Kluwer Competition Law Blog

AG Sharpston's Opinion in KME: a new step toward full appellate jurisdiction in antitrust cases (imposing fines)?

Damien Gerard (College of Europe, Belgium) · Wednesday, February 16th, 2011

On February 10, Advocate General (AG) Sharpston issued her Opinion in the KME case (C-272/09 P – here), an appeal brought before the European Court of Justice (ECJ) against a judgment whereby the General Court (GC) dismissed the applicants' request for a reduction of the fine imposed by the EU Commission to sanction their participation in the copper industrial tubes cartel. Interestingly, the AG ventured a few considerations on the nature of EU antitrust decisions and on the due process requirements arising from Article 6 of the European Convention on Human Rights (ECHR) on the right to a fair trial.

As indicated in a previous post (see here), there is a hot debate ongoing in the EU over the compliance of the antitrust enforcement system ran by the Commission with the requirements of Article 6 ECHR and, as a corollary, over the appropriateness of the standards applied by the EU Courts for the judicial review of Commission antitrust decisions, in particular those imposing hefty fines. The debate is taking place at many levels and is fuelled, in particular, by the growing recognition of the criminal nature of EU antitrust decisions in spite of the wording of Article 23(5) of Regulation 1/2003, according to which "*Decisions* [imposing fines] *shall not be of a criminal law nature*".

Generally, the question of compliance with Article 6 ECHR can also be viewed as a label to capture a deeper systemic issue, that of the emergence of a gap between, on the one hand, the modernization of the EU antitrust enforcement framework and, on the other hand, the hybrid character of the EU Courts' jurisdiction. In a nutshell (for a more elaborate version of the argument, see here), the dramatic rise in the amount of fines combined with the increased reliance on negotiated procedures and the modernization of substantive principles, have modified profoundly the EU antitrust enforcement landscape over the past decade. Over the same period, the EU Courts have displayed a growing tendency to rely on a deferential review standard when scrutinizing Commission decisions, that of the so-called "manifest error of assessment". Combined with a contraction of the EU Courts' unlimited jurisdiction with respect to fines as a result of the recognition of the Fining Guidelines as a binding source of law, that evolution has contributed to create the perception of a decline in the intensity of judicial review, which is corroborated by certain quantitative and qualitative indicators. This is paradoxical, though, as the sustainability of the innovations brought by the modernization process appears conditioned, arguably, on expanding the jurisdiction of the EU Courts in reviewing appeals brought against infringement decisions, so as to carve out a space guaranteeing private parties the possibility of fair dialectic exchanges over the substance of cases, at arm's length with the Commission.

Discussing the merits of the applicants' plea according to which the GC had failed "*to carry out a thorough and close examination of its arguments at first instance*" (¶43), AG Sharpston develops a three-prong analysis with the view to assess, in her own words, whether "*the General Court failed to subject the decision at issue to the scrutiny required by the ECHR*" (and the EU Charter of Fundamental Rights for that matter – ¶60). First, the AG finds "*little difficulty in concluding that the procedure whereby a fine is imposed for breach of the prohibition on price-fixing and market sharing agreements in Article* [101(1) TFUE] *falls under the 'criminal head' of Article 6 ECHR as progressively defined by the European Court of Human Rights*" (¶64). That statement is quite notable as such, even though other AGs have voiced similar views in the past (remember acting AG Vesterdorf in *Polypropylene*).

Second, however, AG Sharpston gives credit to the (Commission's) view that antitrust enforcement "*differs from the hard core of criminal law*", so that "criminal-*head guarantees will not necessarily apply with their full stringency*" with the effect, in particular, of allowing antitrust penalties to be imposed "*by an administrative or non-judicial body which does not itself comply with the requirements of* [Article 6 ECHR], *provided that the decision of that body is subject to subsequent control by a judicial body that has* ***full jurisdiction*** *and does comply with those requirements*" (¶67, emphasis added). In other words, the AG takes the view that the administrative nature of the enforcement system currently in place in the EU is not problematic as such but that "[T]*he issue is whether the General Court exercised 'full jurisdiction' within the meaning of the case-law of the European Court of Human Rights*" (¶68). Sharpston appears thus to concur with the view that the heart of the debate over the compliance of the EU antitrust enforcement system with Article 6 ECHR lies with the scope of the jurisdiction exercised by the EU Courts over Commission decisions imposing fines. Hence, in her reading of the Human Rights Court case-law, full jurisdiction implies "*the power to quash* ***in all respects, on questions of fact and law****, the decision of the body below*" (¶69, emphasis added). This begs the immediate question of the appropriateness of the control of legality – and the limits thereof – exercised currently by the EU Courts over Commission antitrust decisions, pursuant to Article 263 TFUE.

Yet, in the present case, the AG does not enter into that debate because, in what constitutes the third stage of her analysis, she notes readily that "*we are concerned solely with an appeal against the amount of a fine*". In that respect, Article 261 TFUE confers upon the GC unlimited jurisdiction in a way that is consistent "*at least in theory*" with Article 6 ECHR insofar as it enables the court "*to cancel, reduce or increase the amount, with no restriction as to the type of grounds (of fact or law) on which it can be exercised*" (¶70). Picking on a point made apparently by the Commission itself, she did emphasize, though, that the concept of full jurisdiction as understood in the Article 6 ECHR case-law of the European Court of Human Rights differs from that envisioned in Article 261 TFUE because the former "*must be taken to cover also appeals against, for example, the actual finding of an infringement*" (idem). In other words, full jurisdiction according to Article 6 ECHR ought to mean "full appellate jurisdiction", which is not the type of control exercised currently by the EU Courts over Commission antitrust decision.

As noted, given the nature of pleas raised by the applicants, AG Sharpston did "*not propose to extent* [her] *analysis any further*" (¶70). Had she done so, she could have found that Article 31 of Regulation 1/2003 expressly endows the EU Courts with "*unlimited jurisdiction to review decisions whereby the Commission has fixed a fine*", which is akin to full appellate jurisdiction even though it is currently not interpreted as such by the EU Courts. This is so despite the fact that Article 31 of Regulation 1/2003 constitutes the main instance of implementation of Article 261 TFUE and that its predecessor – Article 17 of Regulation 17 – was drafted, as apparent from

contemporary doctrinal comments, with in mind the objective of ensuring full appellate jurisdiction over decisions imposing fines (the limitative wording of Art. 261 TFUE is also usefully informed by a comparison with former Art. 36 ECSC).

Overall, the Opinion of AG Sharpston constitutes a lucid statement to be added to a growing list of signals perceptible in recent judgments of a progressive move toward a broader interpretation of the EU Courts unlimited jurisdiction "with respect to fines", which could (and ought to) lead eventually to the exercise of full appellate jurisdiction over Commission decisions imposing fines. Even though the current interpretation of the boundaries of judicial review is relatively entrenched in the EU case law, the transformations brought by the modernization of the EU antitrust enforcement framework provide the EU Courts with a justifiable opportunity to depart from the classic articulation of its jurisdiction. By doing so, they could in effect rebalance the dynamics of the EU antitrust enforcement system and the incentives of the relevant actors, i.e., bridge the gap referred to hereinabove, and ensure at the same time compliance with the due process requirements of Article 6 ECHR. To be sure, in view of its sophisticated resources, the task of carrying out a full appellate review of Commission decisions is certainly within the expertise of the EU Courts, as it is already the case for the courts of many Member States.

This entry was posted on Wednesday, February 16th, 2011 at 12:13 am and is filed under Source: OECD“>Antitrust, Source: OECD“>Cartels, Source: OECD“>Competition, European Union
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.