Fundamental Rights and Competition Law - a new beginning?

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I. Framework

- **Before the Lisbon Treaty**
  - Fundamental rights form an integral part of the general principles of law whose observance the Community judicature ensures (Case C-299/95 , § 14)
  - Article F (2) of the Treaty on European Union, "*the Union shall respect fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, as general principles of Community law*"
  - EU Courts drew inspiration from ECHR and ECtHR case law, when developing general principles of EU law
  - The ECHR has "*special significance in that respect*" (Case T-348/94, § 55; Case 222/84, § 18)
- **After the Lisbon Treaty**
  - The Lisbon Treaty (entered into force on 1.12.2009) confers binding legal force on the provisions of the Charter of Fundamental Rights of the European Union:
    - same legal status as the EU Treaties
    - the purpose is "*to strengthen the protection of fundamental rights…by making those rights* ***more visible*** *in a Charter*" (Preamble)
    - for their proper interpretation, it is necessary to know the source of each of these rights (Art. 52 Charter).
    - the meaning and scope of rights which correspond to those guaranteed by the ECHR are to be determined by reference to the [ECHR] and the case law of the ECtHR (Art. 52(3) Charter)

I. Framework (2)

- **Two-layered system of protection (art. 53 EU Charter)**
  - EU Charter applies to EU institutions and Member States implementing EU law
  - ECHR remains relevant for Member States acting within their areas of competence
- **Art. 6(2) TEU provides for the accession of the EU to the ECHR**
  - Anyone claiming that his or her rights under the ECHR have been violated by the European Commission, or by the EU Courts reviewing the Commission's decision, will be able to bring an application against the EU before the ECtHR after all remedies before the EU Courts have been exhausted
    - EU Courts would be subject to ECtHR (and bound by its case law). They may no longer be able to control the construction of human rights within the EU
    - Possible tensions: consistent with their origin and functions, ECtHR tends to guarantee a more extensive protection of individual rights, while the ECJ has traditionally been more mindful of institutional balance
  - The expected accession to the ECHR increases the importance of effective fundamental rights protection within the EU
- A broad rethinking of traditional antitrust enforcement at the EU an national level has ensued in light of the rights guaranteed by the ECHR and the Charter, among which principally (but not only):
  - Right to a fair trial by an independent and impartial tribunal (Art. 6(1) ECHR → Art. 47 (2) EU Charter)
  - Presumption of innocence (Art. 6(2) ECHR → Art. 48 EU Charter)
  - Right not to be tried or punished twice for the same criminal offence (Art. 4, Prot. No. 7 ECHR → Art. 50 EU Charter)

II. The *Menarini* judgment: end of judicial deference?

- **Main facts**
  - Decision by the Autorità garante della concorrenza e del mercato concerning a complex cartel between suppliers of blood-glucose tests for diabetes affecting numerous calls for bids by local health units and distribution to patients in the Italian market. Upheld by TAR Lazio/Consiglio di Stato on the basis of traditional review of legality. Italian Court of Cassation confirms that Italian administrative judges cannot go beyond that standard and encroach on the authority's margin of appreciation. Menarini appeals to the ECtHR
- **Competition law is of a criminal nature**
  - Based on the «Engel» test (qualification of the rule as criminal within its own legal order, nature of the rule, nature and severity of the sanction), competition law charges are criminal charges under Art. 6(1) ECHR
- **Two-tier antitrust enforcement system compatible with Art. 6(1) ECHR**
  - Art. 6 ECHR does not apply in "*full stringency*" to charges not falling into hard-core criminal law, such as competition law charges (*Jussila*). Therefore, the EU/Italian model is legitimate: an administrative body not fully impartial and independent can uphold competition law charges
  - However, the administrative decision must be subject to judicial review by a judge having full jurisdiction, i.e. « *pouvoir de réformer en tous points, en fait comme en droit, la décision entreprise, rendue par l'organe inférieur …se pencher sur toutes les questions de fait et de droit pertinentes pour le litige dont il se trouve saisi* » (Menarini, § 59)
  - A mere review of legality, which defers to the margin of appreciation of the administrative body, is not sufficient. But the ECtHR acknowledged that the Italian judges had actually exercised full jurisdiction in the case at hand, going beyond the legality standard of review provided by national rules

II. The *Menarini* judgment: end of judicial deference? (2)

- **Crisis of judicial deference**
  - Progressive demise of judicial deference in EU case law (already prior to *Menarini*)
    - Tetra Laval judgment (ECJ): "*the Commission has a margin of discretion with regard to economic matters*", but EU Courts must not "*refrain from reviewing the Commission's interpretation of information of an economic nature*"; they must ensure that evidence is "*factually accurate, reliable and consistent*", no relevant information is left out and conclusions are appropriate (§ 39). True for merger cases, true for infringement decisions
    - Modernisation of antitrust enforcement: direct effect of Art. 101(3)
    - Increasing role of private enforcement and stand-alone decisions by national judges: it would be unthinkable for a judge of full appeal on the merits to defer to a margin of appreciation by the judge of first instance
  - Review of legality over administrative decisions is no longer enough
    - KME, Chalkor, Otis judgments (ECJ): in carrying out the "*review of legality*", "*the Court 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*" (§ 121)
    - Posten Norge judgment (EFTA Court): "*the Court must be able to quash in all respects, on questions of fact and of law, the challenged decision*" (§100)

II. Standard of review following *Menarini*

- **Uncertainty**
  - *Menarini* creates instability by requiring a full jurisdictional review within the two-tier system
    - Review of legality is provided for by Treaty (Art. 263 TFEU) and national laws
    - Should judges always depart from a legality review in order to comply with *Menarini* requirements?
    - Do Art. 261 TFEU and Art. 31 of Regulation 1/2003 mean that EU Courts have «*unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment*", including on the finding of infringement? Loose language in KME, Chalkor and Otis seems to support this view
- **In Italy**
  - A number of hurdles stand in the way:
    - The exercise of full jurisdiction by administrative judges may be challenged as exceeding their powers of review
    - Absence of guarantees for confidential treatment of business secret in court creates a dilemma (companies might have to choose between disclosing exculpatory confidential information or failing to fully defend themselves)
    - Lack of full fact-finding powers: a more intense review of the facts of the case and more widespread assessment of new issues (not previously taken into account by the NCA) requires the judges to request information from the parties, obtain documents, address questions (not limited to legal issues). A different trial schedule may be needed
    - Lack of resources and reluctance to have recourse to specialized expertise
  - Specialized court? Amendments to procedural rules?

III. Binding effect of antitrust decisions and Article 6 ECHR

- **Right to a fair trial**
  - The right to a fair trial requires the judge to examine thoroughly and impartially all elements of facts
  - Some national laws (UK and Germany) prevent courts from deviating from the findings of a NCA decision
  - Italian case-law confers a privileged probative value to ICA's decisions
    - The nature of privileged evidence of the ICA decision prevents the defendant from arguing against the very same factors that the ICA relied upon to find a violation of antitrust rules (see judg. n. 13486/2011, para. 4.2). As a consequence, the defendant can rebut the presumption of a causal link by alleging and proving different and specific factors, which were *ex se* capable of causing the damage or contributed to its causation, but it cannot rely on factors already examined and dismissed by the ICA (see judg. n. 10211/2011, par. 5.3, and, more recently, no. 5327/2013)
  - Need to spell out guarantees against unwarranted probative value: (i) the antitrust decision needs to be final and limited to the same parties (*2008 White Paper*); and (ii) the probative value should normally be confined to the existence of the infringement ("*the existence of loss and of a direct causal link between the loss and the agreement or practice in question remains, by contrast, a matter to be assessed by the national court*" C-199/11 *Otis et aa*, § 65)
  - Does this comply with the *Menarini* principles? Or can a full jurisdiction review by appeal judges actually justify the binding value of final administrative decisions?

III. Binding effect of antitrust decisions and Article 6 ECHR (2)

- **No binding effect where limited (or no) judicial review in fact occurred**
  - Procedural rules or case law may dispense the courts with a thorough examination of each allegation contained in the antitrust decision
    - Courts are not requested to examine claims which, even if they were found to be correct, could not lead to the annulment of the decision (resistance test ; *e.g.*, Council of State, judg. no. 5276/2012)
    - In findings of an antitrust infringement, facts shall not be considered individually, but rather systematically, assessing their probative value upon the whole of the circumstances of facts. Consequently, the lack of proof with relation to a single episode of a complex and general conduct is not sufficient to determine the annulment of the decision (TAR Latium, judg. no. 2715/2004, and Council of State, judg. no. 1397/2006, *Menarini*)
  - Review courts might not be willing to go into secondary facts, even if they could be relevant in civil actions – appeal judges are not draft revisers
- **Rebuttable presumption allowed**
  - Margin of appreciation of civil courts should be unaffected when the finding is based upon incomplete evidence or inadequate investigation
  - A distinction should be made between facts that are "*directly relevant*" or "*peripheral or incidental*" to the infringement (ECWA, 2001, *Enron Coal Services*)

IV. *Ne bis in idem* principle

- **Legal basis**
  - Art. 50 Charter (and Art. 4 of the Protocol No. 7 to the ECHR)

    "*No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law*"
- **Different notion of "idem"**
  - **ECJ:**
    - Identity of the facts, unity of offender and unity of the legal interest protected (*Aalborg Portland A/*S). According to the ECJ, parallel proceedings within the European competition network are not contrary to the principle of *ne bis in idem* insofar as EU/national competition rules pursue "*different ends*" (*Walt Wilhelm*).
  - **ECtHR:**
    - Principle of *ne bis in idem* applies also when a company is punished for two offences, albeit nominally different, each of which comprises the "*content of the wrongdoing*" of the other in every respect, provided that they embody the same essential elements of each other (*Franz Fischer v. Austria*). In this respect, parallel proceedings within the European competition network might not be acceptable.

IV. *Ne bis in idem* principle (2)

- **Need for a convergence between the two approaches?**
  - **I. under Regulation No. 1/2003 the Commission and the NCAs are involved in the same task of protecting free competition in the internal market**
  - **II. after the Lisbon Treaty, the EU Charter of Fundamental Rights has the same status as the EU Treaties and Art. 52(3) requires consistent interpretation**

- **Same conduct approached by a number of authorities**
  - The principle of *ne bis in idem* might have an impact on traditional EU case law on the relationship between competition law and regulation, where the prevalence of competition law concerned conflicting decisions without the same origin, function and standing, *i.e.*, Commission decisions applying EU competition law vs. national decisions applying national laws
  - The issue might arise in industries where Commission and national authorities apply sets of laws having the same EU source and act in coordination with each other. In the gas sector, *e.g.*, there is an increasing amount of EU regulation (or national regulation developed on the basis of EU law) aimed at enhancing competition

V. Error of law and *nulla poena sine culpa*

- ***Nulla poena sine culpa***
  - Is a subjective element (*culpabilité*) needed to attribute liability for criminal offences?
    - Is this a corollary of the presumption of innocence?
- **Limited relevance of subjective element**
  - EU Courts generally qualify abuse of dominant position or cartel offence as objective conducts: intent is not required to find a violation
  - Pursuant to Reg. 1/2003, fines shall be imposed only for intentional or negligent infringements (Art. 22(3)). Absence of intent may also justify a fine reduction
- **Rule of law is not always clear or precise**
  - The terms of the violation "*must have been sufficiently foreseeable, at the time of the perpetration of the alleged misconduct, in the light of the wording of that provision, as interpreted by the case-law*" (Case T-99/04, *Treuhand*)
    - hard-core violations fall clearly into examples provided in by Art. 101 and 102 TFEU
    - case-law and soft-law measures progressively shape the constituive elements of illicit conducts
    - but there are novel or borderline cases

V. Error of law and *nulla poena sine culpa* (2)

- **Narrow scope for escaping antitrust liability**
  - Unavoidable error of law
    - "*Only where the error committed by the undertaking regarding the lawfulness of its market behaviour was unavoidable – sometimes also called an excusable error or an unobjectionable error – has the undertaking acted without fault and it cannot be held liable for the cartel offence in question*" AG Kokott, in case C-681/11, *Schenker*, § 45)
    - It occurs "*only very rarely*": only where the undertaking concerned took all possible and reasonable steps to avoid its alleged infringement of EU antitrust law (*id.*, § 46)
    - If the undertaking is simply negligent, a reduction may apply
    - Size of the firm may be relevant
  - Specific circumstances upon which expectation may be based
    - Legal advise (external and specialized lawyer; fact-specific and thoroughly assessed)
    - Prior decision by a NCA or national court
      - 'No-grounds for action' decision could create expectations that the undertaking can continue the market behaviour examined by that authority at least within its regional jurisdiction
  - Symbolic fines may be imposed when violation is new
    - "*the issues raised in relation to the application of EC competition rules are of such a specific nature as not to enable conclusions to be easily drawn from previous Commission decisions or case-law of the Court of Justice", "the CFO was not, at the time, aware that its sales arrangements in 1996 and 1997 were in breach of Community law*" (case IV/36.888 , *Football World Cup* § 123)

VI. Conclusions

- **A moving border between effective enforcement and fundamental rights**

- **New balance is required, thereby giving full effectiveness to the rights and principles enshrined in the Charge, which is now part of EU law**
  - Improving due process safeguards before administrative decision-makers
  - Encouraging a full review by appeal courts, effectively removing potential obstacles

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