constitute for the objectives of the Union."*⁶

AG Wathelet also emphasises that *"the General Court's assessment should be **sufficiently independent** from that of the Commission, in that the General Court may neither solely refer to the amount set by the Commission – in a relatively arbitrary fashion, apparently like in the present case for the basic amount – nor feel bound by the Commission's calculations or the circumstances that the Commission had taken into account"*.⁷

In particular, AG Wathelet **criticises the GC for too often limiting itself to assessing whether the Commission applied its own Fining Guidelines correctly**, despite the GC not itself being bound by those Guidelines.⁸ These very criticisms were advanced in Chalkor's appeal by White & Case LLP. In light of the *Chalkor* judgment and the ECHR case-law, AG Wathelet concludes that it is not enough to defer to the Commission's discretion or intervene only in case of manifest error. It must make an in-depth legal and factual review of the fine.⁹ The AG stresses that the GC **itself** has to carry out the assessment of whether the fine imposed was proportionate, and to check that all the relevant elements were actually taken into account.¹⁰

AG Wathelet concludes that the GC's unlimited jurisdiction means in practice

⁴ Opinion, para. 109 (free translation).

⁵ Opinion, para. 118 (free translation), emphasis in the original.

⁶ Opinion, para. 117 (free translation).

⁷ Opinion, para. 121 (free translation), emphasis added.

⁸ Opinion, para. 123 (free translation).

⁹ Opinion, para. 125.

¹⁰ Opinion, para. 129.

that undertakings may put forward arguments as regards both the liability and the appropriateness of the fine.¹¹ He states that such reinforced judicial control is necessary in light of the **ever-increasing fines imposed by the Commission**, and the methodology that “often” leads to enormous sums (up to 10% of the undertaking’s annual turnover).¹² The Opinion reviews in a far more comprehensive manner than any recent judicial examination the underlying principles pertaining to judicial review of fines, including the much debated judgement of the ECHR in Menarini¹³ and the dissent of the Portuguese judge in that case. He quotes and underlines the following remarks by a former Advocate-General: *“In short, a new situation is emerging, which is more problematical [...]. The question must then be asked whether [...] the new trend in the fines policy might not make it appropriate to steer a slightly different course so as to make certain that it is possible in every case to guarantee results that are in conformity with the general requirements of reasonableness and fairness”*. (Point underlined by AG Wathelet in his opinion)¹⁴

In the present case, AG Wathelet considers that the GC failed to conduct the requisite in-depth review. The GC judgment regarding the violation of the principles of proportionality is particularly short, and makes reference to general arguments without properly reviewing the elements and the facts of the case. The GC should have examined the fact that much lower fines were imposed on Deutsche Telekom and Wanadoo Interactive than on Telefónica, although in each case the 1998 Fining Guidelines were used, and the conduct of all three was similar and took place largely simultaneously on markets that were similar in size, economic importance and stage of growth. Therefore, the GC should have asked the Commission to explain why the basic amount was set at €90 million in this case, much higher than in previous cases and more than 4 times higher than the minimum amount prescribed by the 1998 Fining Guidelines. Similarly, the GC should have asked the Commission to explain the 25% deterrence increase applied to Telefónica.

In sum, AG Wathelet does not state that the principle of non-discrimination, principle of proportionality and the principle that penalties must fit the offence were infringed, but finds that the GC failed to exercise its full jurisdiction to review whether the fine complied with these principles. Therefore, he proposes that the case should be returned to the GC for a new ruling on the amount of the fine imposed by the Commission.

Conclusions

AG Wathelet’s Opinion reaffirms that **in-depth judicial control of competition decisions is not only desirable, but actually required to guarantee the compatibility of EU competition law’s entire enforcement system with the ECHR and the Charter of Fundamental Rights**. The Opinion also spells out very clearly the practical consequences of the unlimited jurisdiction provided by the Treaty to the General Court. The Court has to carry out **its own independent assessment of the proportionality of the fine**, taking into account all relevant elements, and **cannot merely rely on the Commission’s discretion**. AG Wathelet’s Opinion constitutes a strong challenge to the trend of “light judicial review” in competition law cases.

¹¹ Opinion, para. 135.

¹² Opinion, para. 144.

¹³ ECtHR, A. Menarini Diagnostics srl v. Italy, second section, 27 September 2011.

¹⁴ Opinion of Advocate General Tizzano in the case Dansk Rørindustri (Joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P) issued on 8 July 2004, para 132-133, quoted by AG Wathelet at para.144.

Worldwide. For Our Clients.

40 Offices. 27 Countries.

Brussels

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.