

EU Courts' Jurisdiction over and Review of Decisions Imposing Fines in EU Competition Law

by

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Abstract

The aim of this article is to analyse the extent of judicial review exercised by the EU courts over the European Commission's decision imposing fines in EU competition

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law. When considering appeals against fines in competition law, the position of the EU courts are limited to a review of imposed fines in respect of the European Commission's Guidelines instead of an exercise of a more comprehensive appellate review. The review should not only be a control of legality but it has to be an unlimited merits control. An appeal control should be directed to review fully the facts and to control proportionality of the imposed fines. The article analyses also the question of the protection of fundamental rights in the scope of the review over decisions imposing fines. For that purpose, the article provides also a comparative analysis of the selected judgments of the EU courts and the European Court of Human Rights.

Résumé

Le but de cet article est d'analyser l'étendue du contrôle juridictionnel exercé par les Cours de l'Union européenne sur les décisions de la Commission européenne imposant des amendes. En examinant les pourvois formés contre les décisions imposant des amendes les juges vérifient seulement si les amendes ont été infligées conformément aux lignes directrices de la Commission européenne au lieu d'effectuer un contrôle juridictionnel plus complet. Ledit contrôle ne peut pas être seulement un contrôle de légalité mais il faut que ce soit un contrôle de plein juridiction. De plus, l'article comporte une analyse du problème du contrôle des décisions imposant des amendes à la lumière de protection des droits fondamentaux. Dans ce but, l'article aussi comporte l'analyse comparative des jugements sélectionnés des cours de l'Union européenne et de la Cour Européenne des Droits de l'Homme.

Classifications and keywords: fines; antitrust proceedings; unlimited jurisdiction; appeals; principle of the proportionality; right to fair trial.

I. Introduction

The unlimited jurisdiction granted to European Courts¹ under Article 31 of the Regulation 1/2003² and Article 261 of the Treaty on the Functioning of the European Union (TFEU)³ allows them, in theory, to perform an exacting

¹ The European Courts, i.e: the Court of Justice (hereafter, the Court) and the General Court (hereafter, GC; until 30 October 2009 known as the Court of First Instance, hereafter, CFI).

² Council Regulation (EC) no. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ [2003] L 1/1; see Article 31 of Regulation 1/2003: 'The Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed'; previously this was Article 15 of Regulation 17.

³ See Article 261 TFEU: 'Regulations adopted jointly by the European Parliament and the Council, and by the Council, pursuant to the provisions of the Treaties, may give the Court of

review/assessment of the legality of the European Commission's decisions. Many authors have noted that in recent years the judicial review of the imposition of fines has changed⁴. In conducting reviews of fines imposed, the EU courts have become more focused on the competences ascribed to the European Commission (i.e. substantial margin of discretion/unrestricted rights, and absence of manifest/obvious error of assessment) than on review of the proportionality and accuracy of the fines. The former focus can be characterised as a **narrow or limited review** of imposed fines (granting wider discretion to the European Commission), while the latter would constitute a more **comprehensive appellate review**. In the latter approach the real character of the fines (for cartels and also abuses of dominant position⁵) imposed is reviewed, as compared to the former approach which concentrates on the absence of obvious error. This variance in standards of review requires an examination into, and clarification of, the extent of judicial review exercised by the EU courts over the discretionary/unrestricted rights held by the European Commission (hereafter, the Commission).

In our opinion the EU courts (especially the GC) do not sufficiently use their power of the full review of decision imposing fines for infringements of EU competition law. This article begins with a brief presentation of the issue of the intensity of the supervision exercised by the EU courts, relying on examples from past (i.e. pre-Guidelines era on control of Commission's decisions) and present judgments (i.e. the Commission's Guidelines and its consequences for jurisdiction of the EU Courts). It then goes on to explain the meaning of 'unlimited jurisdiction' under Article 261 TFEU and Article 31 of Regulation 1/2003 and practice of EU courts in exercising the relevant control. Next the practice of EU courts shall be also analysed from the perspective of a potential breach of fundamental rights [e.g. a right to an effective remedy and to a fair trial (Article 47 of the Charter of Fundamental Rights of the European Union, hereafter, CFR, and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, hereafter,

Justice of the European Union unlimited jurisdiction with regard to the penalties provided for in such regulations'.

⁴ I. Forrester, 'A challenge for Europe's judges: the review of fines in competition cases' (2011) 36(2) *European Law Review* 186; F. Castillo de la Torre, 'Evidence, Proof and Judicial Review in Cartel Case', [in:] C. D. Ehlermann, M. Marquis (eds.), *European Competition Law Annual 2009: Evaluation of Evidence and its Judicial Review in Competition Cases*, London 2011; W.P.J. Wils, 'The Increased Level of EU Antitrust Fines, Judicial Review and the European Convention on Human Rights' (2010) 33(1) *World Competition* 12; also I. Forrester, 'A Bush in Need of Pruning: the Luxuriant Growth of 'Light Judicial Review'', [in:] C. D. Ehlermann, M. Marquis (eds.), *European Competition Law Annual 2009...*'.

⁵ Regulation 1/2003 covers infringements of Article 101 and 102 TFEU.

ECHR) and the principle of proportionality in criminal offences and penalties]. The article concludes with a summary and some reflections for the future.

II. Judicial control under Article 263 TFEU (i.e. plea of ‘illegality’) and under 261 TFEU (i.e. plea for ‘unlimited jurisdiction’)

The EU Courts have jurisdiction in two respects over contestations of Commission decisions imposing fines on undertakings for infringement of the EU competition rules. First, it has the task of reviewing the legality of those decisions within the context of the jurisdiction granted under Article 263 TFEU⁶. The judicial scrutiny exercised under a plea of illegality is limited to four grounds of annulment, to wit: lack of competence, infringement of an essential procedural requirement, of the Treaty, or of any rule of law related to its application⁷, and misuse of powers. EU courts cannot substitute their own assessment for the economic appraisal contained in contested Commission decision⁸. The degree of control in the review exercised by the EU courts is limited to checking whether the Commission did not overstep the limits of its rights/discretion, and did not commit any error of law or of fact in the assessment of the evidence before it⁹. Review of issues of law by the EU courts entails the power to ‘interpret the law and then check whether the Commission has applied the correct legal principles’¹⁰ in the case before it. Oppositely, when the applicants seek to challenge the ‘complex economic assessments’ conducted by the EC, the extent of judicial control appears to be far less intense¹¹. Secondly, the GC has power to assess, in the context of the unlimited

⁶ A. Andreangeli, *EU Competition Enforcement and Human Rights*, Cheltenham 2008, pp. 164–168.

⁷ In these contexts, it must in particular review the Commission’s compliance with the duty to state reasons laid down in accordance with Article 296 of the Treaty, infringement of which renders a decision liable to annulment.

⁸ E.g. see 74/74 *CNTA SA*, ECR [1975] 533, paras. 8-17, and also recently T-155/04 *SELEX*, [2006] ECR 4797, para. 28.

⁹ A. Andreangeli, *EU Competition Enforcement...*, p. 165, and also C.S. Kerse, N. Khan, *EC Antitrust Procedure*, 5th ed. London 2004, pp. 467-468.

¹⁰ B. Vesterdorf, ‘The Court of Justice and Unlimited Jurisdiction: What does it mean in practice’ (2009) 2 *Global Competition Policy* 2-3, available at <https://www.competitionpolicyinternational.com/the-court-of-justice-and-unlimited-jurisdiction-what-does-it-mean-in-practice/>

¹¹ 42/84 *Remia*, ECR [1985] 2585, para. 26; also T-68, 77–78/89 *Società ItalianaVetro*, ECR [1992] II-1403, para. 320; and more recently T-168/01 *Glaxosmithkline*, ECR [2006] II-2969, para. 57: ‘the Court hearing an application for annulment of a decision applying Article 81(1) EC must undertake a comprehensive review of the examination carried out by the Commission

jurisdiction accorded to it by Article 261 TFEU and Article 31 of Regulation 1/2003 (previously Article 15 of Regulation 17), the appropriateness of the amount of fines imposed. By virtue of the Commission's duty, under Article 296 of the Treaty, to set out its reasons in its decision¹², that assessment may justify taking into account additional information which is not *senso stricto* required. The full jurisdiction regarding penalties requires that the EU courts must 'be able to not only control fully the objective legality of an act, but at least to review fully the facts upon which a decision is based'¹³. This unlimited judicial review/control over decisions fixing fines endows the courts, in consequence, with the power to 'cancel, reduce or increase' their amount.

III. Pre-Guidelines era on control of Commission's decisions imposing fines

It should be noted that the European Commission adopted its own set of Guidelines in 1998. The Guidelines cannot be regarded as limiting the Commission's discretion in imposing/fixing fines, but must rather be viewed as an instrument allowing undertakings access to more precise information on EU competition policy¹⁴. Originally, the Guidelines ensured the transparency and objectivity of the Commission's decisions on fines. The Guidelines constitute an instrument intended to define, while complying with higher-ranking law, the criteria which the Commission proposes to apply in the exercise of its discretion. As a consequence they constitute a self-limitation of the Commission's power¹⁵, insofar as the Commission must comply with a set of guidelines which it has itself laid down¹⁶.

unless that examination entails a complex economic assessment, in which case review by the Court is confined to ascertaining that there has been no misuse of powers, that the rules on procedure and the statement of reasons have been complied with, that the facts have been accurately stated, and that there has been no manifest error of assessment of those facts'.

¹² As regards review of the Commission's compliance with the duty to state reasons, the second subparagraph of Article 23(3) of Regulation 1/2003 provides that 'in fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement'.

¹³ D. Waelbroeck, D. Fosselard, 'Should the decision-making power in EC antitrust procedures be left to an independent judge? – the impact of the European Convention on Human Rights on EC Antitrust procedures'

(1994) 14 *Yearbook European Law* 111.

¹⁴ E.g. T-236/01, T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon and Others v Commission*, ECR [2004] II-1181, para. 157.

¹⁵ T-214/95 *Vlaams Gewest v Commission*, ECR [1998] II-717, para. 89.

¹⁶ T-380/94 *AIUFFASS and AKT v Commission*, ECR [1996] II-2169, para. 57.

The independent approaches of the control of Commission's decisions imposing fines were manifested in early judgments of the Court of Justice. In the *Quinine* case¹⁷, the Court underscored that:

- (i) the object of imposed fines was to suppress illegal activities and to prevent any reference, and such object could not be adequately attained if the imposition of a penalty were to be restricted to current infringements alone¹⁸;
- (ii) for the purpose of fixing the amount of the fine, the gravity of the infringement was to be appraised by taking into account, in particular, the nature of the restriction on competition, the number and size of the undertakings concerned, the respective proportions of the market controlled by them within the Community, and the situation of the market when the infringement had been committed¹⁹.

In the context of the *Quinine* case it should be noted that the Court, after having conducted its review of the factual circumstances which constituted the underlying reason for the Commission's decision on fines (i.e. duration of the infringement), held that a shorter (than that in the contested decision) period of infringement 'does not appreciably alter the gravity of the restrictions on competition arising from the agreement, it justifies only a slight reduction in the fine'²⁰.

In another case – *Pioneer*²¹ – the Court carried out a similarly wide review of the Commission's contested decision on fines. As regards its assessment of the size of the imposed fines, the Court declared that it was permissible, for the purpose of fixing the fine, to have regard to both (i) the total turnover, which gave an indication of the size of the undertaking and of its economic power; and (ii) the proportion of that turnover accounted for by the goods with respect to which the infringement had been committed, which gave an indication of the scale of the contravention²². The Court, in reviewing the compliance of the levied fines with the principle of proportionality, stated that it was important not to confer on one or on the other undertaking fines which are disproportionate in relation to the other factors, and that the imposition of an appropriate fine could not be the result or effect of a simple calculation based on the total turnover of a perpetrator²³.

The Court, reviewing the legality (and also proportionality) of imposed fines, by virtue of its powers of unlimited jurisdiction, also has to bear in

¹⁷ 41/69 *Quinine*, ECR [1970] 661.

¹⁸ 41/69 *Quinine*, paras. 173 and 174.

¹⁹ 41/69 *Quinine*, para. 176.

²⁰ 41/69 *Quinine*, para. 187 and also the opinion of AG Ganda in 41/69 *Quinine*.

²¹ In the literature, this judgment often is referred to as '*Musique Diffusion Francaise*'.

²² 100–103/80 *Pioneer*, ECR [1983] 1825, para. 121.

²³ 100–103/80 *Pioneer*, para. 121 *in fine*.

mind other factors which, as shown in an example below, it may point to in its assessment of the gravity of the infringements in the decision under review. The duration of an infringement (prohibited practice) enters into both the general assessment of the Court as well as within the framework of its unlimited jurisdiction.²⁴ If a period of infringement is shorter than indicated in a contested decision, that should consequently result in a reduction of the fine imposed²⁵. In the event that more than one undertaking is involved in the same infringement, for the purpose of determining the proportions between the fines to be fixed the period of infringement which should be taken into account must be ascertained in such a way that the basic turnovers will be as comparable as possible²⁶.

In such a context the *Dunlop Slazenger* case is worthy of brief mention. On the basis of the factual circumstances in this case the CFI considered that in the event a court, within the framework of its powers of unlimited jurisdiction, reduced a finding *vis-à-vis* the duration of an infringement, this did not necessarily have to translate into a reduction of the fine in proportion to the reduced period of infringement²⁷. The gravity and the cumulative nature of the infringements while they were being actually committed are however factors which might justify a limited reduction of fines.

In the next judgment, in the *Tetra Pak v Commission* case, the CFI expressed a view that 'in order to enable the undertakings concerned to assess whether the fine is of a proper amount (...) and the Court to exercise its power of review, the Commission is not bound (...) to break down the amount of the fine between the various aspects of the abuse. In particular, such a breakdown is impossible where, as here, all the infringements found are part of a coherent overall strategy and must accordingly be dealt with globally for the purposes both of applying Article 86 of the Treaty and of setting the fine'. In exercising its control over the amount of a fine imposed, it is sufficient for the reviewing CFI that the Commission specifies in its decision its criteria for setting the general level of the fine imposed on an undertaking. It is not required to state specifically how it took into account each factor included among the criteria which contributed to establishing the general level of the fine²⁸.

²⁴ 100-103/80 *Pioneer*, para. 124.

²⁵ 100-103/80 *Pioneer*, sentence in which the Court declared void a contested decision to the extent to which it found a longer period of concerted practices; see similarly the opinion of AG Slynn in 100-103/80 *Pioneer*.

²⁶ 100-103/80 *Pioneer*, para. 122.

²⁷ T-43/92 *Dunlop Slazenger*; ECR [1994] 441, para. 178.

²⁸ See, by analogy, in particular T-1/89 *Rhône-Poulenc v Commission*, ECR [1991] II-867, para. 166; T-2/89 *Petrofina v Commission*, ECR [1991] II-1087 and 41/69 *ACF Chemiefarma v Commission*, ECR [1970] 661 and 40-48, 50, 54-56, 11, 113 and 114/73 *SuikerUnie and Others v Commission*, ECR [1975] 1663.

To recapitulate, it can be seen that in the pre-Guidelines period the intensity level of judicial review and scrutiny of the legality and the amount of imposed fines may be described as the extensive model of the jurisdiction held by the EU courts. In the period following the adoption of the Guidelines, the standard model of review exercised by EU courts over fixed fines began to evolve in the direction of limited review, which comes down to a mere assessment whether the Commission did or did not commit an obvious/manifest error. Even though the judges are not legally bound by the Guidelines concerning fines, they usually merely verify compliance with them the decision imposing fines.

IV. Adoption the Guidelines by the European Commission – consequences for the jurisdiction of the EU Courts

After the European Commission adopted the Guidelines²⁹ in 1998, the position of the EU courts began to alter, evolving towards a more limited exercise of jurisdiction over decisions imposing fines. Although the Court has on occasion engaged in an extensive review of fines in cases brought after the adoption of the Guidelines (e.g. the T-236/01, T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon* and T-8/02 *Groupe Danone* cases), it nowadays often takes a more formal and limited approach with regard to the intensity of its assessment of imposed fines. In the early fine cases – during the pre-Guidelines period – the decisions usually contained a review of the strengths and weaknesses of the evidence and a prudent consideration of all pertinent factors, without exception examining the seriousness of an infringement (gravity and duration). In the cases decided by the Commission on the basis of application of the Guidelines, the judicial inquiry conducted on review addresses principally whether the Commission had the discretion (unrestricted right) to impose the fine, rather than whether the fine was appropriate (proportional).

On the one end of the scale one may note numerous judgments which do no more than accurately record that the fine imposed lies within the range of discretion attributable to the European Commission (as in the cases T-241/01 *Scandinavian Airlines*, T-15/02 *Vitamins*, or T-116/04 *Wieland-Werke*). At the other end of the scale, one may find judgments where the EC courts substitute their own assessment for the Commission's (for example T-38/02 and the appeal C-3/06 P *Groupe Danone v Commission* or, and T-217/06 *Arkema v*

²⁹ Commission Guidelines on the method of setting fines imposed pursuant to Article 15(2) Regulation 17, OJ [1998] C 9/3; these Guidelines were replaced in 2003 by new Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003, OJ [2006] C 210/2, now in effect (hereafter, the Guidelines).

Commission). To this effect, the case C-534/07 P *Wiliam Prym* needs to be mentioned. In that case the Court, referring to its earlier case-law, emphasized the view that the unlimited jurisdiction conferred on EU courts authorized them, by taking into account all of the factual circumstances, to vary the contested measure/decision, even without annulling it, so as to amend, for example, the amount of the fine³⁰.

First, the judgments of EU courts in which the courts carried on the line of the case-law directed at extensive review of a Commission decision was analysed. Although the Commission has discretion when determining the amount of fine, and is not required to apply a precise mathematical formula³¹, nonetheless the EC courts have unlimited jurisdiction within the meaning of Article 261 TFEU in actions contesting decisions whereby the Commission has fixed a fine, and accordingly may cancel, reduce or increase the fine imposed. In that context, in *Tokai Carbon* the Court stressed that its assessment of the appropriateness of the fine might, independently of any manifest errors made by the Commission in its own assessment, justify the production of and taking into account additional information which was not mentioned in the Commission's decision³².

According to the case-law (in most instances relying on judgments passed before the adoption of the Guidelines), the amount of a fine must at least be proportionate in relation to the factors taken into account in its assessment, such as the gravity and the duration of the infringement³³. Consequently, where the Commission divides the undertakings concerned into categories for the purpose of setting the amount of the fines, the thresholds for each of the categories thus identified must be coherent and objectively justified³⁴. In the *Groupe Danone* case the CFI stated that, as concerns setting the amount of the fine, it had unlimited jurisdiction and might in particular cancel or reduce the fine pursuant to Article 17 of Regulation 17³⁵. When exercising its unlimited jurisdiction, the EU courts must consider whether the amount of the fine imposed is proportionate to the gravity and duration of the infringement³⁶

³⁰ C-534/07 P *Wiliam Prym*, ECR [2009] I-07415, para. 86.

³¹ T-150/89 *Martinelli v Commission*, ECR [1995] II-1165, para. 59.

³² This same position was taken by Court of Justice in C-297/98 P *SCA Holding v Commission*, ECR [2000] I-10101, para. 55.

³³ T-202/98, T-204/98 and T-207/98 *Tate & Lyle and Others v Commission*, ECR [2001] II-2035, para. 106.

³⁴ T-213/00 *CMA CGM and Others v Commission*, ECR [2003] II-913, and T-23/99 *LR AF 1998 v Commission*, ECR [2002] II-1705, para. 298.

³⁵ T-38/02 *Groupe Danone*, ECR [2005] II-4407, para. 51; see also the earlier case-law, for example: T-83/91 *Tetra Pak Commission*, ECR [1994] II-755, para. 235, and to the same effect *Tokai Carbon*, para. 79.

³⁶ To that effect see, for example, T-229/94 *Deutsche Bahn v Commission*, ECR [1997] II-1689, paras. 125 and 127, and T-222/00 *Cheil Jedang v Commission*, ECR [2003] II-2473, para. 93.

and must weigh the seriousness of the infringement taking into account the circumstances invoked by the applicant³⁷. As the Court stressed in the appeal case *Groupe Danone* ‘**in setting the new amount of the fine, the Court of First Instance acted not within the framework of Article 263 TFEU, but in the exercise of its unlimited jurisdiction under Article 261 TFEU and Article 31 of the regulation no. 1/2003**’ [emphasis added]³⁸.

The EU courts are therefore empowered, in addition to carrying out a mere review of the lawfulness of the penalty, to substitute their own appraisal for that of the Commission and, consequently, to cancel, reduce or increase the fine or penalty payment imposed³⁹. It follows that the EU courts are empowered to exercise their unlimited jurisdiction where the question of the amount of the fine is before them, and that this jurisdiction may be exercised to reduce that amount as well as to increase it.⁴⁰ According to AG P. Maduro the Court, in describing the extent of jurisdiction of EU courts, expressed the opinion that ‘the distinguishing characteristic of the jurisdiction of the Community Courts under this provision [unlimited jurisdiction within the meaning of Article 261 TFEU – M.B.] is that it allows them not only to review the legality of the sanction, but also to vary the sanction, even in the absence of a material error of fact or law on the part of the Commission’⁴¹.

Finally, the more recent judgments of the EU courts, which refer to the limited extent of review currently exercised over measures fixing fines, need to be analysed. According to this line of the case-law, the review of a decision fixing fines is limited to an assessment of the range of discretion attributable to the Commission. There are many examples in the recent jurisprudence where the EU courts have limited their review to the legality of the fine imposed by the European Commission (e.g.: T-241/01 *Scandinavian Airlines System*; T-16/04 *Wieland-Werke*). The first case in which the CFI used this concept of reduced scrutiny was the judgment in *Scandinavian Airlines*. Examination of the seriousness of the infringement was limited to reviewing whether the Commission’s **assessment was not vitiated by an obvious error**⁴². Similarly in case T-116/04 *Wieland-Werke*, the CFI ruled that ‘where the Commission has a discretion, for example, as regards the amount of increase for the purposes of deterrence, review of the legality of those assessments is limited to determining

³⁷ To that effect see, for example, C-333/94 P *Tetra Pak v Commission*, ECR [1996] I-5951, para. 48: ‘the manifest nature and particular gravity of the restrictions on competition resulting from the abuses in question justified upholding the fine’.

³⁸ C-3/06 P *Groupe Danon*, ECR [2007] I-01331, para. 53.

³⁹ C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others v Commission*, ECR [2002] I-8375, para. 692.

⁴⁰ C-3/06 P *Groupe Danon*, paras. 61 and 62.

⁴¹ AG P. Maduro’s opinion in case C-3/06 P *Groupe Danon*, para. 45.

⁴² T-241/01 *Scandinavian Airlines*, ECR [2005] II-2917, para. 79.

the absence of manifest error of assessment. (...) Nor, in principle, does the discretion enjoyed by the Commission and the limits which it has imposed in that regard preclude the exercise by the Court of its unlimited jurisdiction⁴³. Bo Vesterdorf, commenting on this new approach, reflecting a lesser intensity of scrutiny, pointed out that 'the reality is that, almost without exception, the Court limits itself to performing a control of the legality of the fine or, rather, to verifying whether the Commission has applied the Guidelines for the calculation of fines correctly. In doing so, it will normally apply the manifest error test, as can be seen in the recent judgment in the Wieland-Werke case'⁴⁴By contrast in T-101/05 and T-111/05 *BASF and UCB*, the CFI employed a comprehensive concept of review of fixed fines. The EU courts are empowered to carry out a mere review of the lawfulness of the penalty, or to substitute its own appraisal for that of the Commission and, consequently, to cancel, reduce or increase the fine or penalty payment imposed where the question of the amount of the fine is before them. What is essential is that the Court underlined that, in such context, it had to be borne in mind that the Guidelines were without prejudice to the assessment of the fine by the Community judicature when it exercises its unlimited jurisdiction⁴⁵. On the basis of the facts in the case *BASF and UCB*, the CFI, exercising its unlimited jurisdiction, reduced the amount of the fine⁴⁶.

V. Unlimited jurisdiction: what does it mean?

Having regard to the issues surrounding the intensity of judicial control over the Commission's decisions, it seems reasonable to ask: what does the legal expression 'unlimited jurisdiction' mean? The term 'unlimited jurisdiction' does not in itself contain an explanation of its consequences. Does such a formulation of the EU court's jurisdiction suggest that it enjoys a wider scope

⁴³ T-116/04 *Wieland-Werke*, para. 33.

⁴⁴ Analogical position has been expressed by I. Forrester, 'Due Process in EC Competition Cases: A distinguished Institution with Flawed Procedures' (2009) 34(6) *European Law Review* 817; and see also Working Paper and a Report of the Global Competition Law Centre (GCLC) of the College of Europe: D. Slater, S. Tomas, D. Waelbroeck, 'Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?' (2008) 4 *Global Competition Law Centre Working Papers Series*, available at <http://www.coleurope.eu/content/gclc/documents/GCLC-WP-04-08.pdf>, also published in (2009) 5(1) *European Competition Journal* 97.

⁴⁵ T-49/02 to T-51/02 *Brasserie nationale and Others v Commission*, ECR [2005] II-3033, para. 169.

⁴⁶ T-101/05 and T-111/05 *BASF and UCB*, ECR [2007] II-04949, paras. 213–223.

of discretion than the Commission? Does it suggest that the EC courts have less scope to alter the amount of the fine, i.e. that there are areas where the Commission has discretion to which the reviewing EU courts must defer? Or does it mean that the EU courts may choose to defer?

Another issue which should be born in mind is the relation between the formula ‘unlimited jurisdiction’ and the *non ultra petita* rule. The *non ultra petita* rule has the effect of limiting a court’s jurisdiction to questions which have been formally raised by a party to the proceedings before the court. The question has arisen what implications the *non ultra petita* rule has in connection with the concept of unlimited jurisdiction within the meaning of Article 261 TFEU. The notion of unlimited jurisdiction concerns that very aspect – the demarcation between the powers of the judiciary and those of the administrative authorities. Article 261 TFEU and Article 31 of Regulation 1/2003 (previously Article 17 of Regulation 17) grant the EU courts the possibility to replace the assessment of the administrative authority with their own, and thus to decide in place of the Commission. This clearly creates a significant, i.e. extensive, exception to the normal jurisdiction of the EU courts, albeit in a limited area⁴⁷.

Accordingly, within this area, the *non ultra petita* rule, properly understood as a restriction on the exercise of judicial power, has only a limited role to play. Advocate General P. Maduro expressed the view that it merely implied that the EU courts must not exercise their unlimited jurisdiction without having been seized of the matter of the fine⁴⁸. Once the issue of the amount of the fine has been submitted for reassessment, the jurisdiction under the Article 261 TFEU is indeed unlimited, in the sense that it may be exercised both in order to reduce and in order to increase the fine. By implication, the GC may apply a different method of calculation when it reassesses the fine, even if that method is less favourable for the undertaking concerned. It should be underlined that the review carried out by the EU courts in respect of the Commission’s decisions on competition matters is more than a simple review of legality, which would permit only dismissal of an action for annulment or an annulment of the contested measure. The unlimited jurisdiction conferred on the GC by Article 31 of Regulation 1/2003, in accordance with Article 261 TFEU, authorises the court to change the contested measure, even without

⁴⁷ For the same view, see the opinion of AG V. van Themaat in 240/82 to 242/82, 261/82, 262/82, 268/82 and 269/82 *Stichting Sigaretten industrie v Commission*, [1985] ECR 3831, at 3851. One should also note that in 8/56 *ALMA* the Court of Justice stated: ‘Even in the absence of any formal submission, the Court is authorised to reduce the amount of an excessive fine since such a result would not have an effect *ultra petita*, but would on the contrary amount to a partial acceptance of the application’, ECR [1957 and 1958] 95, para 100.

⁴⁸ See AG P. Maduro’s opinion in C-3/06 P *Groupe Danone*, para. 46 and following.

annulling it, by taking into account all of the factual circumstances, so as to amend, for example, the amount of the fine⁴⁹.

First of all, a review of the legality with which the EU courts are vested means in practice application of the criteria used in an appraisal by the Commission to determine the gravity of an infringement of competition law for the purposes of calculating the fine, namely the criterion of the actual impact of the infringement on the market. In the exercise of its unlimited jurisdiction, the GC took into account the defects identified, and considered whether it had any effect on the amount of the fine and whether it was necessary, accordingly, to adjust the amount. In the course of that examination, the Court held that it was not appropriate to amend the starting amount of the fine set in the decision at issue. The bringing of an action does not entail the definitive transfer to the EU courts of the power to impose penalties. The Commission finally loses its power only if the court has actually exercised its unlimited jurisdiction. **In other words, where the EU courts simply annul a decision on the ground of illegality without themselves ruling on the substance of the infringement or on the penalty, the institution which adopted the annulled measure may re-open the procedure at the stage at which the illegality was found to have occurred, and exercise once again its power to impose penalties.** In consequence, the EU courts are not competent to substitute themselves for the Commission in re-opening an administrative procedure which has been entirely or partially annulled.

In contrast, in the case T-15/02 *Vitamins* the CFI expressed the view that was possible for the EU courts to exercise its unlimited jurisdiction under Article 261 TFEU and Article 31 of Regulation 1/2003 only where it had made a finding of illegality affecting the decision about which the undertaking concerned had complained in its action, and in order to remedy the consequences which that illegality had for determination of the amount of the fine imposed, by annulling or, if necessary, adjusting the fine⁵⁰. In that regard the review which the GC is required to exercise in respect of a Commission decision finding an infringement of competition rules and imposing fines is confined to a review of the legality of that decision, and only if it holds void some aspect of a contested decision may the GC exercise unlimited jurisdiction, which includes the possibility of amending or annulling the fine imposed.

In this context it is worth pointing out the principle enunciated by the Court that, in adjudicating in the context of an appeal from a decision of the GC, the Court is limited to verifying whether, by confirming the criteria employed by the Commission to fix the fines and checking or even correcting the way in

⁴⁹ C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others v Commission*, ECR [2002] I-8375, para. 692.

⁵⁰ T-15/02 *Vitamins*, ECR [2006] II-497, para. 582.

which they were applied, the GC committed a manifest error, and whether it respected the principles of proportionality and equal treatment which govern the imposition of fines⁵¹. In *Dansk Rørindustri* the Court ruled that it was not for it, ‘when ruling on questions of law in the context of an appeal, to substitute, on grounds of fairness, its own assessment for that of the Court of First Instance exercising its unlimited jurisdiction to rule on the amount of fines imposed on undertakings for infringements of Community law’⁵².

The jurisdiction exercised by the Court, which is limited to a manifest/obvious error committed by the GC, is understandable when the Court adjudicates in an appeal, but it should be rejected for being too formal and narrow when its reasoning is extended by analogy to the control exercised by the GC in the context of complaints brought in the first instance by undertakings against the Commission’s decisions. The crucial arguments in favour of rejecting such a standard are the requirements flowing from the principle of effective judicial protection and the role of fundamental rights in EU competition law.

It should be underlined that the position taken by EU courts, when they examine a Commission’s decision on fines, seems to be too restrained. The Commission’s broad margin of discretion in assessment of the facts is confirmed in relation to the many elements involved in the calculation of fines: duration, deterrence, recidivism, mitigating circumstances etc. According to the EU courts’ case-law, the nature of competition enforcement, which involves the necessity of making ‘complex economic assessments,’ justifies the exercise by the EU courts of a ‘limited’ review in its examination into the evidence reviewed and assessed by the Commission⁵³. One may ask whether the standard applied by EU courts to pleas raised under Article 263 of the TFEU, i.e. to review whether the ‘complex economic appraisals’ conducted by the Commission justify annulment of a decision, may be suited not only to the objective nature of the conditions laid down in Articles 101 and 102 TFEU, but also to the ‘criminal’ nature of antitrust proceedings, and whether the aforementioned standard might not also be applicable to the unlimited

⁵¹ Such a position was expressed by the Court of Justice in 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*, ECR [2004] I-123, para 365; and also by AG A. Tizzano’s conclusion in C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri*, ECR [2005] I-05425, para. 100.

⁵² C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri*, para. 245.

⁵³ T-65/98 *Van den Bergh v Commission*, ECR [2003] II-4653, para. 136, and T-17/93 *Matra Hachette SA v Commission*, ECR [1994] II-595, para. 104; C-194/99 P *Thyssen Stahl v Commission*, para. 73. See also D. Geradin, ‘The EU competition law fining system: a reassessment’ (2011) 052 *Tilburg Law and Economics Center (TILEC) Discussion Paper* available at <http://ssrn.com/abstract=1937582> or <http://dx.doi.org/10.2139/ssrn.1937582>, p. 43 and following.

jurisdiction accorded to EU courts by Article 261 TFEU and Article 31 of Regulation 1/2003. In our opinion, **using the standard of review elaborated for cases brought on ‘the plea of illegality’ under Article 263 TFEU, as a framework for determining the extent of the jurisdiction exercised by the EU Courts in their review of the legality of decisions imposing fines under Article 261 TFEU (unlimited jurisdiction), leads to unjustified confusion between the two separate grants of power to EU courts. *Ex definitione* the extent of jurisdiction of the EU courts under Article 261 TFEU (i.e. the plea of unlimited jurisdiction) is wider than the power of EU courts exercised solely under the plea of illegality from Article 263 TFEU, because Article 31 of Regulation 1/2003 (i.e. ‘the plea of unlimited review’) endows EU courts with full jurisdiction over ‘decisions whereby the Commission has fixed a fine or a periodic penalty payment’ and consequently with the power to ‘cancel, reduce or increase’ their amount⁵⁴.**

VI. Breach of fundamental rights – is there a threat?

The aforementioned practice of EU courts should be also analysed from the perspective of a potential breach of fundamental rights⁵⁵. In this section of our article, we examine the right to an effective remedy and to a fair trial (Article 47 CFR and Article 6 ECHR) and the principle of proportionality in criminal offences and penalties⁵⁶. Even at first glance it can be seen that these particular rights may be threatened by the aforementioned practices of the EU courts.

The right of undertakings to invoke fundamental rights⁵⁷ before the European Commission or the EU courts during competition law proceedings is not so obvious on its face, and thus requires a short discussion in this article.

⁵⁴ A. Andreangeli, *EU Competition Enforcement...*, pp. 162–164

⁵⁵ The terms ‘fundamental rights’ and ‘human rights’ shall be used alternatively.

⁵⁶ The right to obtain an effective remedy in a competent court has been recognized by the ECJ as a general principle of law. See, for instance, 222/84 *Johnston*, ECR [1986] 1651, para. 61.

⁵⁷ ‘Undertakings’ fined by the Commission for an infringement of competition rules are in most cases legal entities, which raises the question whether they can invoke the same rights and freedoms that are regarded as fundamental to individual human beings. Both, the European Court of Human Rights and the EU Court of Justice have acknowledged undertakings as entities entitled to invoke human/fundamental rights, regardless of whether the undertaking in question is a legal or natural person. The only difference lies in the character of the right invoked. Legal entities are not enabled to invoke rights which are strictly linked with the faculties of a natural person, i.e. human dignity, right to life, right to the integrity of the person, prohibition of slavery etc. See M. Emberland, *The Human Rights of Companies: Exploring the*

1. Fundamental rights in EU competition law proceedings – a brief overview

The adoption of the Treaty of Lisbon has signalled a clear intent to strengthen the protection of fundamental rights in the EU. The major change envisaged by this treaty *vis-à-vis* fundamental rights is encompassed in the change in the legal status of the CFR, which now has become a binding legal instrument of primary law, having the same legal status as the Treaties themselves⁵⁸. Another important change concerns the EU itself, which is obligated to accede to the ECHR⁵⁹. This new situation raises two issues which should be identified and briefly described in this short section of our article: (i) the problem of multiple sources of fundamental rights in competition law proceedings, and (ii) the question of the character of the competition law proceedings, which impacts on the right to invoke particular rights, as well as their applicability.

2. Multiple sources of fundamental rights in competition law proceedings

There are three main sources of fundamental rights that may be invoked by undertakings in competition enforcement proceedings before EU bodies – the general principles of EU law, the ECHR, and, since the taking effect of the Treaty of Lisbon, the CFR. Most often the parties invoke all three sources. Article 6(3) TEU provides that fundamental rights, as guaranteed in the ECHR and as they result from the constitutional traditions common to the Member States, shall constitute general principles of EU law. The content of these general principles is mostly supplied by the EU courts. The EU courts, when specifying the content of a general principle, which in this case means one of the fundamental rights, have referred to constitutional traditions common to the Member States, and (mainly) to the ECHR. It should be pointed out that the ECHR is no more than a point of reference and not yet a legally binding source of law of for the EU bodies⁶⁰. Until December 2009 the status of the CFR was even weaker than that of the ECHR. The ECJ did not refer to the CFR at all. It was mentioned only by the General Advocates and, rather seldom, by the GC⁶¹. Lately however a change in the ECJ's reasoning can be observed. In two recent

Structure of ECHR Protection, Oxford 2006, K. Kowalik-Bańczyk, *The issue of the protection of fundamental rights in EU competition proceedings*, z. 39, Centrum Europejskie Natolin, Warszawa 2010, pp. 90–95.

⁵⁸ Article 6(1) TEU.

⁵⁹ Article 6(2) TEU.

⁶⁰ See K. Kowalik-Bańczyk, *The issue of the protection...*, p. 118 and following, and the decisions cited therein.

⁶¹ K. Kowalik-Bańczyk, *The issue of the protection...*, p. 123.

cases, *KME*⁶² and *Chalkor*⁶³ the judges referred to the provisions of the CFR exclusively. The Court stated that: 'The principle of effective judicial protection is a general principle of European Union law to which expression is now given by Article 47 of the Charter . . . {which} . . . implements in European Union law the protection afforded by Article 6(1) ECHR. It is necessary, therefore, to refer only to Article 47'. So it can be seen that the CFR has gained significantly in importance, and that as a result the ECHR has been disadvantaged in a way. Unfortunately, this does not mean that it will be any easier for the parties to establish the precise scope of the right that they wish to invoke. The EU courts tend to vaguely describe the scope and the meaning of the principles they incorporate, in part because of the multiple sources that they themselves refer to⁶⁴. Even though the ECJ invoked the CFR in the aforementioned cases, this does make the scope and the meaning of the fundamental rights in question clear and precise. The EU courts nearly always refer to their earlier judgments, and, depending on the principle in question, they might have referred in such judgments to various sources. It should be stressed that a great step forward in the clarification of EU fundamental rights would occur if the EU courts explicitly recognised the jurisprudence of the European Court of Human Rights (hereafter, ECtHR), i.e. its decisions defining the meaning and the scope of a human right provided for in the ECHR⁶⁵. In our opinion this should be a consequence of Article 52(3)⁶⁶ CFR and the Recital 37 of Regulation 1/2003, which is also affirmed in the ECJ's jurisprudence⁶⁷.

3. The character of the competition law proceedings – the invocation and applicability of particular rights

Even if an undertaking establishes the scope of the fundamental right that it wishes to invoke, there remain issues surrounding the invocation and application of the right in competition law proceedings. The specific character of competition enforcement proceedings affects which right may be invoked,

⁶² See C-272/09 P *KME Germany AG, KME France SAS and KME Italy SpA v European Commission*, not yet reported.

⁶³ See C-386/10 P *Chalkor AE Epexergias Metallon v European Commission*, not yet reported.

⁶⁴ See K. Kowalik-Bańczyk, 'The issue of the protection...', p. 116.

⁶⁵ See I. Forrester, 'A challenge for Europe's judges...', p. 201.

⁶⁶ This is the only way to guarantee that 'the meaning and scope of those rights (...) be the same as those laid down by the [ECHR]'. See 'Explanation on Article 52 – Scope and interpretation of rights and principles', Explanations relating to the Charter of Fundamental Rights, OJ [2007] C 303/02.

⁶⁷ See W.P.J. Wils, 'The Increased Level of EU Antitrust Fines, Judicial Review, and the European Convention on Human Rights' (2010) 33(1) *World Competition* 9.

since some fundamental rights can be invoked by any entity in any official proceeding⁶⁸, others may be invoked only in relation to criminal proceedings⁶⁹, and some only to a certain extent in proceedings other than criminal⁷⁰. Formally the Commission is, in the context of competition law proceedings, an administrative body applying administrative law, and when it imposes fines by decisions, they are not invested with a criminal law nature *per se*⁷¹. Some authors⁷² argue however that, due to their severity and their increasing level, the antitrust fines imposed by the Commission are criminal in nature. This is also consistent with the *Engel* criteria⁷³, established by the ECtHR in the *Engel* case in 1976⁷⁴.

There are also some scholars who go further and argue that, due to the ‘criminal-like characteristics: criminal-like investigations; severe moral stigma; huge penalties; possible national imprisonment; and public disgrace (...) the application of the competition rules by the European Commission is a matter of hard core criminal law enforcement within the meaning of the ECHR’⁷⁵. Others assert that competition law proceedings fall outside the scope of hard core criminal law⁷⁶. While we do not take a position on this dispute, because it exceeds the scope of this article, it is worth noting that if it were agreed that competition proceedings fall within the scope of hard core criminal

⁶⁸ E.g. Article 47 CFR.

⁶⁹ E.g. Article 49(3) CFR, based on its wording.

⁷⁰ E.g. Article 6 ECHR, see W.P.J. Wils, ‘The Increased Level...’, 14

⁷¹ Article 23(5) of the Regulation 1/2003.

⁷² See for e.g. D. Slater, S. Thomas, D. Waelbroeck, ‘Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?’ (2009) 5(1) *European Competition Journal* 97–143; I. S. Forrester, ‘Due Process in EC Competition Cases...’, p. 817; and by the same author – ‘A challenge for Europe’s judges...’, pp.185–207; also F. Dethmers, H. Engelen, ‘Fines under Article 102 of the Treaty on the Functioning of the European Union’ (2011) 32(2) *European Competition Law Review* 86-99; D. Geradin, ‘The EU Competition Law Fining...’.

⁷³ See the ECtHR judgment of 8 June 1976 *Engel and Others v the Netherlands*, Series A no 22, Application no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72. The ECtHR said that in order to determine if Article 6 ECHR is applicable the following three *alternative* criteria had to be taken under consideration when assessing the criminal nature of an imposed penalty: (i) the domestic classification; (ii) the nature of the offence; (iii) the severity of the potential penalty which the person concerned risks incurring.

⁷⁴ W.P.J. Wils points out that the increasing level of antitrust fines has nothing to do with the fact that those fines are criminal in nature. He argues that the *Engel* criteria have been met for a long time now by the antitrust proceedings and it is obvious that the fines in question are criminal in nature, but they fall outside of the ‘hard core of criminal law’, which means that Article 6 ECHR may be invoked only to some extent. See W.P.J. Wils, ‘The Increased Level...’, p.13.

⁷⁵ See I. S. Forrester, ‘A challenge for...’, pp. 201–202.

⁷⁶ See W.P.J. Wils, ‘The Increased Level...’, p. 18 and following

proceedings, then by virtue of Article 6 ECHR it would be impossible for the Commission in its present shape to impose fines on undertakings, because it is an administrative body which combines administrative and decision-making functions, and not an independent and impartial tribunal. The ECtHR has never ruled on the compatibility of EU competition law enforcement procedures with Article 6 ECHR, but its decisions in national cases seem to confirm that competition law proceedings **are criminal in nature, but fall outside of the hard core of criminal law**⁷⁷, i.e., that an administrative body (non-judicial) which combines administrative and decision-making functions (like the Commission), can impose fines which are criminal in nature, provided that there is a possibility of appeal to a **judicial body with full jurisdiction**. 'Full jurisdiction' means, among other things, that the judicial body reviewing the decision has the power to change in all respects, on questions of both fact and law, the decision taken by the inferior body⁷⁸. Furthermore, it should be emphasized while that the EU courts have never agreed that these proceedings are criminal in nature, they have acknowledged that some rights which can be invoked in criminal proceedings also apply in competition law proceedings⁷⁹.

4. Meeting ECHR standards: the Court of Justice of the European Union – a judicial body with 'full jurisdiction'?

It can be seen that the EU competition law enforcement procedure formally meets the Article 6 ECHR standards. 'The Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed'⁸⁰. In other words, the EU courts have the possibility to change in all respects, on questions of fact and law, the decision taken by the Commission and they do not have to limit themselves to a simple control of its legality. The wording of Article 31 of Regulation 1/2003 is even mentioned by the Portuguese judge Pinto de Albuquerque in his dissenting opinion to the ECtHR's ruling in the *Menarini* case⁸¹ as an example of a 'strong' ('fort') model of judicial review, as opposed to a 'weak' ('faible') judicial control, in the latter of which **the court cannot, among other things,**

⁷⁷ Regarding national procedures, see ECtHR judgment of 27 September 2011 in the case *Menarini Diagnostics S.R.L. c. Italie*, Application No 43509/08 (only in French), para. 57 and following

⁷⁸ See *Menarini*, para. 59.

⁷⁹ See K. Kowalik-Bańczyk, *The issue of the protection...*, p.108 and following

⁸⁰ Article 31 of the Regulation 1/2003.

⁸¹ See *Menarini*, para. 8 of the Dissenting Opinion of judge P.S.Pinto de Albuquerque.

replace the technical evaluations made by the administrative body with its own findings.

Unfortunately, as has already been shown, the EU courts' practice does not comport with the strong model referred to by judge de Albuquerque above. In practice the EU courts perform only a limited/narrow, or, as judge de Albuquerque would put it, 'weak' judicial review of the Commission's decisions. In taking the position that the Commission has a large margin of discretion and adopting the practice of confirming the Commission's decisions in the absence of manifest error, the EU courts are only controlling legality within the meaning of Article 263 TFEU. Not only must the EU courts have the power of full jurisdiction, but in order to meet the standards of Article 6 ECHR they must use it⁸², i.e. they should review whether the Commission has used its competences appropriately, examine whether the Commission's sanctions are proportional and well-founded, and analyse its technical evaluations. Moreover they should perform a detailed analysis to assure that any fines imposed correspond to the pertinent parameters, including the proportionality of the imposed fine⁸³, and if necessary change (cancel, reduce, increase) the imposed fine **drawing on their own evaluations.**

Recently, a glimmer of hope has emerged for at least a slight change in the way that judicial review is being performed by the EU courts. The ECJ has lately been asked, in the *Chalkor* case⁸⁴, for its opinion on this practice as implemented by the GC. Naturally it refused to answer, because the role of an appeal court is not to examine the lower court's or even its own practice, but to decide on the correctness of a particular decision taken by the lower court. A similar problem occurred in the *KME* case⁸⁵, cited above. Nonetheless, the Court's judges had to review these two judgments of the GC, which can be viewed as representative examples of the aforementioned practice⁸⁶. In both cases the Court seemed not to discern the problem. In general its judges, having analysed the powers of the GC, declare that 'the review of legality provided for under Article 263 TFEU, supplemented by the unlimited jurisdiction in respect

⁸² See *Menarini*, para. 63.

⁸³ See *Menarini*, para. 64 and following

⁸⁴ C-386/10 P *Chalkor*, para. 34 and following. and para. 49. It is noteworthy that the person asking the ECJ for the opinion was none other than I. S. Forrester, who represented *Chalkor* in the case.

⁸⁵ See the opinion of AG E. Sharpston in the case C-272/09 P *KME Germany AG, KME France SAS and KME Italy SpA v European Commission*, not yet reported, para. 81.

⁸⁶ T-21/05 *Chalkor AE Epexergias Metallon v European Commission*, ECR [2010] II-01895, para. 58 and following. and the judgment of the GC of 6 May 2009 in case T-127/04 *KME Germany AG, KME France SAS and KME Italy SpA v Commission of the European Communities*, ECR [2009] II-01167, para. 31 and following

of the amount of the fine, provided for under Article 31 of Regulation 1/2003, is not therefore contrary to the requirements of the principle of effective judicial protection in Article 47 of the Charter⁸⁷. This may be seen as positive in that the Court underscores the power of the GC to review the Commission's decisions, even in areas giving rise to complex economic assessments⁸⁸. In addition, the Court examined whether the GC actually performed the full review, thoroughly analysing all the pleas of illegality submitted to it by the applicants⁸⁹. It found that the GC did fulfil its duties. It may be that in these cases the applicants' arguments were weak and the GC did actually perform a full review. However, in our opinion the problem raised was not directly addressed. AG Sharpston suggests in her opinion in the *KME* case that the problem with the review conducted by the GC lies in the language which it used, rather than in the degree of scrutiny it exercised⁹⁰. This view may be true in these two cases, but it can hardly be true in general. The GC should start by changing its language, because if it uses the manifest error standard and refers to the Commission's discretion there will always be voices claiming that it does not perform a full review. In other words, the GC cannot declare that it is not required to perform a full review, but then go ahead and do just that. Unfortunately, the Court was not severe enough *vis-à-vis* the GC. The ECJ did not comment on the manifest error standard applied by the GC, even though the applicants pointed it out. Thus the Court's decision contained no clear signal to change the existing practice. Hopefully, these two judgments will have the effect of causing the GC to reconsider its scrutiny of Commission decisions, but without a clear signal from the Courts the practice may well remain the same. It should be born in mind that the GC is the only court entitled to review the Commission's decisions based on findings of fact – the General Court's decisions are subject to a right of appeal to the Courts on points of law only⁹¹. This is a compelling reason for a thorough review in the first instance. The GC should not be reluctant to use the full review powers granted to it. This is especially important in the area of competition law, because of the criminal/quasi-criminal character of the fines imposed by the Commission, as well as the controversial issue that the administrative body imposing those fines combines the roles of both prosecutor and adjudicator.

⁸⁷ C-386/10 P *Chalkor*, para. 67.

⁸⁸ C-386/10 P *Chalkor*, para. 54.

⁸⁹ It should be pointed the ECJ underlines that 'the exercise of unlimited jurisdiction does not amount to a review of the Court's own motion, and that proceedings before the Courts of the European Union are *inter partes*'. So it is the job of the applicant to formulate its demands precisely. See C-386/10 P *Chalkor*, para. 64.

⁹⁰ See the opinion of AG in case C-272/09 P *KME*, para. 73.

⁹¹ See Article 256 TFEU.

5. Another criterion of control: the principle of proportionality between criminal offences and penalties

As one critic rightly points out⁹², another reason why the aforementioned practice would seem not to satisfy the standards of fundamental rights' protection is the lack of review of proportionality. As we can see in the *Chalkor* and *KME* cases cited above, the fact that competition law fines have a criminal character loses its significance when it comes to the application of Article 47 CFR, because this provision provides that **everyone** has the right to an effective remedy and to a fair trial **regardless of the character of the proceedings**. The situation was different on the basis of the Article 6 ECHR. However, the criminal character of competition law proceedings is important when it comes to applying those rights reserved for criminal proceedings, such as, among others, the principle of proportionality between criminal offences and penalties, as provided in Article 49(3) CFR, which declares that: 'The severity of penalties must not be disproportionate to the criminal offence'.

The review of proportionality is essential in competition law cases, especially now that the level of the fines has increased so dramatically⁹³. This is another reason why the GC cannot limit itself to a review of manifest error only. In the past there have been some cases in which the GC explicitly refused to review proportionality⁹⁴. Now that the CFR is legally binding, this state of affairs is unacceptable.

The calculation of the fine assessed must 'personalise' the fine in relation to the individual characteristics of undertakings and proportion the fine assessed on an undertaking in relation to the other undertakings involved in the illegal conduct. The principle of proportionality is applied not in absolute terms, but rather in relative terms. This means that the principle is designed to ensure that the penalty is personalised and proportionate to the gravity of the infringement and to the other circumstances, both subjective and objective, of each case. From that standpoint, the proportionality and non-discriminatory character of the fine cannot derive from a simple correlation with the overall turnover for the previous business year, but rather from the entire set of factors involved and referred to. As the Court itself has observed 'the gravity of infringements has to be determined by reference to numerous factors, such as the particular circumstances of the case, its context and the dissuasive effect

⁹² See I. S. Forrester, 'A challenge for...', pp. 206–207.

⁹³ See D. Geradin, 'The EU Competition Law Fining...', pp. 13–15; D. Slater, S. Thomas, D. Waelbroeck, *Competition law proceedings...*, pp. 128–129; F. Dethmers, H. Engelen, 'Fines under article 102...', pp. 86–93.

⁹⁴ See I. S. Forrester, 'A challenge for...', footnote 115 and the decision cited therein.

of fines; moreover, no binding or exhaustive list of the criteria which must be applied has been drawn up⁹⁵.

The relative/ambivalent aspect of the test of proportionality is especially observable in cases of collective infringements. Where an infringement has been committed by a number of undertakings, the requirement of proportionality means that, when the fine is fixed, it is necessary to examine the relative gravity of the participation of each undertaking. That same requirement is imposed by the principle of equal treatment which, according to settled case-law, is violated when similar situations are treated differently or different situations are treated in the same way, unless such treatment can be objectively justified⁹⁶. It thus follows that the fine must be equal for all undertakings which are in the same situation, and as well that differing conduct cannot be punished by the blanket application of a single penalty. Proportionality must be considered as one of the important factors to be taken under consideration by the EU courts when performing a full review which would meet all the standards of fundamental rights' protection.

VII. Final remarks

In our opinion there are no satisfactory arguments for imposing limitations on the review of the legality of Commission decisions by EU courts in competition enforcement proceedings, and only the exercise an unlimited jurisdiction can guarantee the principle of effective judicial protection. Full judicial review means that the Commission's decisions imposing fines should be assessed more precisely and in-depth, particularly with respect to proportionality and adequacy. The line of the case-law which has been developed after the adoption of the Guidelines by the Commission, i.e. the introduction of a limited standard of review, restricted to manifest error *vis-à-vis* the assessments made by the Commission in the course of deciding the competition law cases before it, cannot be considered adequate. In the context of its unlimited power to

⁹⁵ 'Among those numerous factors for appraisal of the infringement may be included the volume and the value of the products involved in the infringement, the size and economic strength of the undertakings which committed the infringement and the influence they are able to exercise on the market, the conduct of each undertaking, the role played by each in committing the infringement, the benefit which they have obtained from such anti-competitive practices, and the economic context of the infringement, and so forth' – a conclusion provided for by AG A. Tizzano in C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri*, ECR [2005] I-05425, especially para. 69 and the judgments cited therein.

⁹⁶ See, for example, 106/83 *Sermide*, ECR [1984] 4209, para. 28, and C-174/89 *Hoche*, ECR [1990] I-2681, para. 25.

review discretionary acts, the General Court should assess the seriousness of the infringement and the amount of the fine in accordance with the same criteria as used by the Commission. The General Court should not limit its power to exercise a comprehensive review of discretionary measures. Instead it ought to make frequent use of the proportionality principle and adequacy when it reviews challenges to decisions imposing fines.

When the EU courts simply annul a decision on the ground of illegality (i.e. based on a plea of illegality alleged pursuant to Article 263 TFEU), without ruling on the substance of the infringement or on the penalty, the institution which adopted the annulled measure should re-open the procedure at the stage at which the illegality was found to have occurred and re-exercise its power, including the power to impose penalties. By contrast, when an applicant challenges a decision imposing fines under a ‘plea of unlimited jurisdiction’ based on Article 261 TFEU in connection with the Article 31 of Regulation 1/2003, the extent of the jurisdiction exercised by the EU courts reviewing such decision should not be restricted to the criterion of manifest/obvious error in the assessment performed by the Commission. The different, and wider, character of the ‘the plea of unlimited jurisdiction’ contesting a Commission decision imposing a fine, exercised under Article 261 TFEU and Article 31 of Regulation 1/2003, in comparison with ‘the plea of illegality’ brought solely under Article 263 TFEU, justifies the application of a comprehensive ‘full jurisdiction’.

This full review is also indispensable from the point of view of protecting fundamental rights. Formally, the EU courts have all the tools necessary to perform a full review, so it is hardly comprehensible why they would limit themselves and perform only the limited/narrow review. In order to comply with the standards contained in Article 6 ECHR, the EU courts should ensure that the ‘strong’ model is applied without exception. A good starting point would be a change in the language used by the GC, so that applicants would know when and if this court really performed a full review. There is also a great need for continuity in the case-law. Furthermore, particularly since the CFR has become a binding instrument since the effective date of the Lisbon Treaty, the EU courts should put a much greater emphasis on review of the proportionality between the incriminated practice and the level of fine. The fines should be more ‘personalized’. On the other hand, applicants should bear in mind that it is their responsibility to raise issues and pleas under the law when appealing a decision, and it is their obligation to adduce evidence in support of their pleas. The judicial review exercised by the EU courts is limited to those claims duly raised and presented by the applicants.

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