Effective Judicial Protection through Adequate Judicial Scrutiny—Some Reflections

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The right to effective judicial protection is enshrined both in the European Convention of Human Rights (Article 13) and in the Charter of Fundamental Rights (Article 47)—now, with the entry into force of the Treaty of Lisbon, elevated to the status of primary law. This right is increasingly frequently invoked by individuals claiming individual rights under EU law. It is, however, no less a right for ‘undertakings’ (ordinary businesses) who fall foul of the competition rules and who find themselves on the receiving end of adverse decisions. Such decisions now often—one might say, usually—impose fines so substantial that they are likely to have a significant impact on the undertaking’s profitability if not indeed its future viability. I have suggested in my opinion in Case C-272/09 P KME that they are, moreover, a sanction that falls within the ‘soft’ part of criminal law for the purposes of Article 6 ECHR.

In KME the Court confirmed a number of important points. First, ‘the principle of effective judicial review is a general principle of European Union law to which expression is now given by Article 47c of the Charter’. Second, the margin of discretion enjoyed by the Commission in areas giving rise to complex economic assessments ‘does not mean that the Courts of the European Union must refrain from reviewing the Commission’s interpretation of information of an economic nature. Not only must those Courts establish, among other things, 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’. Third, the Commission is required to ‘carry out a thorough examination of the circumstances of the infringement’ before setting the fine. Fourth, ‘the Courts must carry out the review of legality incumbent upon them on the basis of the evidence adduced by the applicant in support of the pleas in law put forward. In carrying out such a review, the Courts cannot use the Commission’s margin of discretion—either as regards the choice of factors taken into account in the application of the criteria mentioned in the Guidelines or as regards the assessment of those factors—as a basis for dispensing with the conduct of an in-depth review of the law and of the facts’. Fifth, the EU Courts’ unlimited jurisdiction ‘empowers the Courts, in addition to carrying out a mere review of the lawfulness of the penalty, to substitute their own appraisal for the Commission’s and, consequently, to cancel, reduce, or increase the fine or penalty payment imposed’. These powers, taken together, add up to a review that ‘is not therefore contrary to the requirements of the principle of effective judicial protection in Article 47 of the Charter’. Possibly, that might be expressed more cogently as ‘such a review satisfies the obligation to guarantee effective judicial protection’.

So how can we ensure that such a review is, indeed, what happens?

Essentially, carrying out a review to that standard implies crawling over the file carefully and rigorously. That takes time and resources, particularly in a multilingual court where documents have to be translated from their source language into French, the working language of the EU courts, and where judges from different Member States will (of necessity) mainly be writing and deliberating in a language that is not their mother tongue. The workload of the General Court has increased and gone on increasing. At the formal hearing on 16 September, when five Members of the General Court left and five newcomers were welcomed, President Jaeger of the General Court spoke of ‘la surcharge de travail exceptionnelle’, whilst Judge Azizi (a veteran of the General Court, leaving after 18 years’ service) referred to ‘la charge de travail énorme et toujours croissante’. The detail of the scrutiny required, coupled with a not unnatural desire to make the ensuing product appeal-proof, have led the General Court to produce very long judgments. Unfortunately, these also sometimes take a very long time to emerge from the judicial machine. Recently, this has led undertakings appealing to the Court of Justice against judgments of the General Court to allege (in addition to their substantive grounds of appeal) that the General Court has failed to adjudicate upon their appeals within a...
reasonable time and to seek, on that free-standing ground of appeal, a reduction in the fines imposed upon them. Of these appeals, Case C-40/12 P Gascogne Sack Deutschland, Case C-50/12 P Kendrion and Case C-58/12 P Groupe Gascogne are currently pending before the Grand Chamber. Case C-35/12 P ASPLA and Case C-36/12 P Álvarez (arising out of the same cartel) and Case C-578/11 P Deltafina (involving a different infringement) have all been suspended until the Court of Justice delivers its judgment in the first group of cases.

What can be done to square the circle: to ensure that effective judicial review does not produce unreasonable delay and thus defeat the purpose of the exercise?

One possibility is to engage in wide-ranging reforms to the General Court’s procedures and case-handling techniques. In a previous editorial for this journal, Judge Marc van der Woude has explored what that might mean. I do not feel qualified to offer specific suggestions. All courts can probably improve their procedures. At the same time, there is usually a limit to what can be achieved by way of internal reform. The ‘need to reform’ should not be used as a stick with which to beat the General Court. Dealing with the problem with which it is confronted requires solutions that exceed what can reasonably be expected by way of internal reform.

Another possibility is to increase the available judicial manpower. (I leave aside, deliberately, the question of whether it is better to increase the number of judges serving in the General Court, or to create one or more specialist tribunals below the General Court, or indeed to have another ‘go’ at the judicial architecture of the EU courts, with a view to ensuring that—in conjunction with judicial review and enforcement of EU law by the national courts—an overall system of effective judicial review and protection under EU law is available to ‘le justiciable’.) I have already argued in my opinion in Case C-58/12 P Groupe Gascogne that the Member States have (as it seems to me) a constitutional responsibility to ensure that the European Union can discharge its responsibility to guarantee effective judicial protection by making available the necessary resources to the EU courts.

An equally important issue is ensuring stability and continuity amongst the serving membership of the EU courts (General Court and Court of Justice alike). The Member States have different traditions of how they nominate members to the EU courts and whether or not they maintain serving members. From the perspective of the courts (and of those accessing those courts), matters look rather different. If a serving member is replaced after a single mandate, the experience they have acquired is lost to the court in which they serve. Worse, if there is uncertainty as to whether or not they will be renewed, they will have (significantly before their current mandate ends) to withdraw from sitting in new hearings and to concentrate on finishing up existing dossiers in case they are not renewed. This is destabilising and inefficient (as well as very stressful, at a personal level, for the individuals concerned and the référendaires and assistants who are working with them and whose jobs are linked to the member’s mandate). Member States could make a significant contribution to the effectiveness of the existing judiciary by speeding up the renewals process, prioritising stability over ‘your turn next’ and taking fully into consideration the extra time needed to complete the (re)appointment process that arises from the fact that the Article 255 committee now vets all prospective nominees (and re-examines re-nominations) before the file is passed on to the Council for endorsement.

Finally, you the reader of this editorial—the advocate pleading competition cases before the EU courts, or the in-house adviser analysing the merits of challenging a Commission decision or lodging an appeal—can also make a major contribution towards ensuring that the courts function effectively and smoothly and can deliver effective judicial review. Please (I beg you) consolidate your arguments and only run with the points that have some real substance to them. Don’t put in an application with six grounds of appeal, each divided into several sub-points (you know, and I know, that not all are of equal merit!). Please plead succinctly and clearly (think of translation!) and please don’t throw in an additional 600 pages of annexes in case something there might help to swing the case your way. And, by the way: please don’t appeal a clearly hopeless case to the Court of Justice just to show the client that you’ve tried everything you can. We too are worried about our workload—particularly the part of that workload that consists of wholly unmeritorious or manifestly inadmissible appeals—and we are looking at ways to streamline how we deal with such cases. You have been warned.

Ensuring effective judicial protection against the background of increasing workload and financial constraints is a real challenge. It can be achieved; but everyone needs to play their part.

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