PUBLIC ENFORCEMENT: ECHR PERSPECTIVE – A CASE STUDY

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CASE STUDY - MENARINI

On April 20, 2003, the Italian competition authority imposed a fine of €6 million on Menarini.

Menarini and other four pharmaceutical firms, between 1997 and 2001, operated a complex price-fixing and market-sharing arrangement in the market for diagnostic tests for diabetes.

Menarini challenged the decision, without success, in front of the competent Italian courts (the Regional Administrative Tribunal of Latium, the Council of State, and the Court of Cassation).
CASE STUDY - MENARINI

Having exhausted all national remedies, Menarini brought its case before the ECtHR.

Menarini’s main contention was that the Italian system of judicial review of the authority’s antitrust decisions infringed its right to a fair trial under art.6(1) ECHR, in so far as it did not allow the company to have access to a court with powers of full judicial review, nor to obtain a judicial re-examination of the AGCM’s decision.
COMPATIBILITY OF NATIONAL AND EU ENFORCEMENT SYSTEMS OF COMPETITION LAW WITH THE ECHR AND THE CHARTER OF FUNDAMENTAL RIGHTS
MENARINI: CRIMINAL SANCTIONS?

ECtHR applied the Engel criteria:

1. the anti-competitive practices attributed to the applicant were not sanctioned under Criminal law but on the basis of Italian competition law, which is administrative in nature, thus the first criterion was not met.

2. the second criterion (the nature of the infringement): held that the relevant rules were designed to preserve a public interest such as the maintenance of competition on the market; AGCM’s activity aimed to defend general interests of society normally protected by Criminal law.

3. nature and severity of the sanction: a punitive purpose—the punishment of illegal conduct—and preventive in nature, by deterring the interested company and third parties from reiterating the conduct in question.

Held: these considerations plus the high amount of the sanction, the antitrust proceedings had to be considered criminal in nature.
under the ECHR, the imposition by an administrative authority—as are the Commission and the NCAs—of a fine characterised as criminal in nature is not per se incompatible with the ECHR in so far as the decision imposing it is open to challenge before a court who can offer all the guarantees afforded by art.6(1) ECHR
ECtHR clarifies that among the most important features of a system of full judicial review, there is the power to examine all questions of fact and law relevant to the dispute and to modify the contested decision.
the ECtHR acknowledges that, in the framework of the Italian system of judicial review, no administrative court can substitute its own legal qualification of the facts and technical evaluation to that of the AGCM.
However, it observes that, in the case under examination, the Italian administrative courts did not carry out a simple review of the legality of the AGCM decision, but thoroughly reviewed Menarini’s claims in law and in fact, the evidence upon which the adoption of the decision was based, and the soundness and proportionality of the AGCM’s choices, thus verifying its technical assessments.
ECtHR notes that the Italian courts had full jurisdiction with regard to the level of the fine imposed on Menarini, and thus could have modified the latter had they found it to be inadequate or not proportionate in relation to the infringement in question.

In light of the above, the ECtHR concluded that the AGCM’s decision was subject to the scrutiny of judicial authorities enjoying powers of full judicial review and, consequently, no infringement of art.6(1) ECHR could be detected.
judicial review exercised by the Italian administrative courts, being limited to a review of legality, does not satisfy the requirements of a system of full judicial review. Italian administrative courts could only annul a decision when affected by an irregularity, but could not substitute their own technical evaluations to that of the AGCM. No thorough review of the discrentional choices of the AGCM which are at the very heart of the imposition of competition law sanctions. Italian administrative courts merely adhered to the technical evaluations of the AGCM and did not carry out a new assessment. The classical concept of full jurisdiction entails the possibility of reassessing all factual and legal aspects that relate to the attribution of liability. According to his opinion, the applicant did not thus have the possibility to formulate its contentions in front of a judicial authority offering the guarantees enshrined in art. 6(1) ECHR.
ART 6 ECHR

➤ ‘In determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...’

➤ Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law

➤ Everyone charged with a criminal offence has the following minimum rights...
MAIN CONCERNS - EU COMMISSION AND COMPETITION ENFORCEMENT

➤ High fines
➤ Broad powers
➤ Lack of a ‘fresh pair of eyes’ within the system
➤ Administrative decision-making, which is subject to full judicial control, satisfies the requirements of the Convention and the Charter

➤ Access to a court with full jurisdiction

➤ The court carries out a full and unrestricted judicial review
IS EUROPEAN COMMISSION A TRIBUNAL?

- The General Court has held that the Commission is not a ‘tribunal’ for the purposes of Article 6(1), but that the judicial control exercised by the General Court over the Commission’s decisions satisfies the requirements of Article 6(1) (e.g. case T-348/94 Enso Espanola v Commission 1989 ECR II-1875)
FULL JURISDICTION?

‘The Court hearing an application for annulment of a decision applying article 81(1) EC must undertake a comprehensive review of the examination carried out by the Commission, unless that examination entails a complex economic assessment, in which case review by the Court is confined to ascertaining that there has been no misuse of powers, that the rules on procedure and on the statement of reasons have been complied with, that the facts have been accurately stated and that there has been no manifest error of assessment of those facts’ (T-168/01 GLAXOSMITHKLINE v Commission upheld on appeal C-501/06)
‘While the community courts recognize that the commission has a margin of appreciation in economic or technical matters, that does not mean that they must decline to review the commission’s interpretation of economic or technical data. The community courts must not only establish whether the evidence put forward is factually accurate, reliable and consistent but must also determine whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it’ (T-201/04 Microsoft v Commission 2007 ECR II-3619)
IS THIS A FULL REVIEW?
Decisions to impose fines for breach of Arts 101/102 not of a criminal law nature (Art 23(5) Regulation 1/2003)

However, proceedings for breach of Arts 101/102 fall under Art 6 ECHR (even if not characterised as such in domestic law)

Menarini case: proceedings resulting in imposition of a €6 million for price-fixing and market-sharing were criminal in nature so that there was a requirement under Art 6 ECHR for a full appellate review of the administrative decision imposing the fine
ANTITRUST CRIMES: SOFT OR HARD CORE?

➤ There may be a distinction between hard core criminal offences and other criminal offences not strictly belonging to the traditional categories of criminal law, such as administrative penalties arising from customs law, competition law or tax surcharges, where the criminal-head guarantees will not necessarily apply with their full stringency (case Jussila, 73053/01, ECHR - ‘criminal cases which do not carry any significant degree of stigma’)

➤ AG Sharpston (opinion, KME Germany C-272/09): The offence involves engaging in conduct which is generally regarded as underhand, to the detriment of the public at large, a feature which it shares with criminal offenses in general and which entails a clear stigma; a fine of up to 10% of annual turnover is undoubtedly severe, and may even put an undertaking out of business; and the intention is explicitly to punish and deter
The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights (Art 6(1) TEU).

Rights contained in the Charter which correspond to rights guaranteed by the ECHR have the same meaning and scope, not only by reference to the text of the Convention but by reference to the case law of the Eur Court of Human Rights.

Fundamental rights, as guaranteed by the ECHR, and as they result from the constitutional traditions common to the MSs, shall constitute general principles of the Union’s law (Art 6(2) TEU).
RIGHTS UNDER ECHR

➤ Right to a fair trial (Art 6)
  ➤ Fines: criminal nature?
  ➤ Acces to court
➤ Respect for private and family life, and correspondence (Art 8)
  ➤ Dawn raids/inspections
DAWN RAIDS

Application of ECHR
Art 8 ECHR: respect for private and family life, home and correspondence

In certain circumstances the rights guaranteed by Art 8 includes the right to respect for a company’s registered office, branches or other business premises (Colas Est v France, App 3791/97, ECHR)

ECJ followed this judgment in case Roquette Freres, departing from its previous case law (C-94/00, 2002, ECR I-9011)