THE SCHINDLER RULING OF THE COURT OF JUSTICE OF THE EUROPEAN UNION: POTENTIAL IMPLICATIONS FOR FUNDAMENTAL RIGHTS AND EU COMPETITION LAW

To Our Clients and Friends:

I. Background

Defense counsel in European antitrust proceedings have long bemoaned the fact that "fundamental rights" did not effectively find their way into the fabric of the rights of the defence, despite their appearance in the European Convention on Human Rights (the "EHCR"). Many had hoped that this situation would change with the embodiment of the Charter of Fundamental Rights of the European Union into the general body of EU law as a result of the enactment of the Treaty of Lisbon in 2007. Since that time, the EU antitrust defence Bar has been largely disappointed with the limited utility of "human rights" challenges to the scope of EU antitrust investigative powers.

The latest Ruling of the Court of Justice of the European Union (the "CJEU") in the Schindler Case on the interplay of fundamental rights and EU competition procedure confirms that the roles of investigator, prosecutor and enforcer in competition law can be concentrated in the hands of the European Commission (the "Commission"). This concentration of powers can occur without any compromise of the fundamental rights that might otherwise be seen to stem from the conflict of interest arising from an institution exercising such potentially conflicting powers. However, as regards the "margin of appreciation" traditionally afforded by the European Courts to all assessments "of an economic nature" undertaken by the Commission, the Ruling might nonetheless have some far-reaching implications, if developed in subsequent cases. Thus, the traditional deference of the European Courts to the exercise by the Commission of such discretion might be the subject of erosion from an unexpected quarter -- the ECHR.

By Decision of 21 February 2007, the European Commission ("Commission") imposed fines on a number of companies belonging to the Otis, Kone, ThyssenKrupp and Schindler ("Schindler") groups for their participation in four cartels in certain European markets for the sale, installation maintenance and modernisation of elevators and escalators (the "Decision"). The fines imposed on the Schindler corporate group amounted to more than EUR 143 million (approximately USD 188.3 million). The infringements established by the Commission consisted mainly in competitors sharing the markets between themselves by agreeing or concerting to allocate tenders and contracts for the sale, installation, maintenance and modernisation of elevators and escalators.

Schindler brought an action before the then EU Court of First Instance (now the General Court) for annulment of the Commission's Decision or, in the alternative, the reduction of the fines imposed upon
it. By a Judgment delivered in 2011,[3] the General Court rejected all of the arguments put forward by Schindler and upheld the fines imposed by the Commission.

II. The Schindler Ruling of the Court of Justice of the European Union: Considerations in Relation to Fundamental Rights

Schindler sought to have the General Court's Judgement overturned by bringing an appeal before the Court of Justice of the European Union ("CJEU"). A number of arguments were put forward, particularly some alleging breaches of the provisions of the European Convention of Human Rights ("ECHR") as well as several arguments relating to the fine calculation. By its Judgment of 18 July 2013, the CJEU rejected all of these arguments and maintained the amount of the fine imposed.[4] Schindler's arguments relating to the alleged breaches of fundamental rights are discussed below.

A number of circumstances have brought attention during the last years to the interplay between fundamental rights (and, in particular, the ECHR) and EU Competition law. First, Article 6(2) of the Treaty of Lisbon, which entered into force in December 2009, imposes on the European Union ("EU") an obligation to formally join the ECHR.[5] Second, the Treaty of Lisbon rendered the CFREU binding on the EU Member States. Third, in the Menarini Ruling, the European Court of Human Rights ("ECtHR") made it clear[6] that fines in competition law cases constituted substantial financial penalties and can be characterised as being criminal in nature, within the meaning of Article 6 ECHR, irrespective of their characterisation under national (and, presumably, EU) law.[7]

Schindler argued, inter alia, that the Commission's procedures "infringe[d] the principle of separation of powers [...] applicable to criminal proceedings under [Article 6 ECHR]."[8] Article 6 of the ECHR, entitled "right to a fair trial", contains the procedural guarantees which the ECHR grants defendants in proceedings of a criminal nature (e.g., presumption of innocence, the right to be informed promptly and in detail of the nature and cause of the accusation, the right to legal assistance, etc.).

The ECtHR had indicated in its Ruling in the Menarini case that a system of administrative enforcement of the competition rules was compatible with Article 6 ECHR as long as the decisions of the administrative authority are subject to review by a judicial body having unlimited jurisdiction and provided that this judicial authority does in fact exercise this unlimited jurisdiction.[9]

It could be argued that the CJEU had already decided this issue in the Chalkor and KME Cases, where it established that the review of the General Court satisfied the requirements of Article 6 ECHR.[10] However, the CJEU had also indicated that it would review whether the General Court had exercised its powers of full review on a case-by-case basis. This would be the approach taken by Professor Wesseling and Judge Van der Woude, according to whom "even if such a system theoretically complies with the [...] Menarini] requirements, it cannot be automatically concluded that this also applies to the application thereof in any specific case".[11] In the words of the CJEU in the Chalkor case:
"[...] it is necessary to establish whether, in the present case, the General Court carried out the requisite review [...] [i]t is the judgement under appeal that falls to be reviewed by the Court of Justice in the present appeal, not the General Court's case-law as a whole".[12]

At first sight, the Judgement in the Schindler Case seems to depart from this case-law, to the extent that it merely cites paragraphs from Chalkor and seems to consider that the issue is settled, and that the Commission's power to impose fines is compatible with Article 6 ECHR, without actually reviewing whether the General Court had actually exercised its powers of full review of the challenged Decision.[13]

However, this probably constitutes an excessively formalistic reading of Schindler. Indeed, the Chalkor and KME rulings arguably constituted an implicit reversal of the previous case-law according to which the EU Courts exercised a deferential standard of review as to assessments of economic nature undertaken by the Commission.[14] In the words of the CJEU, in both cases:

"[... ] 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".[15]

While the recent Schindler Ruling does not call into question this interpretation, the ruling seems to confine these principles to the domain of fines, which was not the direct subject-matter of the appeal. In the words of the CJEU:

"As regards the review of legality, the Court has pointed out that the European Union judicature must exercise [its margin of discretion] on the basis of the evidence adduced by the applicant in support of the pleas in law put forward and that it 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 1998 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 [...].".[16]

The better reading, however, is that the Schindler Ruling reaffirms the validity of the argument, already included in Chalkor and KME, according to which the principle of effective judicial protection, enshrined at Article 47 of the CFREU and Article 6(1) ECHR, requires the European judicature to be awarded unlimited jurisdiction[17] or, more precisely, "the power to assess the evidence, to annul the contested decision and to alter the amount of a fine [...].".[18]

III. Conclusions

Given the institutional roles of the Commission as promoter and prosecutor, investigator and enforcer of EU competition law, it comes as no surprise that an increasing number of challenges have been
made regarding the compatibility of EU competition law procedures with the ECHR. None of these challenges has, to date, been successful before the CJEU.

According to some authors, this is probably due to the fact that the CJEU pays only "lip-service" to the principles of due process and respect for the rights of the defence and the right to good administration.[19]

However, a holistic reading of the Chalkor, KME and Schindler Rulings does not seem to warrant such a pessimistic interpretation. First, it should be stressed that the cases decided thus far by the CJEU in this domain referred to hard-core restrictions of competition law and, in particular, to naked cartels.[20] Although alleged cartelists are entitled to the respect of their fundamental rights, the CJEU might understandably be reluctant to annul cartel fines absent a clear breach of these rights. Second, true cartels are less likely to constitute infringements where the Commission has relied on its "margin of appreciation regarding assessments of economic nature". Accordingly, it is less likely for the General Court not to have exercised its "full jurisdiction" in such circumstances and to merely have deferred to the assessments made by the Commission. Third, at least some of the fundamental rights pleadings reaching the CJEU seem to have themselves been procedurally flawed.[21] Finally, it might be telling that the CJEU’s positions in the Schindler case regarding the lack of separation of powers begin with a reminder of the fact that the Decision was adopted in 2007, and, therefore, both before the Lisbon Treaty came into force (2009) and the accession of the EU to the ECHR had occurred.[22] Neither the Chalkor nor the KME rulings contained this implicit caveat.

One way of interpreting this would be that the CJEU considers itself de facto bound by the ECHR. However, were this to be the case, there would arguably be little need to include the caveats cited above, particularly given that the ECHR has been acknowledged to constitute a source of the "general principles of EU law" as far back as the 1970s.[23]

Perhaps the implicit message that the CJEU is trying to convey is that the Court is aware that there might be instances where EU competition procedure might be incompatible with the ECHR, but that it will closely scrutinise claims that that is the case, and will be willing to determine the different value of the CFREU and the ECHR as sources of European law, depending on the time of the adoption of the challenged act.[24] Indeed, issues such as, e.g., the scope of legal privilege for in-house lawyers, might change depending on whether the ECHR is considered to constitute a full source of European law or merely, as is the case today, one of the sources to be taken into consideration when determining the scope of general principles of EU law. In practice, this means that the Court will give the Commission some time to fully adapt its procedural rules to both legal instruments. In fact, certain of the Commission’s latest reforms of its Best Practices in Antitrust Proceedings, such as informing parties in the Statement of Objections of the main relevant parameters for the possible imposition of fines, the enhanced access to "key submissions" of complainants or third parties (such as economic studies) prior to the Statement of Objections and the publication of rejection decisions for complaints, might all arguably be measures that are attributable to the impact of the ECHR.[25]

Schindler constitutes the latest of the CJEU Rulings regarding the compatibility of EU antitrust procedure with fundamental rights in general, and particularly those rights enshrined in the
ECHR. Although *Schindler* effectively puts an end to the debate as to whether the roles of prosecutor and enforcer in competition law can both be vested in the Commission simultaneously, the Ruling might nonetheless have potentially sweeping consequences as regards the deference traditionally accorded by the European Courts to assessments by the Commission "of an economic nature" in the context of a Decision. This might put additional pressure for the Commission to provide consistent evidence in support of its theories of harm, particularly in relation to complex abuses of dominant position and merger cases. In addition, the fact that the CJEU emphasised the point that the Treaty of Lisbon had not entered into force when the Commission's Decision at issue in these proceedings was adopted, raises the possibility of a yet more stringent review of the Commission's rules on procedure in relation to those Decisions adopted after the EU formally became a party to the ECHR. This might open a Pandora's box of challenges regarding well-established rules of EU Competition procedure, such as the limitation of legal privilege to external counsel, the possibility for the Commission to investigate infringements during years without formally opening the proceedings or the practices of the Commission as regards the copying of electronic documents during an on-spot investigation, none of which is arguably consistent with the applicable case-law of the ECtHR. Thus, the impact of the *Schindler* ruling might be seen in future rulings of the European Courts.


[5] The legal basis for the accession of the EU is provided for by Article 59, paragraph 2 ECHR ("the European Union may accede to this Convention"), as amended by Protocol No. 14 to the ECHR which entered into force on 1 June 2010. For the state of the negotiations see http://hub.coe.int/what-we-do/human-rights/eu-accession-to-the-convention.

[6] To the extent that it was previously not the case, see the following ECtHR earlier cases relating to competition systems, the Ruling of 27 February 1992 *Société Stenuit v. France*; of 15 July 2003 *Fortum v. Finland* and of 3 June 2004, *Neste St-Petersbourg v. Russia*.


[21] E.g., in the Schindler case, the plea regarding the alleged lack of directness in the taking of the evidence in the Schindler ruling was not accompanied by a parallel contest of any specific facts demonstrated through that evidence (see Schindler at paras. 44 to 46).

[22] See Schindler, at paras. 31 and 32.

It should be highlighted that, as the Court highlights at para. 31 of Schindler, "it is settled case-law that, in an action for annulment, the legality of the contested measure must be assessed on the basis of the fact and the law as they stood at the time when the measure was adopted" (see Joined Cases C15/76 and 16/76 France v Commission [1979] ECR 321, at para. 7; Case C-449/98 P IECC v Commission [2011] ECR I-0000, at para. 62).

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