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**Due Process in Antitrust
Proceedings Before the
European Commission:
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Enough**

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I. INTRODUCTION

The issue of due process in competition law proceedings before the European Commission (“Commission”) has been debated for many decades, since the early days of the European competition enforcement system.²

For many commentators, the original sin was to combine the investigative and adjudicative functions under the roof of the Commission. The principle of this combination has been strongly criticized, as has its concrete implications for how the guilt or innocence of companies is determined. The fact that the final decision-making in cases involving significant sanctions lies in the hands of 28 politically appointed commissioners—who are not involved either in the decision drafting or in the hearing of the parties—is one of the strongest sources of complaints.³ And the fact that the same Commission officials investigate the case, draft the accusation (the so-called Statement of Objections (“SO”)), receive the responses of the parties, convoke the oral hearing, and draft the infringement decision is also widely perceived as a flawed concentration of powers.⁴ The risk of prosecutorial bias associated with such a combination of incompatible functions is often pointed out as a source of unfairness and even, in some cases, potential errors.⁵

Several reforms have been suggested to remedy these weaknesses. The most ambitious would be to adopt a system similar to the United States in which the Commission would

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² See for example F. Graupner, *Commission Decision-Making on Competition Questions*, 10 C.M.L. REV. 291 (1973) cited in I. S. Forrester, *Due process in EC competition cases: A distinguished institution with flawed procedures*, EUR. L. REV. 817 (2009).

³ The only exception being that the commissioner for competition can be involved in the decision drafting, although he never attends hearings.

⁴ For a description of such criticisms, see inter alia D. Geradin & N. Petit, *Judicial Review in European Union Competition Law: A Quantitative and Qualitative Assessment*, TILEC Discussion Paper Series 2011/8; I. S. Forrester, *supra* note 2; Donald Slater, Sébastien Thomas, & Denis Waelbroeck, *Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?*, The Global Competition Law Centre Working Paper 04/08 (2008); J. Jourdan, *Droits procéduraux des entreprises dans les procédures de cartel de l’Union Européenne*, J. DE DROIT EUROPÉEN, 381 (2013); S. Kinsella, *Is it a Hearing if Nobody is Listening?*, 3(1) CPI ANTITRUST CHRON. (March 2010).

⁵ For the description of such potential bias, see W. Wils, *The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis*, 27(2) WORLD COMPETITION, 201-224 (2004).

investigate antitrust proceedings, but its adjudicative power would be transferred to the Court of Justice of the EU (“CJEU”). Less ambitious suggestions (although probably more realistic in the short term) aim to reorganize the Commission’s Directorate General for Competition (“DG COMP”) to structurally separate services involved in investigations from those involved in decision making. The role of the commissioners would then be limited to confirming or vetoing decisions drafted by case teams specifically dedicated to the adjudicative task and separated (e.g. via Chinese walls) from the case team investigating the case.⁶

The entry into force of the Lisbon Treaty in 2009 provided full legal effect to the Charter of Fundamental Rights of the EU (“the Charter”) and made it clear that the European Union will accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”).⁷ Both of these changes fuelled the aspect of the debate relating to the compatibility of this combination of functions with fundamental rights enshrined in both acts, notably Article 6 ECHR (the right to a fair trial).

In 2011, the European Court of Human Rights (“ECtHR”) issued its widely noted *Menarini* judgment,⁸ stating that an administrative body may impose competition law penalties (which constitute criminal law sanctions) without infringing Article 6 ECHR, as long as the parties have the possibility to appeal such decisions before a tribunal with full jurisdiction as to facts and law, not merely to review legality.

While it can still be doubted whether this is the final word of the ECtHR (the judgment was not issued by the Grand Chamber and Judge Albuquerque issued a strong dissenting opinion), and also whether the CJEU fulfills the criteria of full judicial review,⁹ there could be a temptation for the Commission to consider that *Menarini* closes, once-and-for-all, the above mentioned debates regarding the combination of investigative and adjudicative functions.

However, even if *Menarini* is construed as excluding any possibility that the EU enforcement system infringes the right to a fair trial (which, again, is doubtful), would this mean that the system is bullet proof against other criticisms? Is this really the end of the debate on the combination of investigation and decision-making powers?

It is submitted that the impact of the *Menarini* judgment should not be overestimated. An enforcement system does not become adequate simply because it does not infringe fundamental rights. Compliance with such rights should be seen as a minimum mandatory standard, not an achievement. Despite the *Menarini* judgment, bold reforms to the Commission’s antitrust enforcement structure are still necessary. Indeed, such reforms would reinforce the Commission’s antitrust policy.

⁶ For a good description of different possible reforms to remedy the combination of functions, see the Report presented at the Fifth Annual Conference of the Global Competition Law Center, 11-12 June 2009, *Enforcement by the Commission—The Decisional and Enforcement Structure in Antitrust Cases and the Commission’s Fining System*.

⁷ Article 6(2) of the Treaty on European Union states that: “The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.”

⁸ Judgment of 27 September 2011, *Menarini Diagnostics v Italy*, Application no. 43509/08.

⁹ For different aspects of the debate as to whether the CJEU exerts full judicial review, see D. Geradin & N. Petit, *supra* note 4, and H. Schweitzer, *Judicial Review in EU Competition Law*, RESEARCH HANDBOOK ON EU COMPETITION LAW (Damien Geradin & Ioannis Lianos, eds., 2011).

II. COMPLIANCE WITH FUNDAMENTAL RIGHTS: NOT AN ACHIEVEMENT, ONLY A REQUIREMENT

The *Menarini* judgment should not be construed as the final word in the debate as to the appropriateness of current due process rules before the Commission. This judgment potentially addressed only the criticisms relating to fundamental rights. As the Commission's Hearing Officer has said, the jurisprudence of the ECtHR:

[...] does of course not exclude a possible wider discussion as to whether or not this system is, among the various systems that are legally possible, the best system in terms of administrative cost, effectiveness, or other policy considerations.¹⁰

Still, it seems that this jurisprudence offers an opportunity for the Commission to reject further claims that the EU enforcement system should be reconsidered. In this vein, the Director-General for Competition recently stated that:

As far as the Commission is concerned however, these recent developments should allow us to put to rest institutional debates and concentrate on our core business—on enforcing the law.¹¹

It would be most regrettable for the Commission to consider calls for structural changes to its due process rules as illegitimate based on the ECtHR's judgments.¹² Not breaching fundamental rights should not become an excuse to avoid bolder improvements to antitrust enforcement procedures.

The *Menarini* judgment held that Article 6 ECHR allowed, in certain circumstances, a system in which an administrative body imposing criminal law sanctions to combine investigative and decision-making powers, nothing more. While such compliance is of course mandatory, it is far from being the only objective a competition law enforcement system should pursue. Quite the contrary: it is only a minimum standard any competition authority should reach and it has absolutely no meaning as to the effectiveness or fairness of that authority's enforcement policy.

Considering that such compliance puts an end to the institutional debate surrounding EU antitrust enforcement would also call into question the purpose of strong efforts the Commission has made in the past to improve the transparency of its procedures and limit the risk of prosecutorial bias. The introduction of Best Practices, the Chief Economist, and peer review panels were not driven by the necessity to comply with fundamental rights, but rather by the

¹⁰ W. Wils, *The compatibility with fundamental rights of the EU antitrust enforcement system in which the European Commission acts both as investigator and as first-instance decision maker*, 37(1) WORLD COMPETITION 7 (March 2014).

¹¹ Alexander Italianer, *Recent developments regarding the Commission's cartel enforcement*, speech given at the Studienvereinigung Kartellrecht Conference on March 14, 2012 in Brussels.

¹² Although the decision to reform the current institutional structure would not only need the Commission's approval, but also, depending on the changes envisaged, of the European Parliament and the Council of the EU (and even the Member States, should the EU Treaties be amended), the Commission remains the institution controlling almost the entirety of the power of legislative initiative. A reform would therefore require first the support of the Commission to be translated into a legislative initiative.

legitimate objective to reinforce both the legitimacy and the reliability of Commission decisions.¹³

It would therefore be wise for the Commission to keep the door wide open to discussions as to how the very structure of EU competition law enforcement can be improved. Relying on *Menarini* to avoid strong reforms would probably only postpone inevitable changes.

The current level of combination of functions in the Commission is not only problematic with respect to fundamental rights; it also calls into question the appropriateness, legitimacy, and effectiveness of the EU's competition policy. None of these issues was resolved by the ECtHR. The EU should therefore continue paying attention to suggestions for reforms, all the more because most of the suggested changes would not only strengthen the companies' rights, but also the effectiveness of the Commission's antitrust enforcement policy.

III. STRONGER DUE PROCESS FOR A STRONGER ENFORCEMENT POLICY

Calls for stronger due process in EU competition law, especially when voiced by counsels of companies subject to investigations, could be interpreted as attempts to weaken the Commission's enforcement policy so as to avoid infringements being uncovered. This interpretation would be mistaken since most suggested improvements to due process would strengthen both the defendant's rights and the Commission's antitrust policy.

Regard fact-finding, for example. While oral hearings in the current system merely allow the parties to voice their arguments without granting them a real chance to confront other parties, the introduction of a real contradictory hearing with cross-examination of witnesses would allow the case team to test the robustness of factual statements made by parties on which it relied, which would reduce risks of errors. Indeed, why are "contradictoire" hearings used in other EU jurisdictions, notably in criminal law? Not only because they give the defendant greater chances to prove its innocence, but also because they allow the truth more readily to be discovered. In this regard, stronger hearings should not be considered as obstacles to the enforcement efforts of the Commission, but rather as opportunities to strengthen them.

In the same vein, allocating the tasks (i) to investigate and (ii) to take the final decision on the infringement to different officials, working in structurally separate departments of the Commission, would support the Commission's enforcement policy for similar reasons, as it would significantly reduce both the objective risk and the subjective perception by parties of prosecutorial bias. In the current system, companies facing antitrust proceedings often have the feeling that the decision has already been made when they are granted the right to respond to the SO and to a hearing. Such suspicion is triggered both by the fact that companies are defending themselves before the same officials who drafted the SO incriminating them as well as the absence of the final decision makers (i.e. the commissioners) in the oral hearing. In this sense, more robust due process rights would support the Commission's enforcement efforts as they

¹³ Several of these improvements also followed the annulment by the General Court of the EU (then Court of First Instance) of three decisions of the Commission prohibiting mergers (see Judgment of 25 October 2002, *Tetra Laval v Commission*, T-5/02, ECR, EU:T:2002:264; Judgment of 6 June 2002, *Airtours v Commission*, T-342/99, ECR, EU:T:2002:146, and Judgment of 22 October 2002, *Schneider Electric v Commission*, T-310/01, ECR, EU:T:2002:254).

would enhance the Commission's legitimacy, thereby increasing the deterrent effect of its decisions.

The issue in this regard is not so much whether prosecutorial bias really influences the case team. Rather, the problem lies more in the perception companies have that they don't have the chance to defend themselves effectively before persons who are not already convinced of their guilt.

While a structural separation between officials investigating the case and those drafting the infringement decision may not radically change the outcome of most proceedings, it would substantially address the perception of unfairness many companies have when walking out of hearings.

Addressing such legitimacy concerns would inevitably imply reconsidering the role of the commissioners in the decision-making process. Since none of them attends oral hearings nor, except for the Commissioner for competition, are any involved in any step of the proceedings, their legitimacy to decide on guilt or innocence is called into question. As such, a concrete separation of investigative and adjudicative powers, as described above, would necessarily be coupled to a limitation of the Commissioners' role to a mere veto right. This way, parties to antitrust proceedings would know that they are defending themselves before the real decision makers, i.e. the officials drafting the decision.

Again, changes in this regard should not be considered as obstacles to a strong enforcement of antitrust law. On the contrary, it has been stated on several occasions that this perception of unfairness detracts from the effectiveness of Commission decisions:

Although certain issues may not be of significant individual concern, together they serve to sap the effectiveness and fairness of procedures that the Commission has worked hard to establish.¹⁴

The interests of the Commission and those of companies subject to antitrust proceedings are therefore converging in this respect more than they diverge. Unfortunately, the position of the Commission remains ambiguous:

Of course, we can look at ways to improve this process even further, and we will do so through our Best Practices, but the merits of our system as such should not be put into question. We will not follow those who ask us radical changes in this field.¹⁵

While the Commission appears ready to consider limited improvements to due process, it keeps the door closed to debates regarding the allocation of investigative and adjudicative powers. Unfortunately, it is therefore unlikely that substantial changes will be adopted in the next years. This opposition is all the more unfortunate as it may affect the development of due process rights before other antitrust enforcers.

¹⁴ D. Anderson & R. Cuff, *Cartels in the EU: Procedural Fairness for Defendants and Claimants*, INT'L ANTITRUST L. & POL'Y, Fordham University School of Law (2010).

¹⁵ J. Almunia, Vice President of the European Commission responsible for competition policy, *Transatlantic Trends in Competition Policy*, SPEECH/10/305, 10 June 2010.

IV. THE SPECIAL RESPONSIBILITY OF A MODEL INSTITUTION

Despite the above-mentioned concerns, the Commission remains one of the strongest and most influential competition enforcers worldwide. As noted by several commentators, both the substantive law and the institutional organization of its enforcement have inspired many countries which recently introduced similar enforcement systems:

the Commission is perceived as a role model within the European Competition Network and among the global enforcement community.¹⁶

Such a prominent institution is therefore subject to a special responsibility regarding the choices it makes. There is little doubt that the current position of the Commission influences other enforcers. The refusal of the Commission to consider wider reforms to its procedures therefore probably supports the reluctance of other enforcers to reinforce due process rights.

V. CONCLUSION

Compliance with fundamental rights should not become a pretext for public institutions to avoid bold reforms. One can understand that the Commission stopped holding its breath after *Menarini*. But it cannot claim a final victory.

It is hardly credible that the current concentration level of investigative and adjudicative functions is tenable in the long term. In the context of increasing recourse to private damage claims in the European Union, it is more important than ever to have antitrust proceedings not weakened by doubts as to their legitimacy or robustness. Unfortunately, it seems that the Commission is not yet determined to start structural reforms. One can hope that the new commissioners who will be appointed following the recent EU parliamentary elections will be more ambitious than their predecessors in this respect.

¹⁶ AmCham EU, *Due Process in EU Antitrust Proceedings - AmCham EU calls for Improvements in Due Process in EU Competition Cases 3* (2010).