STRASBOURG – THE LUXEMBOURG DIMENSION

ARE THE LUXEMBOURG COURTS CONVENTION-COMPLIANT?

Sources of fundamental rights in EU law

1. Fundamental rights first recognised as "general principles of EU law" by the EU Courts: Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, para 4. Now Art 6 TEU:

   1. The Union recognises the rights, freedoms and principles set out in the Charter, which will have the same value as the Treaties;

   2. The Union shall accede to the ECHR.

   3. Fundamental rights, as guaranteed by the ECHR, and as they result from the constitutional traditions common to the Member States, shall be among the general principles.

2. The Charter:

   a. In sofar as it contains rights that correspond with the ECHR, their meaning and scope shall be the same: Art 52(2).

   b. The level of protection afforded by the Charter may "never be lower than that guaranteed by the ECHR": Art 52(3); see C-400/10 *JMcB*, para 53: can grant more extensive protection.

Giving effect to fundamental rights

3. The CJEU has been active on fundamental rights:

    a. C-60/00 *Carpenter* (Art 8 and rights of free movement);
    b. C-144/04 *Mangold* (general principle of non-discrimination on grounds of age)
    c. C-34/09 *Ruiz Zambrano*, AG Sharpston (scope of application);

4. It has started to give legal effect to the Charter, eg:

    a. Is the CJEU's interpretation of legislation precluded by the Charter: C-400/10 *JMcB*?

    b. Is secondary legislation contrary to the rights guaranteed by the Charter: C-92/09 *Volker* (Arts 7 and 8)?

    c. C-411/10 *NS*, 21 Dec 2011: Protocol No 30, Art 1(1):

> "The Charter does not extend the ability of the CJEU or domestic courts to find that domestic laws of the UK or Poland are inconsistent with the fundamental rights it affirms."

        i. Protocol does not call into question the applicability of the Charter in the UK;

        ii. Art 1(1) of Protocol 30 explains Art 51 of the Charter, with regard to its scope, and does not exempt Poland or the UK from the obligation to comply with the Charter or to prevent a domestic court from ensuring compliance.

    d. Art 51(2) of the Charter:

This Charter does not extend the field of application of EU law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

The standard of review: are the Luxembourg Courts Convention-compliant?

5. Article 263 TFEU (ex Art 230 EC):

> "The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and the European Council intended to produce legal effects *vis-à-vis* third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects *vis-à-vis* third parties.
>
> It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to its application, or misuse of powers.
>
> Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures."

6. The Courts afford the Commission a margin of discretion in matters of complex economic assessment. Case C-12/03 P *Tetra Laval* [2005] ECR I-987, para 39:

> "[w]hilst the Court recognises that the Commission has a margin of discretion with regard to economic matters, that does not mean that the [EU] Courts will refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must the Courts, inter alia, 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 it."

7. And see also Cases T-39/82 and T-40/92 *Cartes Bancaires* [1994] ECR II-2969, para 109:

> "Review undertaken by the Court of the complex economic appraisals made by the Commission… is necessarily limited to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or a misuse of powers"

Is this Article 6 compliant?

8. Art 6 ECHR:

   a. Administrative decision-making must be subject to control by a body with "full jurisdiction, including the power to quash in all respects, on questions of fact and law, the decision of the administrative body": *Albert and Le Compte* (1983) 5 EHRR 533, para 29.

   b. Regulatory penalties, such as competition law fines are "criminal" for the purposes of Art 6 ECHR: *Jussila v Finland*, 23 November 2006, para 43.

9. Does review by the Court of Justice suffice?

   a. Deference on complex issues.
   b. No full "merits" review. Very limited primary fact finding.
   c. Commission investigates and prosecutes.

10. See, eg, Ian Forrester QC, *A Challenge for Europe's Judges: the Review of Fines in Competition Cases* [2011] ELR 2.

The view of the EU Courts

11. The EU Courts have repeatedly rejected such arguments, eg: Case T-156/94 Aristrain [1999] ECR II-651, paras 105-110:

> "The requirement of effective judicial review of any decision of the Commission establishing and penalising an infringement of the Community competition rules… is a general principle of Community law… Review of the legality of a decision of the Commission… must be regarded as…effective judicial review. The pleas on which the person concerned may rely… are of such a kind as to enable the Court to assess the correctness both in law and in fact of any accusation made by the Commission."

12. Strasbourg has now considered a very similar system in a Member State.

13. *Menari v Italy*, 43509/078, 27 September 2011:

    a. M found guilty of price fixing and fined €5m.

    b. Administrative Tribunal rejected the challenge, noting its limited review powers:

        i. Can check whether the decision is logical, appropriate, rational, supported by a proper statement of reasons;

        ii. Cannot substitute its own evaluation of the substance.

14. ECtHR:

    a. Penalty was criminal Art 6, but the procedure applicable to administrative sanctions may differ from that required for crimes in the "strict sense".

b. "A judicial body with full jurisdiction is one which has the power to quash in all respects, on questions of fact and law, the contested decision adopted by the lower body. It must, inter alia, have jurisdiction to examine all questions of fact and law relevant to the issue before it."

c. Majority view: Italian review was adequate: the courts looked at M's allegations of fact and law; were able to verify if the administration made appropriate use of its powers, and to assess the appropriateness of the fine.

d. Dissenting judgment: Admin Tribunal could not substitute its own view of the facts.

15. Judicial consideration of *Menarini*: E-15/10 *Posten Norge*, 18 April 2012: EFTA Court:

a. €12M fine an abuse of dominance
b. Not a criminal charge of "minor weight".
c. Margin of appreciation in economic matters, but not "beyond the leeway that necessarily flows from the limitations inherent in the system of legality of review".

16. Where does this leave the European Courts?

17. Alexander Italianer, Director General, DG Comp (in OECD paper):

> "the [Italian] institutional set up was… very similar to the EU system. The Court deemed that in this case national courts were sufficiently equipped to review the sanctions, and in fact carried out a full review… <u>This is a welcome development which confirms the legitimacy of administrative systems… [and] corroborates the case law of the European Court of Justice</u> which has repeatedly found the EU system of competition enforcement to fulfil the requirements of Art.6 ECHR..."

Does this matter in practice?

18. Practice Directions are highly restrictive. GC:[1]

    a. 50 pages max for application and defence.[2]
    b. 25 pages for reply and rejoinder.
    c. Only those documents mentioned in the text "which are necessary to prove or illustrate its contents" may be submitted as annexes –not further argument.
    d. 15 minutes speech per party, 10 for an intervener.

19. On further appeal to the CJEU:

    a. "effective pleadings need not exceed 10 or 15 pages and replies, rejoinders and responses can be limited to 5 to 10 pages".[3]
    b. Maximum length 20, or 15 minutes, depending on chamber composition.[4]

20. Art 267 reference:

    a. Single round of pleadings.
    b. Oral submissions: 20 minute for each party (unless chamber of 3): 15 min for interveners.[5]

[1] Practice Direction to Parties before the General Court, 7.3.12, section A.4.

[2] Less in appeals from the Civil Service Tribunal and intellectual property cases.

[3] Practice Direction relating to direct actions and appeals, para 43.

[4] Para 51.

[5] Notes for the Guidance of Counsel.

A practical constraint?

21. Pending cases before the GC:[6]

a. 2007: 1154.
b. 2011: 1308.

22. Average duration of competition cases:

a. 2007: 42.6 mos.
b. 2011: 50.5 mos.

Is this delay Convention-compliant?

23. Eg: T-214/06 *ICI*, 5 June 2012:

a. Competition penalty of €91 m.
b. 8 years from the first request for information to judgment of the GC.
c. 5 years 9 months to reach an oral hearing.
d. 4 years 5 months from the close of written proceedings to the hearing.

24. GC held:

a. The right to determination within a reasonable time a general principle of EU law, reaffirmed by Art 47 of the Charter.

b. A breach of the principle of reasonable time could lead to a reduction in the fine.

[6] Annual Report, 2011.

c. No breach on the facts. Applicant had "not put forward any argument as regards the importance for it of this case" and the case did not require "particularly expeditious treatment".

25. Compare ECtHR: a temporary backlog of cases gives rise to no breach of Art 6, but a problem that is one of "structural organisation" may give rise to a breach; eg: *Zimmerman and Steiner v Switzerland* (1983) 6 EHRR 17, para 29 (Swiss Federal Court, 3 ½ yrs); *Guincho v Portugal* (1984) 7 EHRR 223, para 43.

The future?

26. Judge Bjorgvinsson, ECtHR (speaking extra-judicially):

> ECtHR: "would be very careful, not to take decisions which upset the dispute settlement procedures of the European Union" as these are a "matter of judicial policy... I'm not sure the Court will take a leading role in changing such policies."

27. Cf. *Bosphorous Airlines v Ireland* (45036/98), 30 June 2005; protection of fundamental rights by Community law "equivalent".

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9 OCTOBER 2012