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BUSINESS AS USUAL AFTER *MENARINI*?

Marco Bronckers and **Anne Vallery** examine the implications for EU competition law in the wake of the *Menarini Diagnostics* case

The question whether EU competition law enforcement is compatible with the fundamentals of a fair trial, and other principles derived from the European Convention of Human Rights ("ECHR"), has been around for quite some time. Yet this question acquired renewed importance with the entry into force of the Charter of Fundamental Rights incorporated in the Lisbon Treaty. Significantly, the Charter stipulates that to the extent it affords rights that correspond to ECHR rights, the meaning and scope of those rights shall be the same as those laid down by the said Convention, although EU law can provide more extensive protection.[1] As a result, the case law of the European Court of Human Rights ("ECtHR") now lays a floor in the protection of fundamental rights by the EU even before the EU has become a party to the ECHR.

Over the years, a range of fundamental rights-related objections have been formulated about the way EU competition law is enforced. The co-mingling of investigatory, prosecutorial, adjudicatory and policymaking roles within the European Commission has been a particular bone of contention. But other complaints were derived from the ECHR's principles as well, for instance regarding the way the commission conducts dawn-raid inspections or publishes details of its investigations, about presumptions that are made about the liability of parent companies for the conduct of their subsidiaries, the deference shown by the European courts to decisions reached by the commission, etc. Although the EU courts recognised the importance of the ECHR's principles, these complaints were not perceived to have much of an impact on the EU's practice.

In the past the ECtHR had few occasions to pronounce itself directly on the implications of ECHR principles for competition law. In September 2011, a new step was taken with its judgment in *Menarini Diagnostics*.[2] In *Menarini*, the ECtHR was faced with a challenge of a fine of six million euros imposed by the Italian Competition Authority in 2003 on Menarini, for having fixed prices and allocated the market of certain diagnostic tests for diabetes. Menarini asserted that this fine had to be considered a criminal sanction within the meaning of Art. 6 ECHR. Furthermore, Menarini complained that the fine violated the fair trial principles of Art. 6 ECHR, given that the Authority combined the roles of investigator, prosecutor and adjudicator. Italian competition law being modelled on EU competition law, the outcome of this case promised to have important implications for EU competition law.

The *Menarini* judgment

In a 6-1 decision, the ECtHR rejected Menarini's complaint. Overruling Italy's objections, the Court agreed with Menarini that the Italian competition law fine, notably because of its severity, amounted to a criminal sanction within the meaning of Art. 6 ECHR. However, on the merits the majority sided with Italy. It found that an administrative authority could lawfully impose a criminal sanction within the meaning of Art. 6 ECHR, as long as this decision was subject to review by a court having "full jurisdiction" to examine that decision. The Court then looked at the review of the fining decision actually undertaken in two instances by Italian administrative courts, including the Italian Council of State. It found that these domestic courts, notably the Council, had gone beyond a "simple legality control," and had therefore exercised "full jurisdiction."

This conclusion met with a lengthy dissent by Judge Paulo Sérgio Pinto de Albuquerque. In his view, the Italian law pursuant to which the fine was imposed on Menarini did not allow the courts to substitute their own evaluation of the facts for that of the administrative authority. As illustrated by case law, the courts could only engage in a "weak" review of the Competition Authority's decision. Yet in order to meet the requirements of Art. 6 ECHR, Judge Pinto de Albuquerque posited that the review of the courts of a penal sanction would have to be "exhaustive," covering all legal and factual aspects of the case. In his view this is required by the separation of powers doctrine, as the power to punish has traditionally been reserved for the judge. Yet Judge Pinto de Albuquerque was able to end on a positive note. The Italian law that limited the judicial review of administrative decisions meanwhile had been amended in 2010. Under the new law, the Italian courts can fully review all administrative decisions that impose a financial sanction.

The ECtHR judgment was also accompanied by a brief but revealing concurring Opinion of Judge András Sajó. He indicated that he subscribed to the dissenting considerations of Judge Pinto de Albuquerque, and underlined that the only reason he had joined the majority was factual. In his view, the Italian law existing at the time the fine was imposed, as well as certain interpretations of Italian courts, did not encourage the courts to genuinely engage with the substance of administrative decisions. Within this context only a formal or "weak" judicial review seemed to be authorised. Nevertheless, with the majority he felt that the Italian Council of State in the present case, while using terminology suggesting a "weak" review, had actually conducted a sufficiently probing analysis of the Competition Authority's decision. For the purpose of Art. 6 ECHR, what counted was the actual review undertaken, rather than the terminology used.

A range of fundamental rights-related objections have been formulated about the way EU competition law is enforced

The implications of *Menarini*

The *Menarini* judgment is extremely interesting. It demonstrates the immediate relevance of fundamental rights to EU competition law enforcement. In this short note we will highlight its implications for the judicial review of competition law decisions taken in the EU. According to *Menarini*, the lawfulness of any competition law fines imposed by the European Commission under the fair trial principles of Art. 6 ECHR notably depends on the way these decisions are reviewed by the EU courts. Do these courts exercise "full jurisdiction" in their review?

It will be recalled that, pursuant to Regulation 1/2003, the EU courts have "unlimited jurisdiction" in respect of decisions to impose fines, and the courts can "cancel, reduce or increase" the fine originally imposed by the commission.[3] Yet this broad mandate may not cover the commission's underlying finding of an infringement.[4] In respect of EU measures generally, the EU courts exercise their regular "legality" review.[5]

This legality review can go far too, both in respect of legal interpretations, as well as (where the General Court is concerned) factual assessments. But it is well known that the EU courts traditionally grant the European Commission a margin of discretion in respect of "complex economic or technical assessments." In these instances, the EU courts limit their review to "checking whether the relevant rules on procedure and on stating reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers."[6] In competition law, quite a number of assessments by the commission that can be key to the finding of an infringement have been found to be "complex" by the EU courts. Examples include the definition of product markets and geographic markets,[7] the assessment of exchanges of price information,[8] the tests determining the existence of predatory prices,[9] and so on. In view of *Menarini*, it is questionable whether such marginal review by the EU courts amounts to a "full," effective review.

Now it is true that behind this classic formula of restraint, one finds examples of exceedingly close scrutiny by the General Court of commission decisions, including strong criticisms of the way for instance in which the commission has reasoned its definition of the relevant market.[10] It may therefore require only a few relatively small steps to bring the EU court's judicial review of commission decisions more into line with *Menarini*'s notion of "full jurisdiction" inherent in Art. 6 ECHR. Thus, the EU courts could abandon the "complex appraisals" formula and devise a new description of what they actually do.[11] The EU courts could also reduce the number of commission assessments which they consider "complex," and engage more openly with economic facts even though they may be technically difficult.[12] These are worthwhile suggestions, and would certainly lead to improvements.

It would seem that the Court of Justice, in its recent *KME* judgment of December 2011 has been listening, and is now striking a different note. The KME group had been fined almost 40 million euros for its participation in a copper tubes cartel, and its appeal before the General Court had failed. According to the Court of Justice, when carrying out a legality review "the courts cannot use the commission's margin of discretion ... as a basis for dispensing with the conduct of an in-depth review of the law and the facts." [13] Having said this, and having pointed as well to its "unlimited jurisdiction" to review the commission's fines, the court concluded that the EU courts provide effective judicial protection within the meaning of Art. 47 of the Charter. Significantly though, the court omitted any mention of the case law of the Strasbourg court on the corresponding Art. 6 ECHR, including the *Menarini* judgment of a few months before. It did add an interesting observation, echoing *Menarini*'s concurring opinion of Judge Sajó. Although the General Court had referred a number of times to the commission's discretion as being "wide" or "substantial," according to the Court of Justice this had not prevented the General Court from engaging in "the full and unrestricted review, in law and in fact, required of it." [14] KME's appeal was dismissed. The Court followed a similar approach

and reached the same conclusion in the *Chalkor* judgment of the same day (adding the puzzling reflection that it was not necessary to refer to Art. 6 ECHR, because Art. 6 ECHR was implemented in Art. 47 Charter).[15] In our view, it is unfortunate that the appearance of a less than full review by the General Court was not criticised by the Court of Justice. Justice must not only be done, but also be seen to be done. Furthermore, by not engaging with the case law of the ECtHR on Art. 6 ECHR, the Court of Justice left unresolved whether its interpretation of Art. 47 Charter affords the "same rights" to appellants as Art. 6 ECHR, even though this is expressly required by the Charter as we saw above.[16]

The tantalising question remains: is there *any* room left for the EU courts under the "full jurisdiction" standard to leave the commission a margin of appreciation in competition law decisions? Without fully rehearsing the history of the legality review of administrative decision-making, that courts should leave the administration some discretion rather than substituting their own ideas goes back to the concept of separation of powers. In the ordinary scheme of things it is acceptable that executive organs have some policy discretion, as much at least as they are granted by the legislature. But over time the role of the executive has been transformed and may no longer conform to the traditional role assigned to it in the *trias politica*. As Judge Pinto de Albuquerque pointed out in his dissent in *Menarini*, the imposition of sanctions is traditionally reserved for the judiciary. Different standards apply then, and these cannot be ignored when administrative agencies assume such a role. Interestingly, this seems to have been recognised in the recent amendment to Italy's administrative procedure act, to which the dissent drew attention.

From a fundamental rights perspective, it is difficult to accept that the commission enjoys discretion when deciding to impose penalties

Coming back to EU competition law, perhaps the proper solution is to distinguish commission decisions imposing fines, which fall within the criminal sphere protected by Art. 6 ECHR, from other decisions. Accordingly, when the EU courts review decisions imposing fines, no room would be left for any particular discretion in the commission's decision-making. Such a closer review should not raise a problem under the "unlimited jurisdiction" standard regarding fining decisions. In the event the substantive findings of an infringement could not be reviewed under this standard, we believe the EU courts probably have sufficient room to manoeuvre as well when engaged in a "legality review," although this does require them to take some liberties with the Treaty text.

Already the EU courts have been drawing self-imposed distinctions in the intensity of their legality review, to start with when they singled out the very "complex economic assessments" for a lighter review than other findings of the commission. The courts have also indicated instances where a closer review is warranted, for example in respect of the commission's prospective analyses in merger review.[17] In our opinion, therefore, the EU courts seem capable in a legality review of drawing a line between competition law cases where they will comprehensively review all commission findings (notably, in fining decisions); and cases where they grant the commission more or less discretion and review its findings with more or less intensity (such as merger control or state aid). Fining decisions must be deemed criminal cases from an ECHR perspective; other competition law decisions more resemble classic administrative law.

From a different fundamental rights perspective as well, it is difficult to accept that the commission enjoys discretion when deciding to impose criminal penalties. This is the legality principle *nullum crimen, nulla poena sine lege* embodied in Art. 7 ECHR. The exercise of discretion by definition is not predictable. If certain key aspects of a fining decision become too complex for judicial review, one is inclined to think that they must also be too complex for a company to have anticipated in defining its conduct.

Another intriguing question is whether the appeal to the EU courts of a commission fine should not suspend the obligation to pay the fine. If indeed the lawfulness under Art. 6 ECHR of a competition law fine depends on the "full" review by a court, does this not imply that an appeal to the court should have suspensive effect? If an administrative criminal sanction is enforced without being reviewed by a court, is this compatible with the presumption of innocence enshrined in Art. 6? These issues were already raised before the Strasbourg Court a few years ago but not resolved, as the commission fine had meanwhile been quashed by the General Court in Luxembourg.[18]

The Court of Justice is currently sitting on several competition law cases in which fundamental rights have been raised, and where it may begin to articulate the lessons of *Menarini*. But in considering the proper scope of judicial review in competition law cases, let's also keep our eyes on the EFTA Court. This Court has been trail-blazing in other areas of European law as well, such as food regulation and intellectual property. It is currently considering ECHR claims in an appeal brought by *Norgen Poste*, challenging a fine of almost 13 million euros imposed by the EFTA Surveillance Authority in an abuse-of-dominance case.[19]

Finally, one should keep in mind that the impact of *Menarini* stretches beyond the EU courts. When national courts review fining decisions of their national competition law authorities, they should make sure to exercise "full jurisdiction" as well. It goes beyond the scope of this brief note to sketch out the practice of the 27 national jurisdictions in the EU. By way of example, it could be mentioned that the review conducted by the Belgian courts appears rather cursory, as illustrated by the Supreme Court's *Honda* judgment of June 2011.[20]

Conclusion

This contribution discusses only one of the implications of *Menarini*: its impact on judicial review. *Menarini* affirms though that fundamental rights can have a broader impact on other aspects of EU competition law enforcement, including more substantive concepts. This is not only a matter for the European Commission and national authorities applying competition law, and the courts within the EU reviewing their decisions. It is also noteworthy that the ECtHR is becoming increasingly involved.

One example is the controversial presumption that parent companies are liable for the anticompetitive conduct of their 100 percent-owned subsidiaries, which we analyse elsewhere.[21] This parental-liability presumption is currently before the ECtHR in an appeal against a decision from the Dutch competition law authority, which followed EU precedent.[22] In another pending case before the ECtHR, a Finnish company complains that it was denied a fair trial, because the national instance lowered the burden of proof compared to criminal cases, prohibiting the defendant from cross-examining the witness who had denounced its market behaviour.[23]

In sum, to answer the question raised in the title, we certainly do not believe that competition law enforcement in the EU has received a blank cheque from *Menarini* to continue as before. From the outside it may seem that the dual edifice of an administrative authority supervised by independent courts can remain in place. But sooner or later, what happens within these walls is bound to change – for the better, we think. ■

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Footnotes

1 See Art. 52(3) Charter.

2 European Court of Human Rights, *A. Menarini Diagnostics S.R.L. c. Italie* (Requête no. 43509/08), judgment of 27 September 2011.

3 See Art. 31 Reg. 1/2003 jo. Art. 261 TFEU.

4 See the distinction drawn by AG Sharpston in her Opinion of 10 February 2011 in Case C-272/09 P, *KME*, at para. 70. *Contra* Forrester, *A Bush in Need if Pruning: the Luxuriant Growth of "Light Judicial Review"*, in European Competition Law Annual 2009 407, 447-450 (Ehlermann & Marquis eds., 2011).

5 See Art. 263 TFEU.

6 E.g., Case T-201/04, *Microsoft* [2007] ECR II-3601, para. 87.

7 Case T-446/05, *Amann & Söhne* [2010] ECR II-1255, para. 136.

8 Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Cement* [2004] ECR I-123, para. 279.

9 Case C-280/08 P, *Deutsche Telekom*, judgment of 14 October 2010, paras. 143-148; Case C-202/07 P, *France Télécom* [2009] ECR I-2369, para. 7.

10 E.g., Case T-427/08, *Confédération européenne des associations d'horlogers-réparateurs (CEAHR)*, judgment of 15 December 2010, paras. 113-121.

11 See Editorial Comments, *Towards a more judicial approach? EU antitrust fines under the scrutiny of fundamental rights*, 48 Common Market Law Review 1405, 1411 (2011).

12 See Judge Jaeger, *The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of the Marginal Review*, 2 Journal of European Competition Law & Practice 295 (2011); Judge Forwood, as reported in Rego, *Economics pleas should be presented early in antitrust appeals, EU judge says*, MLex, 1 November 2011.

13 Case C-272/09 P, *KME*, judgment of 8 December 2011, para. 102-103. The same wording on this plea appears in C-389/10 P, KME, judgment of 8 December 2011, para. 108 and following.

14 Id., at para. 109.

15 Case C-386/10 P, *Chalkor*, judgment of 8 December 2011, notably para. 50-51.

16 See Art. 52(3) Charter, discussed above in text at note 1.

17 Case C-12/03 P, *Tetra Laval*, [2005] ECR-I-987, para. 39; discussed in Judge Wahl, *Standard of Review – Comprehensive or Limited*, in European Competition Law Annual 2009 (supra note 3), at 285, 290-291. This formula, denoting intensified judicial review, was extended to cartel investigations in *KME, id.*, at para. 94.

18 European Court of Human Rights, *Senator Lines* (Application no. 56672/00), judgment of 10 March 2004. The European Commission imposed the fine in 1998, which was annulled by the General Court in 2003. See Joined Cases T-191/98 and T-212/98 to T-214/98, *Atlantic Container Line* [2003] ECR II-3275.

19 See Crofts, *Fundamental rights in focus as Posten Norge disputes dominance fine before EFTA court*, MLex, 5 October 2011.

20 *Cass. (1ère ch.)*, 3 June 2011, *Honda Motor Europe*, (C.09.0227.N), J.T. 758 (2011); critically annotated by Louis, *La séparation des pouvoirs comme justification d'une limitation* contra legem *du rôle de la Cour d'appel de Bruxelles dans le contentieux du contrôle des décisions du Conseil de la concurrence*, J.T.761 (2011); Derenne & Smeets, *The Belgium Supreme Court rules on the exact scope of the "full jurisdiction" of the Brussels Court of Appeal in competition cases* (Honda), 3 June 2011, e-Competitions, N° 40182, www.concurrences.com. See also Judge Ó Caoimh, *Standard of Proof, Burden of Proof, Standards of Review and Evaluation of Evidence in Antitrust and Merger Cases: Perspective of Court of Justice of the European Union*, in European Competition Law Annual 2009 (*supra* note 3), at 271, 283 (calling attention to the need for the Court of Justice to ensure an even application of the proper standard of review by national courts throughout the European Union).

21 See Bronckers & Vallery, *No Longer Presumed Guilty? – The Impact of Fundamental Rights on certain Dogmas of EU Competition Law*, 44 World Competition 535-570 (No. 4, 2011).

22 See Rego, *Human rights court to review parental-liability presumption*, MLex, 29 June 2011.

23 See Rego, *ECtHR questions Finnish government over 'hearsay evidence' in cartel trials*, MLex, 17 October 2011.