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A lesson on judicial review from the other European Court in Luxembourg

Eric Barbier de la Serre (Jones Day) · Friday, April 27th, 2012

Legal change sometimes takes unpredictable paths: mid-April, something important happened for European law in Luxembourg, but this did not come from the European Court of Justice (the "ECJ").

Not every reader of this blog is necessarily aware that the ECJ has a sister European Court in Luxembourg, which is called the EFTA Court. This Court has jurisdiction with regard to the EFTA States that are parties to the EEA Agreement (at present Iceland, Liechtenstein and Norway). It delivers only a limited number of judgments every year, but they often are interesting reads. Since EEA law very much mirrors EU law, these judgments constitute a significant source of inspiration for EU law itself. In fact, the ECJ's Advocate Generals often refer to EFTA Court judgments in their opinions (See *e.g.*, the recent opinion of Advocate Mengozzi in Case C-49/11 *Content Services*, paragraph 39).

The *Posten Norge* judgment, which the EFTA Court delivered on 18 April 2012, has all it takes to become a very influential judgment, or at least to foster intense debate within the ECJ, for at least two reasons: firstly, it deals with a very important issue, *i.e.*, the scope of review performed on administrative decisions applying European competition law; secondly, it opts for a courageous outcome, since it assertively refuses to limit the review of complex economic assessments made by the EFTA Surveillance Authority (the counterpart of the European Commission) to a "manifest error" standard.

As most readers are aware, a major legal issue of these last few years has been whether the limited review that the EU Courts perform on the Commission's complex economic appreciations is compatible with the right to a fair trial enshrined in Article 6 ECHR (for previous posts of this blog on this issue, see here and here). Almost everybody now agrees that competition law qualifies as criminal law within the meaning of article 6 ECHR. This was confirmed by the European Court of Human Rights itself in its *Menarini* judgment of September 2011 (European Court of Human Rights, *Menarini Diagnostics v. Italy*, No 43509/08, paragraphs 38-42). However, in its *Jussila* judgment, the European Court of Human Rights found that the guarantees of criminal law do not in all cases apply with their full stringency (23 November 2006, *Jussila v. Finland*, No 73053/01, paragraph 43). The crux of the issue has therefore become whether competition law qualifies as hardcore criminal law, which triggers the full application of the guarantees of Article 6 ECHR, or whether it is soft criminal law, in which case those guarantees may be adapted. And if it is not hardcore, where does it lie on the spectrum, and what type of judicial review does it imply?

The *Menarini* judgment was not crystal clear on this last issue: while the European Court of Human Rights suggested that some limitations to the review of competition law decisions were acceptable, it nonetheless found it important that the court reviewing the matter was entitled to assess whether the administrative authority had "made an appropriate use of its powers", which literally implies the existence of powers going beyond a mere control of legality (see paragraphs 61 and 64). The ECJ judgments of December 2011 in *KME* and *Chalkor* also came as a relative disappointment on this point: on the one hand, the ECJ found it sufficient that the EU Courts review both the law and the facts, and have the power to assess evidence, to annul the contested decision and to alter the amount of a fine (Case C-389/10 P *KME Germany and Others* v *Commission*, paragraph 133). Yet, on the other hand, the Court held that the EU 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 of the facts (*Ibid*., paragraph 129). This may well be interpreted as an invitation to restrict limited review to the bare minimum, or even to leave it aside.

In its *Posten Norge* judgment, the EFTA Court did not shy away from directly confronting the issue. This resulted in a sophisticated, convincing analysis, which hopefully will encourage the rethinking of the judicial review of administrative decisions.

The case concerns an interesting decision of the EFTA Surveillance Authority sanctioning Norgen Poste for an abuse of a dominant position and imposing a fine of EUR 12.89 million. In its judgment the EFTA Court accepted that Article 6 ECHR does not in all cases apply with its full stringency and that the scope of the guarantees applied in a given case must be determined with regard to the weight of the criminal charge at issue (paragraph 89). Yet, in the case at hand, having regard to the nature and the severity of the charge at hand, the matter could "not be considered to concern a criminal charge of minor weight". In the Court's view, the amount of the charge in this case is "substantial" and, moreover, "the stigma attached to being held accountable for an abuse of a dominant position is not negligible". Thus, while the form of administrative review may influence, with regard to several aspects, the way in which the guarantees provided by the criminal head of Article 6 ECHR are applied, "this cannot detract from the necessity to respect these guarantees in substance" (paragraph 90, referring to Menarini Diagnostics v. Italy, paragraph 62). Criminal penalties of the kind at issue may be imposed by an administrative 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 in fact comply with those requirements (paragraph 91).

As far as complex economic appreciations are concerned, the Court held that it is precluded from annulling the contested decision "if there can be no legal objection to the assessment […], even if it is not the one which the Court would consider to be preferable" (paragraph 98). As under EU law, the Court must nonetheless establish whether the evidence relied on is factually accurate, reliable and consistent, but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from" (paragraph 99). This is in substance the standard already applied by the EU Courts (Case C-12/03 P *Commission* v *Tetra Laval* [2005] ECR I-987, paragraph 39).

More importantly, the EFTA Court ruled that "when imposing fines for infringement of the competition rules, [the EFTA Surveillance Authority] cannot be regarded to have any margin of discretion in the assessment of complex economic matters which goes beyond the leeway that necessarily flows from the limitations inherent in the system of legality review" (paragraph 100). Moreover, the Court recalled that in a criminal case, "the question whether the evidence is capable

of substantiating the conclusions drawn from it by the competition authority must be answered having regard to the presumption of innocence". As a consequence, although the Court may not replace the authority's assessment by its own and, accordingly, the legality of the assessment is not affected if the Court merely disagrees with the weighing of individual factors in a complex assessment of economic evidence, "the Court must nonetheless be convinced that the conclusions drawn by [the authority] are supported by the facts" (paragraph 101).

In other words, the Court itself must be convinced of the merits of the case, a requirement that sounds perfectly natural since, as noted by the ECJ in *Tetra Laval*, "the essential function of evidence […] is to establish convincingly the merits of an argument or […] of a decision" (Case C-12/03 P *Commission* v *Tetra Laval* [2005] ECR I-987, paragraph 41). The EFTA Court nonetheless comes to a blunt conclusion that the ECJ never expressed so clearly, as it concludes that "the submission that the Court may intervene only if it considers a complex economic assessment to be manifestly wrong must be rejected" (paragraph 102).

It is hoped that this judgment will significantly influence the EU Courts thinking on their judicial review of the Commission's decisions. While in certain cases they perform a thorough judicial review (think of *Tetra Laval* for instance), this has not been true in all cases. In addition, on average their review seems more stringent in merger cases, *i.e.*, purely administrative matters, than in quasi-criminal cases (including, like in the present case, when a decision finding an abuse of a dominant position is at stake). This asymmetry cannot be reconciled with the sliding scale of judicial review which, according to the European Court of Human Rights, is embodied in Article 6 ECHR. Furthermore, in certain cases the EU Courts' limited review has spilled over into certain factual issues that did not involve complex appreciations. For instance, in 2011 the General Court applied twice the standard of the manifest error of appreciation to the question of whether an undertaking had contested the facts on which the Commission based its allegations (Case T-33/05 *Cetarsa* v *Commission*, paragraph 271; Case T-37/05 *World Wide Tobacco España* v *Commission*, paragraph 197). Why did this factual finding require the kind of complex appreciation that normally justifies limited review? Hopefully the *Posten Norge* judgment will help drive the tumultuous river of limited review back into a much narrower channel.

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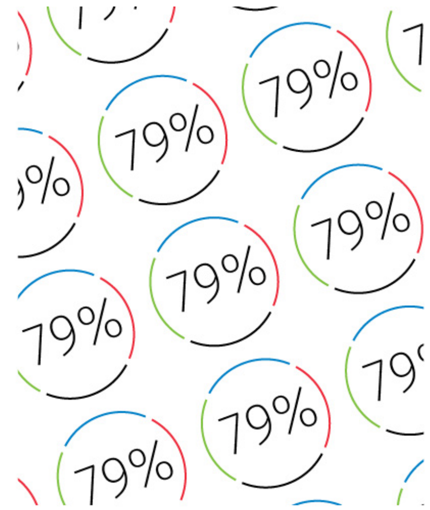

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