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Panel 3: Who Watches the Watchmen?

Due Process Deficiencies in EU Antitrust Proceedings

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1. Setting the Scene

The Key Problem: No Separation of Powers

Legislator, investigator and final decision maker combined

EU Commission acting as

- **Legislator**
 - **Investigator**
 - **Prosecutor**
 - **Adjudicatory Body**
 - and recently also as **private plaintiff** based on fining decisions taken by Commission itself (which are binding for national judges)
- Institutional setup **unfit** to guarantee **impartiality** and **presumption of innocence**
- **Prosecutorial bias** unavoidable
- At a **minimum**, comprehensive **judicial review** required to **counterbalance systemic bias**

Article 6 ECHR

Right to a fair trial

- "1. In the 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. ...
2. Everyone **charged with a criminal offence** shall be **presumed innocent** until proved guilty according to law.
3. Everyone charged with a criminal offence has the following **minimum rights**:
 - (a) to be **informed promptly**, in a language which he understands and in detail, of the nature and cause of the **accusation** against him;
 - (b) to have **adequate time and facilities** for the preparation of his defence;
 - (c) to **defend** himself in person or through legal assistance of his own choosing ...;
 - (d) to **examine or have examined witnesses against** him and to obtain the attendance and examination of witnesses **on his behalf** under the same conditions as witnesses against him;
 - (e)"

Article 47 EU Charter of Fundamental Rights

Right to an effective remedy and to a fair trial

"Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the **right to an effective remedy** before a **tribunal** in compliance with the conditions laid down in this Article.

Everyone is entitled to a **fair and public hearing** within a **reasonable time** by an **independent and impartial tribunal** previously established by law. Everyone shall have the **possibility** of being **advised, defended and represented**.

Legal aid shall be made available"

Article 261 TFEU

"**Regulations** adopted jointly by the European Parliament and the Council, and by the Council, pursuant to the provisions of the Treaties, **may give the Court of Justice** of the European Union **unlimited jurisdiction** with regard to the **penalties** provided for in such regulations."

Article 31 Regulation 1/2003

Review by the Court of Justice

"The Court of Justice shall have **unlimited jurisdiction** to **review decisions** whereby the Commission has **fixed a fine** or **periodic penalty payment**. It may **cancel, reduce or increase** the fine or periodic penalty payment imposed."

Article 263 TFEU

"The Court of Justice ... **shall review the legality** of ... **acts** of ... **the Commission** ... intended to produce legal effects vis-à-vis third parties. ... Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them"

Antitrust Penalties

Consensus: "Criminal Charges" Under Article 6 ECHR

Safeguards of **Article 6 ECHR** apply:

- ECtHR, **A Menarini Diagnostics** (2011)
- Confirmed by ECtHR, **Grande Stevens v. Italy** (2014)
- Same outcome: EFTA Court, **Posten Norge** (2012)

ECtHR

Menarini (2011)

- **EUR 6m fine** imposed by **Italian** NCA for alleged price fixing
- **ECtHR:**
 - Fine, particularly due to its **severity**, constitutes **criminal** sanction
 - **Majority** ruling:
 - Administrative body **can impose criminal sanction** in first instance **if** subsequently **independent tribunal** with "**full jurisdiction**" (*pleine juridiction*) **reviews decision**
 - Domestic courts **had** gone beyond "simple legality control" and therefore exercised "**full jurisdiction**"
 - **Dissenting** opinion Judge Pinto de Albuquerque: **Italian courts** did **not** apply full jurisdiction → not compatible with Article 6(1) ECHR

CJEU

KME, Chalkor (both 2012)

- "[T]he **review of legality** provided for under **Article 263 TFEU**, supplemented by the **unlimited jurisdiction** in respect of the **amount of the fine**, provided for under **Article 31 of Regulation No 1/2003** is **not contrary** to the requirements of the principle of **effective judicial protection** which is currently set out in **Article 47 of the Charter**".
- "[T]he Courts must carry out the review of legality ... on the basis of the evidence adduced by the applicant [T]he **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.**"

Commission's Interpretation

Director-General Alexander Italianer, Speech at Studienvereinigung Kartellrecht, Brussels, March 14, 2012 (referring to Menarini, KME and Chalkor):

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

→ **Really?**

→ **Many important questions remain open**

Telefónica (2014)

CJEU stressed "in-depth" nature of legality review

The General Court "in carrying out the review of legality provided for in Article 263 TFEU, ... did **not merely ascertain** whether there were any **manifest errors of assessment** but carried out an **in-depth review**, as regards **questions of both fact and law**, of the contested decision in the light of the pleas in law put forward by the appellants, thus **satisfying the requirements of an unrestricted review** for the purpose of **Article 47** of the Charter."

But Subsequent Cases Show Limits of EU Court Review

CJEU in Galp Energía (2016) and Villeroy & Boch (2017)

Galp Energía:

- "[W]hen they exercise their unlimited jurisdiction provided for in Article 261 TFEU and Article 31 of Regulation No 1/2003, the EU Courts are empowered, in addition to the mere review of the legality of the penalty, to **substitute their own assessment in relation to the determination of the amount of that penalty** for that of the Commission"
- "By contrast, the scope of that unlimited jurisdiction is **strictly limited, unlike** the review of legality provided for in **Article 263 TFEU**, to determining the **amount** of the fine".
- "[T]he **unlimited jurisdiction** enjoyed by the General Court on the basis of **Article 31 of Regulation No 1/2003** concerns **solely the assessment** by that Court **of the fine** imposed by the Commission, to the **exclusion of any alteration of the constituent elements of the infringement** lawfully determined by the Commission in the decision under examination by the General Court."

Villeroy and Boch confirmed this view

2. Critique

Menarini Interpretation as "Causa Finita"?

Built on Shaky Grounds: Ignores Prior ECtHR Precedent

- ECtHR **De Cubber** case (1984): All instances in criminal proceedings must be an Article 6(1) ECHR tribunal (= independent and impartial)
- **Exception for minor offences to relieve judicial authorities** of task of prosecuting and punishing contraventions which are **numerous but of minor importance** (e.g. **minimal fines** for road traffic, customs or tax violations)
- ECtHR "**Öztürk**" (1984):
 - **DM 60** traffic violation fine
 - Contracting states **not allowed to classify**, at their **discretion, offences as "regulatory"** instead of **criminal**
 - Otherwise, fundamental clauses of Articles 6 and 7 **subordinated** to their **sovereign will**

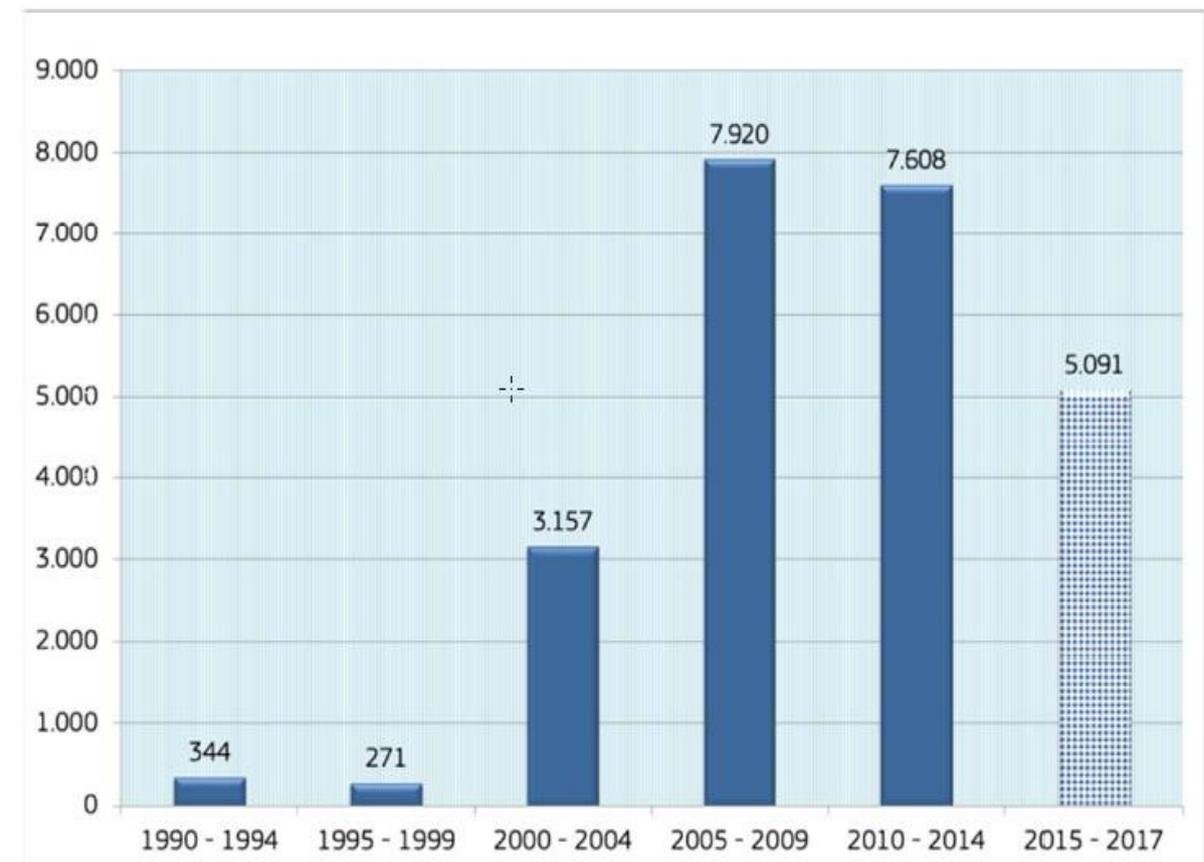
Commercial Impact of EU Antitrust Fines

Over EUR 24.4bn (!) since 1990

1.4. Fines imposed (adjusted for Court judgments) - period 1990 – 2017

Last change: ++17 March 2017++

Period	Amount in €* in million EUR
1990 - 1994	344 282 550,00
1995 - 1999	270 963 500,00
2000 - 2004	3 157 348 710,00
2005 - 2009	7 920 497 226,50
2010 - 2014	7 608 375 579,00
++2015 - 2017++	5 091 156 000,00
Total	24 392 623 565,50



Commercial Impact of EU Antitrust Fines

Highest fine: "Trucks" (2016) – nearly EUR 3bn (!)

1.5. Ten highest cartel fines per case (since 1969)

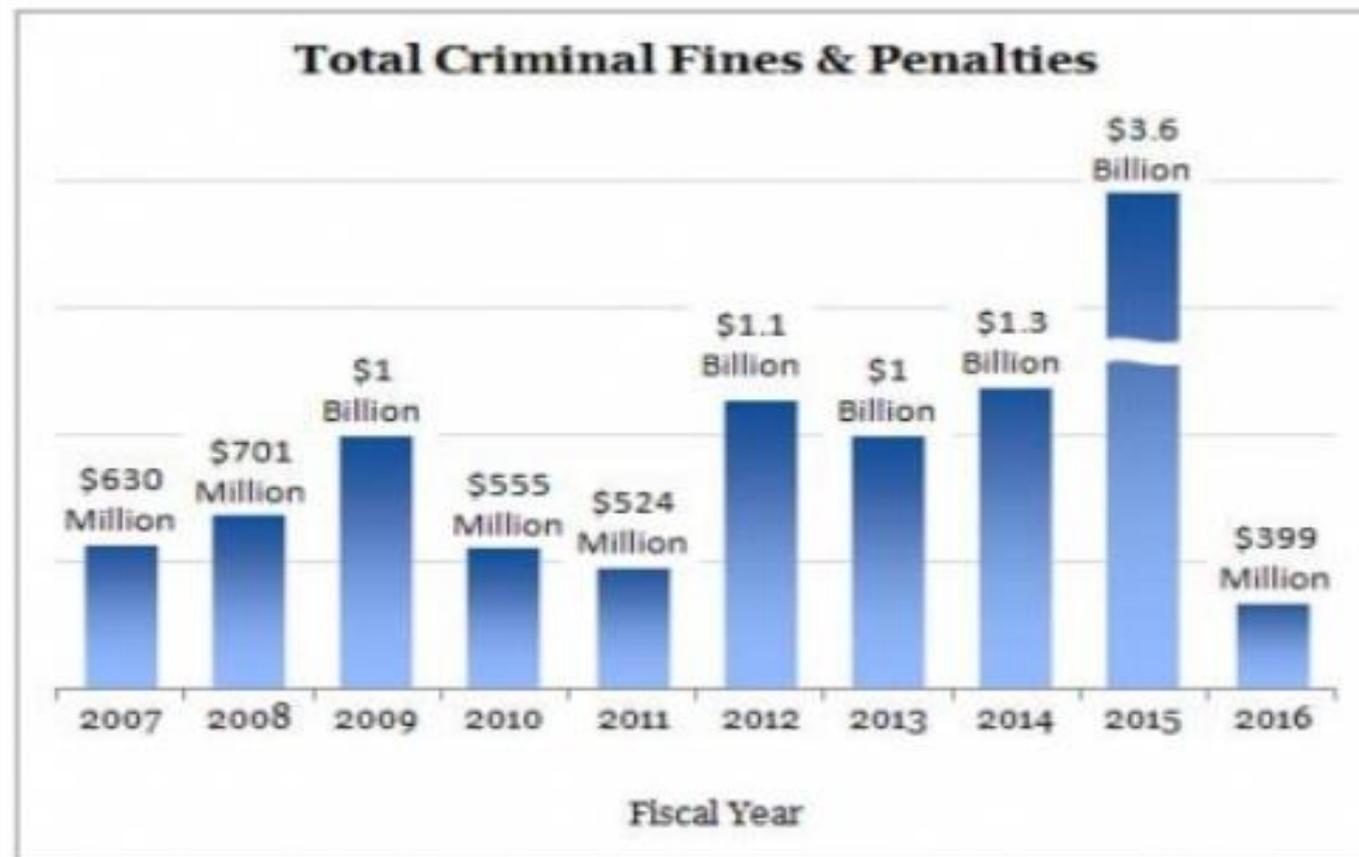
Last change: ++17 March 2017++

Year	Case name	Amount in €*
2016	Trucks	2 926 499 000
2012	TV and computer monitor tubes	1 409 588 000
2013/2016	Euro interest rates derivatives (EIRD)**	1 310 039 000
2008	Carglass	1 185 500 000
2014	Automotive bearings	953 306 000
2007	Elevators and escalators	832 422 250
2001	Vitamins	790 515 000
++2010/2017++	Airfreight	785 345 000
2013/2015	Yen interest rate derivatives (YIRD)	684 679 000
2007/2012	Gas insulated switchgear (incl. re-adoption)	675 445 000

* Amounts adjusted for changes following judgments of the Courts (General Court and European Court of Justice) and / or amendment decisions.

Comparison with U.S. Antitrust Sanctions

Criminal Fines and Penalties – 2017 Update



"Minor Offences" Rationale not Applicable to EU Antitrust Lundbeck (2016)

- General Court: Involvement in competition infringements attaches "**non-negligible stigma**" for **natural and legal** persons
- EU antitrust fines are **not minor offences**

Dissenting Opinion in Menarini (2011)

Judge Pinto de Albuquerque

- **"L'acceptation d'un 'pseudo-droit pénal' ou d'un 'droit pénal à deux vitesses', où l'administration exerce sur les administrés un pouvoir de punition, imposant parfois des sanctions pécuniaires extrêmement sévères, sans que s'appliquent les garanties classiques du droit et de la procédure pénale, aurait deux conséquences inévitables: l'usurpation par les autorités administrative de la prérogative juridictionnelle du pouvoir de punir et la capitulation des libertés individuelles devant une administration publique toute-puissante."**

ECtHR: Case of A and B v. Norway (2016)

Judge Pinto de Albuquerque – Dissenting Opinion

- Case related to **tax** offences
- **Decriminalization** "undoubtedly **raises a serious issue** under ... Articles [6 and 7 ECHR] when it deals with **conduct with a higher degree of social offensiveness** that has been **downgraded** to the **sphere of administrative law**, for **policy purposes**. This is **all the more so** when **administrative offences**, including those committed negligently, are **punishable by astronomical**, sometimes even **unlimited, financial penalties**, fines or surcharges (...)."
- "In fact, this *droit pénal à deux vitesses* **hides a net-widening repressive policy**, which **aims to punish more expediently and more severely**, with **lesser substantive and procedural safeguards**. In this new **Leviathan-like context**, **administrative-law offences are nothing but pure mislabelling of a hard-core punitive strategy** and **administrative law becomes a shortcut to circumvent the ordinary guarantees** of criminal law and criminal procedure."

No "pleine juridiction" exercised in Luxemburg

- Galp Energía and Villeroy & Boch cases **confirm** that EU Courts do **not exercise "unlimited" jurisdiction** (except for the assessment of fines) within the meaning of Menarini
- Legality assessment is **inherently a lesser form** of judicial review **than full jurisdiction** (Christopher Bellamy, 2012)

Conclusion

- **Interpretation of Menarini as last word** in due process debate is **not convincing**
 - Interpretation **ignores prior case law** (no overruling; no distinguishing)
 - Hardly convincing in substance: If taken at face value, protections of Article 6 ECHR and Article 47 would be subject to **political discretion**
 - **No Grand Chamber** judgment
 - Strong **dissenting** opinion
- At any rate: Menarini judgment dealt with **Italian** administrative fining and court system
→ **Cannot** be considered (by analogy) as **approval** of **EU** antitrust proceedings
- **In practice:**
 - EU Courts at best pay **lip service** to guarantees of Article 6 ECHR and Article 47 of the Charter
 - Factually, courts do **not exercise full jurisdiction**

3. Suggested Improvements

Introduce Witness Hearings

Article 6(3)(d) ECHR

Current practice:

- E.g. in approx. 450 competition proceedings 2002-2011 (10 years) **no application** by plaintiffs to hear witnesses ever **granted** (despite > 10 applications)
- **Leniency applicants not heard** as witnesses against cartel participants
- **Duravit** (2013, confirmed by CJEU 2017): In strikingly "boilerplate"-worded explanations **GC rejected all (!)** of several specific **requests** to hear witnesses for topics described in detail

Improvement:

- EU Commission and Courts should start hearing witnesses to **counterbalance "skewed leniency incentives"** through meeting individuals **face-to-face**

Separation of Powers; Full Judicial Review

- Short-term: EU judges to change mindset (and internal rules) and **actually start exercising full jurisdiction** regardless of insufficient grounding in Articles 261, 263 TFEU and Article 31 Regulation 1/2003

- Mid-term:
 - **Strengthen** role of **College of Commissioners** as **adjudicatory** body
 - E.g. Competition Commissioners and DG COMP acting as investigator, preparing the indictment to Commissioners
 - All Commissioners to hear entire case and arguments of both sides, then take final decision (in absence of Competition Commissioner and DG COMP)
 - **Equality of weapons**: Same length of **written** submissions (incl. Commission's fining decision) and **no right of last word** for Commission in Court hearings
 - **Counterbalance** systemic **deficiency** that appealing companies (and not the EU Commission as would-be "prosecutor") are in the **"plaintiff" role**

- Long-term: **Institutional reform**:
 - **Abolish** EU Commission's **combined role** as police force, prosecutor, judiciary and legislator
 - Instead: **Indictments by Commission** to specialized **competition court**
 - **Clarify** language in TFEU about scope of **(full) judicial review**
 - EU to **join the ECHR** (long overdue after Lisbon Treaty 2009)

Further Reading

Gerald Brei, Due Process in EU antitrust proceedings – causa finita after Menarini?, *Zeitschrift für Wettbewerbsrecht* 2015, pp. 34 et seq.

David Vane, The house always wins, *Global Competition Review*, Volume 17 (2014), Issue 9, pp. 5 et seq.