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Galp Energía España: The General Court's failed attempt at enlarging its unlimited jurisdiction

Ivan Pico (Hogan Lovells) · Thursday, August 18th, 2016

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A recent judgment in the Spanish bitumen cartel, *Galp Energía España*,[1] has shed some light on the intensity of the EU Courts' legality review under Article 263 of the Treaty on the Functioning of the European Union ("**TFEU**") in competition cases, and on the scope of the EU Courts' unlimited jurisdiction with regard to reviewing the amount of the fine under Article 261 TFEU. This brings back the age-old debate on whether the system of EU public enforcement complies with the fundamental right to a fair trial and where, in particular, the EU Courts have been criticised for conducting a limited judicial review of Commission decisions imposing severe fines on undertakings for infringements of competition law.

Background: The fundamental right to a fair trial

Article 6(1) of the European Convention on Human Rights ("**ECHR**") guarantees the fundamental right to a fair trial. Article 47 of the Charter of Fundamental Rights ("**CFR**") implements in EU law the protection afforded by Article 6(1) ECHR. Everyone is entitled to the right to a fair trial, even undertakings that are being prosecuted for competition law infringements.

According to Article 23(5) of Regulation 1/2003, fines imposed for infringements of competition law are not of a criminal law nature. In *Menarini*,[2] however, the European Court of Human Rights ("**ECtHR**") confirmed that fines for infringements of competition law constitute criminal penalties in the sense of Article 6(1) ECHR. Therefore, under human rights law, undertakings that are fined for competition law infringements are entitled to a fair trial by an impartial and independent tribunal. Obviously, the Commission does not correspond to the criteria of an impartial and independent tribunal, but the case law of the ECtHR has accepted that decisions whereby criminal penalties are imposed by an administrative authority can be compatible with Article 6(1) ECHR, provided that those decisions can be appealed to a judicial body that has "full jurisdiction". This means that the judicial body must have the power to quash the decision of the administrative authority in all respects, on questions of fact and law.

Just a few months after the *Menarini* ruling, the European Court of Justice ("**ECJ**") was asked to rule on the compatibility of EU competition law enforcement with the right to a fair trial in *KME*[3] and *Chalkor*.[4] The Commission fined KME and Chalkor for taking part in the industrial/copper plumbing tubes cartel. Both undertakings appealed to the General Court ("**GC**") and subsequently to the ECJ, essentially arguing that their right to a fair trial had been compromised by the limited judicial review conducted by the GC.

The ECJ ruled that the review provided for by the Treaties involves the review by the EU Courts of both the law and the facts, and means that they have the power to assess the evidence, to annul the contested decision and to alter the amount of the fine. It concluded therefore that the legality review 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 1/2003 in accordance with Article 261 TFEU, is not contrary to the requirements of the principle of effective judicial protection in Article 47 CFR.[5] The compliance of the EU Courts' legality review in competition cases with the criterion of full jurisdiction was confirmed in subsequent cases such as *Otis*[6] and *Schindler*.[7]

The scope of the Court's full jurisdiction

In *Galp*, a judgment of 21 January 2016, the ECJ got a new opportunity to refine the concept of "full jurisdiction". In this case, Galp was fined for its participation in the Spanish bitumen cartel that consisted of a complex of agreements and concerted practices in the marketing of penetration bitumen in Spain. In its decision the Commission stated that Galp was involved in a single and continuous infringement ("**SCI**") consisting essentially of two groups of principal infringements, namely market sharing and price coordination. The Commission also identified other components of unlawful conduct pertaining to the SCI, such as the monitoring of the implementation of the market-sharing arrangements and the establishment of a compensation mechanism to correct deviations in these arrangements.

Galp appealed to the GC on the basis that the Commission failed to prove to the requisite legal standard that Galp was involved in the monitoring system or in the compensation mechanism established by the cartel. The GC agreed and stated that the Commission failed to adduce evidence proving that Galp had participated in the compensation and control mechanisms at issue. Nevertheless, the GC held that – on the basis of a statement that was not admitted by the Commission as evidence in the contested decision – Galp was aware of the other cartelists' participation in the compensation mechanism and could also reasonably foresee their participation in the monitoring system. Therefore, on the basis of its unlimited jurisdiction, the GC held Galp liable in respect of these two aspects of the infringement. The GC did not vary the starting amount of the fine, but decided to reduce the amount of the fine by an additional 4% in respect of mitigating circumstances, which was added to the 10% reduction already granted in the Commission decision for Galp's limited involvement in the infringement.

In light of these circumstances, Galp appealed to the ECJ on the basis that the GC exceeded its unlimited jurisdiction provided for under Article 31 of Regulation 1/2003 in accordance with Article 261 TFEU. The ECJ held that the GC was correct in ruling that the Commission decision

lacked the necessary evidence to prove Galp's direct participation in the compensation and monitoring systems, but that the GC erred in law by holding Galp liable for its awareness of the other cartelists' participation in the compensation mechanism and the foreseeability of their participation in the monitoring system. By doing so, the GC exceeded its unlimited jurisdiction, since the GC is only allowed to substitute its own assessment for that of the Commission in relation to the level of the fine, and not in relation to establishing the nature and the scope of the liability. The ECJ therefore decided to annul the additional reduction of 4% granted by the GC, and granted a reduction of 10% instead.

Limits to the Court's full jurisdiction

Under Article 263 TFEU the GC reviews the legality of all elements of the Commission decision and has the power to quash it in all respects, on questions of fact and law. This legality review may be supplemented by the GC's exercise of unlimited jurisdiction with regard to the level of the fine provided for under Article 31 of Regulation 1/2003 and Article 261 TFEU. This judicial review complies with the criteria of full jurisdiction as established by the ECtHR, but has certain limits.

Ne ultra petita

First, the Court is not allowed to rule *ultra petita*. The action for annulment does not allow the GC to review certain elements of Commission decisions of its own motion, with the exception of pleas involving matters of public policy which the Courts are required to raise *ex officio* (such as the failure to state reasons). This also applies to the exercise of unlimited jurisdiction with regard to the level of the fine, which has to be raised by the applicant. It is thus crucial for an applicant to raise all the pleas it wants to see addressed by the Court and to adduce evidence in their support, as the Court is only required to adjudicate on the pleas of illegality submitted by the applicant, and in fact is not allowed to rule on a matter that has not been asked. This can sometimes lead to situations where a Commission decision gets annulled in its entirety against one of the addressees, but not against the other because it did not submit the same pleas.

Substituting the Commission's findings with its own

Second, when reviewing legality, the GC cannot substitute an entirely new statement of reasons for the erroneous findings of the Commission. The only time when the GC can substitute its findings for those of the Commission is when determining the amount of the fine under its unlimited jurisdiction. In this circumstance, the GC is not restricted to choosing between letting the Commission decision stand or annulling it, be it in full or in part, but can actually modify the decision. This provides an additional amount of discretion to the GC. However, it is now clear that the GC's power to modify the decision does not extend to the finding of liability, however small the modification may be and even if it inevitably has repercussions on the amount of the fine.

What went wrong in *Galp* is that the GC substituted its assessment of liability for that of the Commission. In essence, the GC tried to save an insufficiently reasoned Commission decision from (partial) annulment by substituting the Commission's findings in relation to Galp's liability

for the infringement with its own. The Commission did not use certain evidence to establish Galp's liability for its participation in the monitoring and compensation mechanisms, upon which the GC assessed the evidence itself and reformulated the nature of Galp's liability from direct participation in the mechanisms at issue, to its awareness and the foreseeability of the other cartelists' participation in those mechanisms. What the GC should have done instead is, following the *Coppens*[8] case law, partially annul the Commission decision as regards Galp's participation in the two ancillary components of the infringement and reduce the amount of the fine accordingly under its unlimited jurisdiction. Galp would in any event have remained liable for the entire SCI, since the Commission decision established the SCI as essentially consisting of two principal infringements, namely market sharing and pricing coordination, which were sufficiently proven.

Conclusion

The GC's attempt in *Galp* to stretch the boundaries of its unlimited jurisdiction brings back interesting issues with regard to the GC's standard of judicial review. As EU law stands today, in competition cases the scope of judicial review provided for in Article 263 TFEU extends to all elements of Commission decisions, in law and in fact, in light of the pleas raised by the applicants and taking into account all the elements submitted by them, whether those elements pre-date or post-date the decision at issue, whether they were submitted previously in the context of the administrative procedure or, for the first time, in the context of the proceedings before the GC, and in so far as those elements are relevant to the review of the legality of the Commission decision. By contrast, the scope of the GC's unlimited jurisdiction is strictly limited, unlike the review of legality provided for in Article 263 TFEU, to determining the amount of the fine.

Although the current model of judicial review is compliant with the case law of the ECtHR, not allowing the GC to substitute its own assessment with that of the Commission is unfortunate from an efficiency perspective. In the UK, for instance, the Competition Appeal Tribunal ("**CAT**"), which reviews the decisions of the Competition and Markets Authority ("**CMA**") imposing fines for infringements of competition law, does have the power to substitute its assessment with that of the CMA. If the CAT finds that the CMA has insufficiently reasoned its decision, it can itself investigate the matter; and it can itself make the finding of an infringement and impose the fine, instead of having to (partially) annul the decision as is the case for the GC. This saves time and resources on the part of the competition authority, that does not have to re-adopt the decision (if it wishes), and on the part of the parties, who do not have to subsequently appeal that decision (if they wish to do so). The same holds true for Commission decisions where there are inconsistencies between the grounds and the operative part. These could be remedied by the GC at an early stage, which would speed up public enforcement and possible follow-on litigation. Allowing the GC to fill up the blanks in such deficient Commission decisions would be desirable from an efficient antitrust enforcement perspective.

In conclusion, the ruling in *Galp* confirms that the Court cannot reformulate infringement findings, however small the impact may be, but is confined to annulling the part of the decision with which it does not agree. A stark contrast thus remains between the Court's legality review under Article 263 TFEU and its unlimited jurisdiction under Article 261 TFEU. The Court's unlimited jurisdiction is indeed not "unlimited", as it is strictly confined to determining the amount of the fine.

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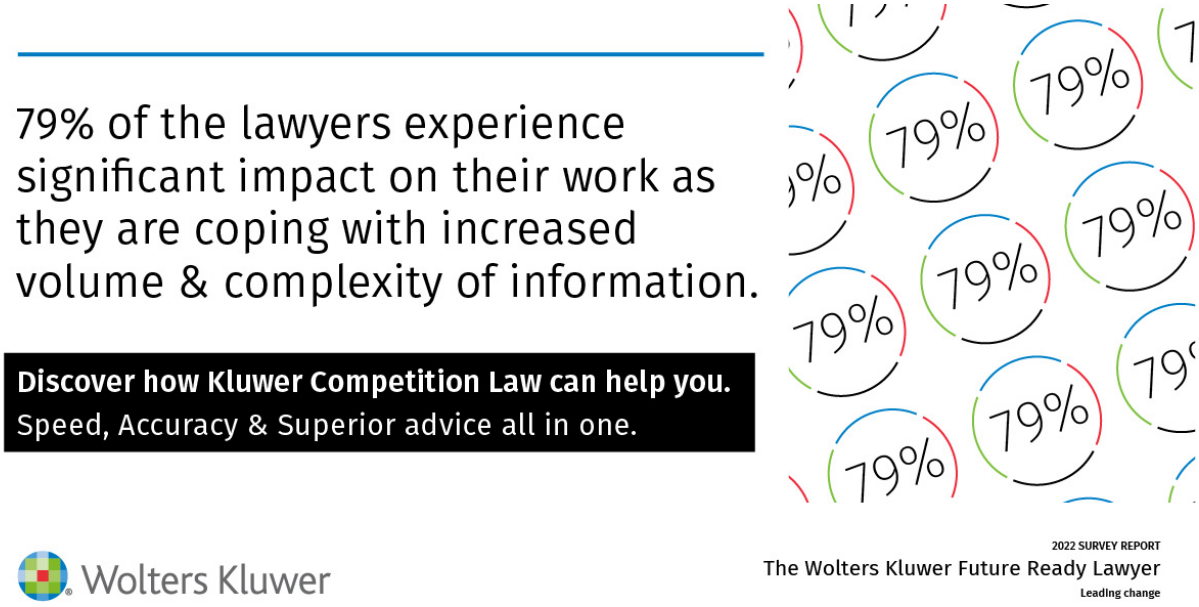

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This entry was posted on Thursday, August 18th, 2016 at 4:28 pm and is filed under European Union
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