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The harmless error rule and the French commitment procedure

Eric Barbier de la Serre (Jones Day) · Tuesday, July 6th, 2010

[Paris Court of appeals, 1 June 2010, Canal 9](#)

Merely one month before the ECJ delivered its very expected judgment in the Alrosa case, a ruling of the Paris Court of Appeals confirmed that the exercise of the rights of the defense in commitment procedures raises delicate issues also at the national level.

This ruling must be read in light of a key difference between the proceedings before the Commission and those before the French Authority: while before the Commission the complainant has limited access to the file, before the French Authority he gets the same right of access as the investigated parties. However, like for many other procedural rights, lack of access to the file does not automatically trigger the annulment of the decision. This is unequivocally confirmed by the reported judgment .

The case originates from a complaint that Canal 9, which operates a local radio called “Chante France”, lodged with the French Competition Authority. Canal 9 complained that Les Indépendants, an interest economic group (“GIE”) that markets advertising space of local or regional radio stations to national or international advertisers, refused access to radio Chante France.

During the investigation, the case officer transmitted to Les Indépendants a preliminary assessment of the case in which he expressed competition concerns on the statutory conditions for the membership to the GIE and on the way these conditions were implemented. In short, the case officer was concerned that the membership conditions were neither objective nor transparent and were lacking a clear definition. He also raised concerns on the existence of severe penalties in case a radio left the group.

To alleviate these concerns, Les Indépendants presented commitments, which the French Authority eventually accepted. In particular, Les Indépendants undertook to amend its statutes to clarify its membership conditions and admission procedure.

Canal 9 found these commitments insufficient and appealed the decision to the Paris Court of Appeals. Before the Court it argued that its procedural rights had been breached because it had not been communicated two reports respectively prepared by the French Ministry of the Economy and the French Conseil supérieur de l’audiovisuel (which is the French regulatory body in charge of

radio and television). The Paris Court of Appeals dismissed the application, but one year later the Cour de cassation – the French Supreme Court – quashed its judgment. The Cour de cassation held that the parties to the proceedings – including the complainant – must be given access to the totality of the documents on which the case officer and the Authority rely to respectively make a preliminary assessment and adopt the decision. However, this principle came with strings attached: for the decision to be annulled, it is necessary to establish that the lack of access has “concretely affected” the party’s “interest”.

On remand, the Paris Court of appeals had to determine the exact meaning of this quite unclear standard. The Court eventually opted for a strict test: the aggrieved party must establish that, in the absence of the irregularity, the commitments “would not have been adopted or would have had a different content”.

In spite of this welcome clarification, the test remains somewhat ambiguous: shouldn’t one understand that what matters is not whether the commitments would have been “adopted” in the absence of the irregularity, since only parties can adopt commitments, but whether they would have been “accepted” or “made binding” by the Authority?

Irrespective of this ambiguity, it seems quite obvious that the Court drew inspiration from the “harmless error rule” of EU law, according to which not all procedural irregularities may entail the annulment of a decision.

In proceedings that lead to a sanction, the content of the harmless error rule depends on whether the evidence to which access was refused was inculpatory or exculpatory. In the reported judgment, the Paris Court of Appeal opted for the rule that applies when an investigated party did not have access to inculpatory documents: a mere chance – or even the probability – that the decision may have been different is not sufficient; it is required that the decision “would have” been different (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 Portland and Others v Commission* [2004] ECR I-123, paragraph 73).

Accordingly, it seems that in the Court’s view an aggrieved complainant is worthy of less protection than an investigated party that did not have access to exculpatory documents, as in this case EU law merely requires the aggrieved party to prove that it “would have been able to use the exculpatory documents for its defence, in the sense that, if it had been able to rely on them during the administrative procedure, it would have been able to invoke evidence which was not consistent with the inferences made at that stage by the Commission and therefore could have had an influence, in any way at all, on the assessments made by the Commission in any decision” (*Ibid.*, paragraph 75).

Interestingly, in the *Alrosa* case, which concerned commitment proceedings and not decisions leading to a sanction, both the CFI and AG Kokott considered that it is sufficient not to be able to determine “the extent to which [...] an irregularity might have affected the Commission’s decision” (Case T-170/06, *Alrosa v Commission* [2007] ECR II-2601, paragraph 203; Opinion of AG Kokott in Case C 441/07 P, *Commission v Alrosa*, not yet published, paragraphs 157-164). But now that the ECJ has ruled that *Alrosa* did not benefit from the rights of the defense in the case at hand (Case C-441/07 P, *Commission v Alrosa*, not yet published), this finding has lost much of its precedential value.

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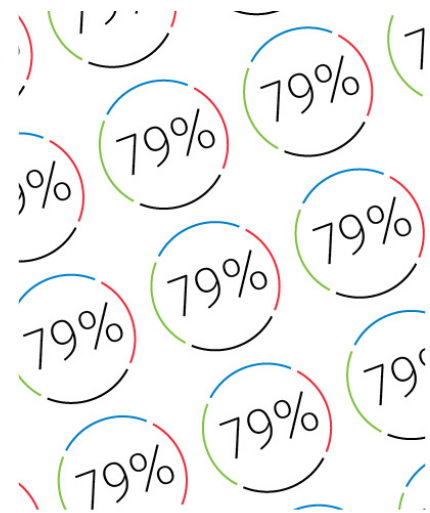
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