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The Commission's Fining Policy and the European Convention on Human Rights: *Menarini and its Implications*

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Menarini: quick facts

ECtHR, 27 Sept. 2011, *A. Menarini Diagnostics S.R.L. v Italy*, n° 43509/08

- 6 million euros fine imposed on Menarini Diagnostics by Italian competition authority (AGCM) for a cartel.
- Appeals all rejected in Italy.
- Case brought to the European Court of Human Rights (ECtHR). Menarini alleged that the Italian judicial system did not allow access to a “tribunal” within the meaning of Article 6 of the European Convention on Human Rights (ECHR).

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Are competition fines part of criminal law?

The debate on criminal law

- It is no longer debated that **competition fines are criminal** within the meaning of *Engel* (ECtHR, 8 June 1976, n° 5100/71, § 82).

- Yet, according to the ECtHR in ***Jussila*** (23 Oct. 2006, n° 73053/01):
  - criminal offences do not all have the same weight:
    - "hard core" of criminal law: full application of fair trial guarantees;
    - outside the hard core of criminal law: less stringent application of such guarantees;
  - "criminal offences are all equal, but some are more equal than others"?

- **The current view of the EU Courts':**
  - competition fines are not hard core criminal law;
  - procedural shortcomings before the Commission can be remedied by an appeal to a court having full jurisdiction, i.e. the General Court. (GC, 13 July 2011, *Schindler*, T-138/07, § 54-56; see also AG Sharpston Opinion in *KME*, C-272/09 P).

ECtHR: Italian competition fines are criminal in nature

- **Italy** argued that the sanctions were “administrative” and thus not part of criminal law.

- **ECtHR:**
  - considered that, due to its severity (EUR 6 million), the sanction at stake belonged to the criminal sphere (§ 42);
  - backed its ruling by a reference to *Lilly v France* (dec. 3 December 2002, n° 53892/00), which considered French competition fines as criminal (§ 43).

- No mention was made of *Jussila* and the notion of hard core of criminal law.

Can an administrative body impose a criminal sanction?

- It is acceptable that a criminal sanction be imposed by an administrative entity not meeting the requirements of Article 6(1) ECHR provided that the decision is subject to review by a court that has full jurisdiction (ECtHR, 23 Oct.1995, *Schmautzer e.a. v Austria*, n° 15523/89, § 34).

- "Full review" within the meaning of Article 6 ECHR means that the court must have the power to quash ("*réformer*") in all respects, on questions of fact and law, the challenged decision (ECtHR, 4 Mar. 2004, *Silvester's Horeca v Belgium*, n° 47650/99, § 27).

- *Menarini* recalls the above-mentioned case law (§ 59).

ECtHR's reasoning in *Menarini*

- The Italian courts which ruled on the applicant's claims fulfilled the conditions of a tribunal within the meaning of Article 6(1) ECHR because:
  - they examined all the applicant's arguments in fact and in law (§ 63);
  - they went beyond a mere legality review, by examining the soundness and the proportionality of the AGCM's appraisal and verifying the AGCM's technical assessments (§ 64);
  - they exercised full review of the sanction by ascertaining its adequacy with respect to the infringement, and could have "replaced" the sanction (§ 65);
  - they went beyond a mere "external" review of the logic and coherence of the AGCM's reasoning, and analyzed the adequacy of the sanction in light of relevant parameters, including the proportionality of the sanction (§ 66).

Judge Pinto de Albuquerque's dissenting opinion

- According to **Judge Pinto de Albuquerque**, "full jurisdiction" in the criminal sphere entails:
  - reviewing the quid and the quantum of sanctions; AND
  - reviewing the reality of the alleged infringement to competition law. Involves going beyond reviewing manifest errors of appraisal.

- "Full jurisdiction" is not a mere *reformatio*, but a *revisio* of the case, i.e. the applicable legal system should allow the court to substitute its own appraisal to that of the administration.

- Full jurisdiction necessarily entails comprehensive ("*exhaustive*") jurisdiction.

How to interpret the *Menarini* ruling?

- **Need to reconcile the majority and the dissenting opinion.**

- **Judge Sajo:**
  - concurs with Judge Pinto's analysis of what full jurisdiction entails;
  - agrees with Judge Pinto that the Italian legislation applicable at the time only provided for a limited judicial review *de jure*, falling short of meeting Article 6(1) ECHR requirements;
  - but considers that the Italian Courts *de facto* went beyond a mere legality review and engaged in a full revision of the decision: therefore, the Court rightly considered that Art. 6(1) ECHR had not been breached.

- Applicant did not ask for a review by the Grand Chamber.

- Is a *de facto*/in practice full judicial review sufficient?

A blanket immunity for the EU fining system?

Issues for the EU fining system

- **The European Commission does not meet Article 6(1) ECHR requirements**, be it only because it acts as investigator, prosecutor and decision-maker.

- Acceptable if “remedied” by full jurisdiction of the EU Courts.

- **Traditional position of EU Courts on the nature of their review:**
  - art. 263 TFEU: limited review of “complex economic assessments” (notion extended over time) and of “complex technical appraisals”;
  - art. 261 TFEU: full jurisdiction to review the calculation of fines. Given as an example of full jurisdiction by Judge Pinto de Albuquerque (§ 8).

- **Mounting pressure on the system**:
  - art 47 of Charter of Fundamental Rights: right to a fair trial;
  - future EU accession to the ECHR.

The in-depth review suggested in *Tetra Laval*

- ECJ,15 Feb. 2005, *Tetra Laval*, C-12/03 P, § 39

> "*Whilst the Court recognises that the Commission has a margin of discretion with regard to economic matters, that does not mean that the Community Courts must refrain from reviewing the Commission's interpretation of an economic nature. Not only must the Community Courts, inter alia, establish whether the evidence relied upon 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*".

KME and *Chalkor*: a missed opportunity

CJEU, 8 Dec. 2011: *Chalkor* (C-386/10 P), *KME* (C-272/09 P)

- *"*[T]*he Courts must carry out the review of legality […]. In carrying out such a review, the 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" (KME* § 102; *Chalkor* § 62).

- "*The 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 therefore contrary to the requirements of the principle of effective judicial protection in Article 47 of the Charter*" (*KME* § 106; *Chalkor* § 67).

- However:
  - the Court does not explain how Art. 263 TFEU and Art. 261 TFEU interact.
  - in those cases, the review does not lead to any revision of the decision.

Posten Norge: reforming without amending the legality review

- EFTA Court, 18 April 2012, *Posten Norge v EFTA Surveillance Authority*, E-15/10:
  - "*the Court must be able to quash in all respects, on questions of fact and of law, the challenged decision. […] Therefore, when imposing fines for infringement of the competition rules, ESA cannot be regarded to have any margin of discretion in the assessment of complex economic matters which goes beyond the leeway that necessarily flows from the limitations inherent in the system of legality review*" (§ 100).
  - Limit to the Court's intense review: it "*may not replace ESA's assessment by its own*" (§ 101). Same as the EU Courts under Art. 263 TFEU.
  - "*Accordingly, the submission that the Court may intervene only if it considers a complex economic assessment of ESA to be manifestly wrong must be rejected* " (§ 102).

The need for a full review

- **Existing imbalance before EU Courts:**
  - relaxation of the Commission's duty to prove its case : systematic use of presumptions of liability;
  - increased difficulty for the claimant to provide the EU judge with all elements to be reviewed:
    - drastic limitation of the written pleadings' number of pages; versus lengthy Commission decisions;
    - dispense of full debate: restriction on replies and rejoinders; dismissal of certain appeals by order as manifestly inadmissible or ill-founded.

- **No need to amend the Treaty**: *Posten Norge* illustrates the high potential/flexibility of the legality review concept.

- For the time being, minimal changes could be brought to the **scope** of the review and not necessarily to the **effects** of said review (i.e. annulment as opposed to substitution of reasoning).

Failing which an action could be brought before the ECtHR

- **Conflicting interpretations** as to the impact of *Menarini* on the EU fining system call for a clear position by the ECtHR.

- **ECtHR jurisdiction *ratione personae***:
  - EU not a party to the ECHR yet;
  - suitable proxy to bring a Member State before the Court:
    - involvement of national representatives in the Advisory Committee

- **Lifting the « Bosphorus shield »**:
  - presumption of equivalent protection is rebuttable;
  - contrary to the *Bosphorus* situation, Member States have some leeway when acting within the framework of the Advisory Committee. Thus it can be argued that *Bosphorus* is not applicable.