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The principal function of the Community Courts, the Court of Justice ("ECJ") and the Court of First Instance ("CFI") is to ensure that in the interpretation and application of the Treaty (and secondary EC law) the law is observed (Article 220EC). The primary role of the Community Courts in this respect, including in the competition field, is judicial review of the legality of acts of the Community institutions (Article 230) which can result in a confirmation, or total or partial annulment of the challenged act in question. In this respect, the Courts therefore act as judicial review courts and not as courts of full appellate jurisdiction with the power to adopt decisions on the merits of the case themselves.

There is one area, however, where the Community Courts do enjoy full jurisdiction. Article 229EC provides that the Community Courts may, by Regulation, be given unlimited jurisdiction as regards sanctions decided under the Regulation in question. In the competition field, with regard to fines imposed by the Commission as sanctions for infringement of the competition rules, this has been done by Art. 31 of Regulation 1/2003.[2] According to Article 31 the unlimited jurisdiction empowers the Community Courts to annul, reduce, or increase the fine in question. It is important to note that under Article 31 it is not a condition for the exercise of those powers that the Court has found errors as to the substance or merits of the case nor as regards the way in which, or the level at which, the Commission has set the fine.

To what extent, then, is this unlimited jurisdiction exercised by the ECJ or the CFI in practice?

The answer is, formally speaking, that it is used every time the Court has to rule on a demand for annulment or reduction[3] of a fine. However, the reality is that, almost without exception, the Court limits itself to performing a control of the legality of the

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[2] The same was applicable under the old Regulation 17 which also granted the Community Courts unlimited jurisdiction with regard to fines imposed under it.

[3] The Court may also be asked by the Commission or an intervening party to increase the fine, even if that only happens very rarely.

fine or, rather, to verifying whether the Commission has applied the Guidelines for the calculation of fines[4] 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,[5] paragraph 32. Here the CFI stated 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 the absence of manifest error of assessment,"

referring to its earlier judgment in Scandinavian Airlines System.[6] In the following paragraph of the judgment (*Wieland-Werke*) the CFI, however, added:

> "Nor, in principle, does the discretion enjoyed by the Commission and the limits which it has imposed in that regard prejudge the exercise by the Community judicature of its unlimited jurisdiction."

It follows from this judgment that the CFI will limit itself to control of legality which will, in principle, not exclude the possibility of exercising unlimited jurisdiction. However, as appears from the following, the exercise of the unlimited jurisdiction is, in practice, the very rare exception.

This might, at least at first glance, seem somewhat at odds with Article 31, but follows in reality from the longstanding and firm case-law of the ECJ according to which—quite correctly—it is for the Commission to decide which competition policy it finds appropriate at any given moment and in the circumstances of the market situation. Competition policy clearly also covers fining policy:[7] Should a fine be imposed or not and, if yes, at which level in order to sanction appropriately the infringement in question and at the same time serve as an appropriate means of deterrence.[8] In addition, the ECJ has unequivocally stated that the Commission is entitled to adopt and publish guidelines indicating the way in which it intends to exercise its powers in certain areas, such as competition enforcement. When such guidelines are adopted and published, the Commission has an obligation to follow them unless the Commission clearly, in a

[4] OJ 2006 C 210/02

[5] Case T-116/04, judgment of 6 May 2009, not yet reported.

[6] Case T-241/01 [2005] ECR II-2917.

[7] *See* Case C-397/03 P, Archer Daniels Midland, [2006] ECR I-4429.

[8] This kind of consideration and decision is in most democratic countries precisely what is reserved for the courts when fines of a criminal character are to be imposed. The character of a fine is, under the case-law of the Court of Human Rights, decided not by declaration in a text of law but decided on an objective basis in considering the purpose and effect of the fine in question. If it is meant to punish and deter the individual in question and the public in general and if it has a defamatory character, it must be seen as equivalent to a fine of a criminal character, *see* judgment of 21 February 1984 of the Court of Human Rights in the *Özturk* case [series A, no. 73]. As I explained in my capacity as Advocate General in the Polypropylene cases, T-1/89 Rhone-Poulenc v. Commission, [1991] ECR II-867, I find that the fines imposed in competition cases are of a penal nature. *See also* Advocate General Leger in the Baustahlgewebe case, C-185/95P [1998] ECR I-8487, ¶31.

specific case, explains the objective reasons for which it has decided to deviate from the guidelines.[9]

The introduction of guidelines for the calculation of fines was undoubtedly the result of relatively harsh criticism of the former (in the late 1980s and very early 1990s) lack of transparency as regards the way in which the Commission calculated the fines during that period. This criticism found its way into the wording of the reasoning of the judges in a number of the first competition law judgments of the CFI at the very beginning of its existence.

The resulting guidelines represent, to a certain extent, considerable progress and make for much more transparency, predictability, and thus legal certainty. This was clearly needed and is to be lauded. However, the flipside of the coin is that it most certainly also has created a whole new and abundant area of litigation. Indeed, almost all (if not all) of the present cases introduced against Commission cartel decisions deal almost exclusively with the fines imposed. The more detailed the rules in the guidelines, the more there is to contest the correctness of.[10]

On the basis of this case-law of the ECJ and when presented with numerous pleas in law alleging that the Commission on this or that point has misapplied its guidelines, it is perhaps no wonder that the CFI will limit itself in practice to simply testing the pleas, which it indeed—as it is supposed to—does very closely. In a vast number of cases, the result of this form of exercise of its jurisdiction has been either full annulment or, in most cases, annulment of the fine as set by the Commission, replaced with a fine set by the CFI. However, in setting the new fine the CFI, in nearly all cases, simply applies the guidelines. In other words, instead of sending the case back to the Commission to allow it to recalculate the fine (which it would need to do if it lacked full jurisdiction), the CFI applies its unlimited jurisdiction and recalculates the fine on the basis of the corrected facts (e.g. duration) but it does so still in application of the guidelines rather than applying its own methodology.

As has quite often been the case, the Court may have found that the infringement in question had not been proven by the Commission to have lasted as long as postulated in the Commission decision. In such a case, the consequence will normally simply be that the fine is reduced to correspond to the period for which there was sufficient proof. If the Decision and the fine were based on an alleged infringement period of five years, but the CFI only found proof for four years, the fine will be reduced by one fifth. The

[9] *See* for instance judgment in Case C-189/02 P, Dansk Rørindustri and others [2005] ECR I-5425.

[10] The same applies to the rules of the leniency programme, even though this initiative of the Commission is also a very efficient tool in the enforcement of the competition rules. Besides the litigation directed at the way in which the leniency rules have been applied in the particular case, another possible side effect of these rules which deserves particular attention on the part of the Commission is the risk that the party seeking immunity may feel tempted to exaggerate the alleged evidence that it brings to the Commission to improve its chances of obtaining either full or part immunity.

same method is applied by the CFI if it only finds proof of collusion concerning price fixing but not, as alleged in the Decision, of any clear effect of the price fixing on market prices. If the Decision, basing itself not only on object but also on effect, had increased the fine using the alleged effect as an aggravating circumstance, the CFI can normally be expected to eliminate that increase in deciding the new fine. The same will be done if, for instance, the turnover for the product in question is found to be smaller than indicated in the Decision as an element for the calculation of the fine. A new fine will be calculated based on the smaller turnover.

This way of correcting the fines is a formal exercise of the unlimited jurisdiction but, in reality, simply adjusts the fine relative to errors found in the calculation or in the basis for the calculation made by the Commission. It does not imply any independent and specific appraisal of the seriousness or lack thereof of the conduct to be sanctioned. Neither the ECJ nor the CFI has been easily convinced of arguments based on fines alleged to be excessive because of the very high levels at which fines are now more and more often being set.

Indeed, only on a very few occasions has the CFI exercised its unlimited jurisdiction in the sense that it has gone beyond control of the (legality) conformity of the fine with the guidelines. This has, however, happened in a very limited number of cases.

One example is *Dunlop Slazenger*[11] in which case the CFI found that, in the light of the seriousness of the infringement as found to be proven, a reduction of the fine corresponding to the degree of lacking evidence was not appropriate. The CFI therefore maintained the fine at the level decided by the Decision. In *Atlantic Container Line*[12] the CFI annulled the fine which was imposed on the undertaking for infringement of Article 82EC because the same conduct was covered by Article 81EC and had been notified to the Commission under a group exemption regulation with ensuing immunity against fines. The CFI in particular found that the undertaking, because of the conduct of the Commission during the administrative procedure, had had good reasons to believe that the Commission would not sanction it for conduct covered by Article 82EC but was exempted under the regulation in question.

In doing so in these two cases the CFI genuinely exercised its unlimited jurisdiction, appreciating all the relevant particular circumstances of the case and arriving at another view of the seriousness of the case or the reasonableness of the reaction of the Commission. In another case, *Tokai Carbon*,[13] the CFI did exercise its unlimited jurisdiction in increasing by 5 percent the fine otherwise set by the Commission. It found that the Commission, because of the conduct of the undertakings

[11] Case T-43/92 [1994] ECR II-441.
[12] Case T-191/98 [2003] ECR II-3275
[13] Case T-236/01 [2004] ECR II-1181

during the administrative procedure, had been justified in not expecting the undertakings to deny before the Court the facts as found by the Decision with the result that the Commission had not found it necessary to defend itself before the Court against such denials. However, the final fine decided by the CFI was nevertheless reduced for other reasons pertaining to the evidence.

Most law enforcers, judges, and counsel for parties will know from experience that, even though a number of cartels concern the same kind of illegal behavior such as price fixing, market sharing, output reduction, or sharing of sensitive market information, no two cartels are identical.[14] They vary as to the more or less elaborate structure of the cartel, the function of the cartel, the degree of collusion, the degree of control of what has been agreed upon, the effects of the cartel, cheating among the participants, and so on. All of this means that it is not enough to just classify a cartel as "very serious" in an automatic manner simply because the infringement in question is considered a hard-core infringement concerning, for example, price fixing. However, it is extremely rare not to see a cartel sanctioned being described by the Commission as very serious with very high fines as a result and, in these cases, the Commission rarely finds any really mitigating circumstances.

Precisely because this happens in practice and because no two cartels are really identical and very much vary as to the serious or less serious character of the cartel, some being very elaborate but some being much less so and of a more haphazard character, it is important that the Court in every case—once it has performed its check of conformity or lack of such with the guidelines—steps back a little and takes an overall look at all the particular circumstances of the case. On that basis it should ask itself if this case is really as serious as claimed by the Commission, or is it less serious or perhaps even more serious; in asking this question the Court will really be exercising its unlimited jurisdiction.

The Court should, however, before performing such an appraisal of the circumstances make sure that during the oral pleadings before the Court, it has given the parties the possibility to comment on elements which the Court finds might lead to a less or more strict view of the seriousness of the case and thus the appropriateness of the fine, perhaps also in view of the overall economic situation of the undertaking and the almost devastating effect that an extremely high fine may have for the undertaking in a particular case. Even if Article 23(3) of Regulation 1/2003 only indicates that the elements to be taken into consideration in calculating the fine are gravity and duration, it follows

[14] Indeed, no two competition law infringements are identical. They inevitably vary as to the facts but in particular also as to the degree of effect or lack thereof. Intention or object may be the same but there may have been no effect at all or only to a limited extent. Even if effect is not an indispensable condition for finding infringement, it must be examined and considered in order to correctly appreciate the gravity of the infringement which, in turn, must be reflected in the setting of a possible fine; see e.g. Judgment in Case T-83/91, *Tetra Pak* v *Commission* [1994] ECR II-75, ¶ 240, and Judgment in Case T-44/00 *Mannesmannröhren-Werke AG* v *Commission* [2004] ECR II-2223, ¶ 229.

clearly from the case-law that the Commission, and therefore certainly also the Community Courts, must consider all relevant facts and circumstances of the case[15] which must include the overall general fairness of the sanction in view of all the individual circumstances of any particular case. The unlimited jurisdiction granted to the Community Courts under Article 31 of Regulation 1/2003 and Article 229EC permits them to perform precisely this type of assessment. In view of the ever increasing level of the fines imposed by the Commission, fines which now may amount to more than one billion Euros on a single undertaking and who knows how much more next time,[16] it is my humble submission that it is now so much more necessary that the Community Courts fully exercise their unlimited jurisdiction and not just verify if the Guidelines have been followed correctly by the Commission.

[15] *See* Joined Cases 100-103/80, *Musique Diffusion Francaise*, [1983] ECR 1825

[16] It is in this context perhaps useful to underline that fines under Regulation 1/2003 are exclusively meant to be appropriate sanctions proportionate to the character and gravity of the infringement committed and not as a means of confiscating the possible illegal revenue made by the infringement. The Regulation does not provide any legal basis for confiscation and—not that I believe the Commission would do so—use of fines as a means to confiscate would be tantamount to abuse of power.