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Some Reflections on the Unlimited Jurisdiction of the EU Courts to Review Penalties in Competition Cases

*Introduction*¹

Article 261 TFEU allows the Union Legislature to make regulations giving the Court of Justice² unlimited jurisdiction with regard to the penalties provided for therein. The Legislature has availed of this facility on a number of different occasions:³ the best known and most frequently discussed being that provided for by Article 31 of Regulation 1/2003. This confers unlimited jurisdiction on the EU Courts to review decisions whereby the Commission has fixed a fine or periodic penalty payment, thus permitting them to cancel, reduce or increase such penalties.⁴ The EU Courts may alter a fine imposed by the Commission: they do not substitute it for a new penalty. As a consequence, the judgment of the EU Courts on such a review has no legal consequences for the scope of any guarantee or arrangement the applicant may have

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¹ This contribution, submitted in a purely personal capacity, began life as an address to the inaugural Annual Conference on EU law organized by the Hungarian Academy of Sciences Institute of Legal Studies (Magyar Tudományos Akadémia Társadalomtudományi Kutatóközpont (MTA TK)) on the topic “Between the State and Competition in the Single Market” at the Council Chamber, Faculty of Law, Eötvös Loránd University, Budapest, on November 6, 2015. I wish to thank in particular Dr. Márton Varju, Senior Research Fellow, Center for Social Sciences, Hungarian Academy of Sciences and Dr. Tihamér Tóth, Associate Professor, Pázmány Péter Catholic University, Budapest for their invitation, warm welcome and invaluable assistance. I also wish to thank Mr. Olivier Speltdoom and Ms. Emma-Jean Hinchy, référendaires attached to my chambers, for their useful comments on the final draft of this paper. Any errors are entirely my responsibility.

² As EU institution: however the Court of Justice at present consists of three courts: the Court of Justice, the General Court and the Civil Service Tribunal. The General Court was known as the Court of First Instance prior to the entry into force of the Treaty of Lisbon. Henceforth I shall refer to the courts collectively as “EU Courts” and use the name of an individual court where necessary.

³ See the list in Arabadjiev, “Unlimited Jurisdiction: What Does it Mean today?” in Cardonnel, Rosas & Wahl, *“Constitutionalising the EU Judicial System”*, Hart Publishing 2012, p. 391.

⁴ And see Joined Cases 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 v Commission*, EU:C:2002:582, paragraph 692.

entered into with the Commission as regards the payment of such a fine, including the recovery of interest.⁵

The grant of an unlimited jurisdiction to review fines imposed by a decision leaves quite a number of issues to be decided by the EU Courts. Moreover the exercise of this jurisdiction obliges the EU Courts to assess matters well beyond the more familiar terrain of adjudicating on the legality of measures or interpreting provisions of EU law. It is therefore hardly surprising that the development of this jurisdiction has been somewhat uneven. In the course of this contribution in honour of my colleague and friend Judge Otto Czúcz I propose to examine three of these issues: the judicial character of unlimited jurisdiction and its consequences for litigants; the autonomous character of unlimited jurisdiction and its relationship to the action for annulment and the rationale upon which the EU Courts may have recourse to the Commission's Fining Guidelines⁶ in exercising unlimited jurisdiction.

The Judicial Character of Unlimited Jurisdiction

Almost all applications seeking to invoke exercise of the EU Courts' unlimited jurisdiction aim at the reduction or the cancellation of a fine or penalty imposed by the Commission. In *KME*⁷, the Commission counterclaimed for an increase in the fine that it had imposed on the ground that the applicant had, in the course of the court proceedings, put in issue certain facts that had been uncontested throughout the administrative procedure. The General Court dismissed the Commission's application as unfounded. It follows that the EU Courts may entertain an application to increase a fine in the exercise of their unlimited jurisdiction.⁸

The power to cancel, reduce or increase a fine (as distinct from adjudicating upon its validity) is an integral and necessary component of the "*full jurisdiction*" that must be vested in a judicial organ so as to permit the judicial review of a penalty imposed by an administrative body to satisfy the requirements of Article 6.1 of the European Convention on Human Rights. In *Menarini* the European Court of Human Rights had little difficulty in finding that the imposition of a €6M fine by the Italian Competition Authority was penal in nature, thereby attracting the application of the criminal limb of Article 6.1 of the European Convention of Human Rights.⁹ The requirements of that provision could be met by a procedure that gave an administrative authority the power to first impose a "*penalty*", provided that where the procedures before that authority did not meet all of the requirements of Article 6.1, the decision to impose that penalty could

⁵ Case T-275/94, *Groupeement des Cartes Bancaires "CB" v Commission*, EU:T:1995:141, paragraphs 57 to 60.

⁶ Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006/C 210/02) O.J. 2006 C 210, p.2, hereafter "Fining Guidelines".

⁷ Case T-127/04, *KME Germany AG, KME France SAS and KME Italy SpA v Commission*, EU:T:2009:142, paragraphs 25, 30, 37 and 52–53.

⁸ Case C-301/04 P, *Commission v SGL Carbon AG*, EU:C:2006:432, paragraphs 66 - 70 is an example of a successful application by the Commission.

⁹ Appn. No. 43509/08, *A. Menarini Diagnostics S.R.L. v Italy* ECHR:2011:0927JUD004350908, paragraphs 38–44.

be challenged before a judicial organ exercising full jurisdiction. For a judicial organ to enjoy such full jurisdiction it had to be capable of changing every facet of a decision, in fact and in law and, in particular, to have the power to rule upon all relevant questions of fact and law brought to its attention.¹⁰ Applying this approach to the facts before it, the European Court of Human Rights observed that the administrative court's jurisdiction over competition authority decisions was not limited to verifying their legality but allowed it to decide whether, in the light of the particular circumstances of the case, the competition authority had exercised its powers in an appropriate manner, notably with regard to the merits and proportionality of the choices it had made, including assessments of a technical character.¹¹

The Court of Justice has since asserted that, for so long as the EU has not acceded to the European Convention on Human Rights it is not "*formally incorporated into EU law*".¹² Nevertheless, the TFEU respects the principle of effective judicial protection, now consecrated in Article 47 of the Charter of Fundamental Rights of the European Union¹³ through the conferral of unlimited jurisdiction on the EU Courts, which empowers them to substitute their own appraisal for that made by the Commission and to cancel, reduce or increase a fine or periodic penalty payment imposed thereby. In the opinion of the Court of Justice that conferral of unlimited jurisdiction meets the requirements of Article 6.1 of the European Convention on Human Rights as described by the European Court of Human Rights in *Menarini*.¹⁴

Inherent in this approach is that unlimited jurisdiction is an exercise of the judicial power, by the judicial arm of government. This conclusion also appears to follow from the Court of Justice's judgment in *Chalkor*,¹⁵ where it pointed out that, save for certain pleas derived from considerations of public policy that the Courts are required to raise of their own motion, such as the failure to state reasons for a decision, proceedings before the EU Courts are *inter partes*. In order to invoke the unlimited jurisdiction of the EU Courts an applicant must accordingly raise pleas in law to challenge the decision it seeks to impugn and adduce evidence in support of those pleas. To this end, the applicant must identify the impugned elements of the contested decision, formulate grounds of challenge thereto and adduce direct or circumstantial evidence to demonstrate that its objections are well founded. Of considerable importance in this regard is the recognition that although the General Court is under a duty to examine all complaints based on issues of law and fact that seek to show that the amount of the fine is not commensurate with the gravity or the duration of the infringement, unlimited jurisdiction does not oblige it to undertake a fresh or comprehensive review of the decision of its own motion.¹⁶

¹⁰ Appn. No. 43509/08, *A. Menarini Diagnostics S.R.L. v Italy* ECHR:2011:0927JUD004350908, paragraph 59.

¹¹ Appn. No. 43509/08, *A. Menarini Diagnostics S.R.L. v Italy* ECHR:2011:0927JUD004350908, paragraph 64.

¹² Case C-571/10, *Kamberaj v IPES*, EU:C:2012:233, paragraph 62; Case C-617/10, *Åklagaren v Åkerberg Fransson*, EU:C:2013:105, paragraph 44.

¹³ Henceforth "Charter".

¹⁴ Case C-510/11 P, *Kone Oyj v Commission*, EU:C:2013:696, paragraphs 22–25.

¹⁵ Case C-386/10 P, *Chalkor AE Epexergasias Metallon v Commission*, EU:C:2011:815, paragraphs 63–66.

¹⁶ Case C-295/12 P, *Telefónica SA and Telefónica de España SAU v Commission*, EU:C:2014:2062, paragraph 213, applying Case C-386/10 P, *Chalkor AE Epexergasias Metallon v Commission*, EU:C:2011:815, paragraph 64 and

If unlimited jurisdiction involves the exercise of powers of a judicial character, there appears to be no reason why, as indeed *Chalkor* appears to hold, the usual procedures applicable to inter parties litigation ought not to apply in proceedings of this type. Indeed it may be argued that unlimited jurisdiction consists in determining the law applicable, finding disputed facts and assessing the penalty to be imposed in the light of such determinations and findings. The character of that exercise is immediately recognizable as similar to that conducted by a criminal court.¹⁷ Moreover, the fact that the EU system for the enforcement of competition law contemplates the exercise of investigative, prosecutorial and quasi-judicial powers the Commission does not alter the nature of those powers being so exercised.

If the exercise of unlimited jurisdiction has an unequivocally judicial character, the question arises as to whether the EU Courts can increase a fine in the absence of an application for that purpose. In *Groupe Danone*¹⁸, an appeal against a fine of €44.043M, the Court of First Instance found that the Commission had incorrectly taken account of an element in its assessment of aggravating circumstances. It thus reduced the percentage increase in the fine for this reason to 40% from 50%: however, it did so by means of a different formula to that which the Commission had used. As a consequence, the Court of First Instance reduced the fine by a sum of €1.305M less than would have been the case had it used the Commission's formula.

The applicant appealed against this aspect of the Court of First Instance's judgment on two grounds. First, it asserted that the Court of First Instance had breached the *ne ultra petita* rule, whereby it was limited to ruling upon the case as had been made out before it. Second, it claimed the Court of First Instance had failed to respect the right to be heard by adjudicating upon this issue without having afforded it an opportunity to make submissions thereon.

In his Opinion, Advocate General Poiras Maduro first observed that unlimited jurisdiction gives a power to the EU Courts to sit in the Commission's shoes and to replace the Commission's assessment of facts with its own. The nature of this exercise is of a significantly different order to that of interpreting laws and reviewing the legality of measures usually carried out by the EU Courts.

Addressing the applicant's first plea, Advocate General Poiras Maduro thus took the view that, since the *ne ultra petita* rule was a restriction on the exercise of judicial power, it had a limited role to play in circumstances where the EU Courts were required to discharge what was a quasi-administrative, rather than a purely judicial, function. Accordingly, the application of the *ne ultra petita* rule in the exercise of unlimited jurisdiction was limited to preventing the EU Courts from reviewing a fine in the absence of any request having been made for that purpose. Once such a request had

Case C-389/10 P *KME Germany v Commission* EU:C:2011:816, paragraph 131. See also Case C-510/11 P, *Kone Oyj v Commission*, EU:C:2013:696, paragraphs 30–32.

¹⁷ The power to impose penalties, including imprisonment, for breaches of competition law in Australia, Canada, Ireland and the United States of America is reserved to the Courts. For examples see Banks & Jalabert-Doury, "Competition Law Compliance Programmes and Government Support and Indifference" *Concurrences* No. 2 – 2012. See also Forrester, A Challenge for Europe's Judges: the Review of Fines in Competition Cases (2011) *European Law Review*, pp. 199–203.

¹⁸ Case C-3/06 P, *Groupe Danone v Commission*, EU:C:2006:720.

been made, even where that request was limited to seeking a reduction of the fine, the matter of the fine was properly before the EU Courts, which could then increase it in the exercise of their unlimited jurisdiction. The Court of First Instance could recalculate a fine by recourse to a method that was less favourable to a party than that envisaged by the scope of its argument seeking a reduction of that penalty.¹⁹

The judgment of the Court of Justice simply states that because the EU Courts can exercise unlimited jurisdiction where the amount of the fine is raised before them they may reduce or increase the amount at issue.²⁰ This statement does not seem to distinguish between the existence of a power (to increase a fine, which is not at issue) and the circumstances in which that power may be exercised (where it has not been raised by one of the parties to the litigation, the core issue in *Groupe Danone*). Absent this analysis, it may be surmised that the Court of Justice followed the approach suggested by Advocate General Poiares Maduro. Since then the EU Courts have, on a number of occasions, followed the approach in *Groupe Danone* and have increased fines in the exercise of their unlimited jurisdiction, notwithstanding the absence of an application to that end.²¹

It is suggested such an approach is inconsistent with the idea that unlimited jurisdiction constitutes an exercise of judicial power. Moreover no argument has been advanced as to why the *ne ultra petita* rule ought not to apply to proceedings invoking unlimited jurisdiction in the same way as it applies in any other litigation. The Court of Justice has since held that, under the rules governing the procedure before the EU Courts, notably Article 21 of the Statute of the Court and Article 44(1) (now Article 76) of the Rules of Procedure of the General Court, disputes are determined and circumscribed by the parties, the EU Courts may not rule *ultra petita* and pleas going to the substantive legality of a decision can be examined only where they are raised by the applicant.²² Since the EU Courts appear bound to exercise unlimited jurisdiction within the framework of the case advanced on the parties' behalf it is difficult to understand how they could increase the amount of a fine absent an application duly made before them for that purpose.

The autonomous character of unlimited jurisdiction

The Court of Justice has repeatedly observed that the review of the legality of decisions under Article 263 TFEU is “*supplemented by the unlimited jurisdiction in respect of the amount of the fine, provided for under Article 31 of Regulation No 1/2003*”.²³ This

¹⁹ Case C-3/06 P, *Groupe Danone v Commission*, EU:C:2006:720, Opinion of Poiares Maduro AG, paragraphs 47–49.

²⁰ Case C-3/06 P, *Groupe Danone v Commission*, EU:C:2007:88, paragraphs 60–62.

²¹ Joined Cases T-101/05 and T-111/05, *BASF AG and UCB SA v Commission*, EU:T:2007:380, paragraphs 213–220.

²² Case C-272/12 P, *Commission v Ireland*, EU:C:2013:812, paragraphs 27–28.

²³ Case C-510/11 P *Kone Oyj v Commission*, EU:C:2013:696, paragraph 25, referring to Case C-501/11 P, *Schindler Holding v Commission*, EU:C:2013:522, paragraph 38; Case C-272/09 P, *KME Germany AG v Commission*,

statement accurately describes the procedural position. The applicant in *FNICGV v Commission*²⁴ sought to bring proceedings under Article 229 EC, the precursor of Article 261 TFEU. This choice of remedy was possibly motivated by the fact that the time-limit of two months and ten days within which to commence proceedings under the fifth paragraph of Article 230 EC (now the sixth paragraph of Article 263 TFEU) applied exclusively to actions under Article 230 EC. Dismissing the action by reasoned order, the Court of First Instance referred to Article 225(1) EC (now Article 256 TFEU), which adumbrates its jurisdiction without referring to Article 261 TFEU. The Court of First Instance interpreted this silence to mean that the unlimited jurisdiction conferred upon it by regulations made under Article 229 EC fell to be

*“...exercised by the Community judicature only in the context of the review of acts of the Community institutions, more particularly in actions for annulment. The sole effect of Article 229 EC is to enlarge the extent of the powers the Community judicature has in the context of the action referred to in Article 230 EC. Consequently, an action in which the Community judicature is asked to exercise its unlimited jurisdiction with respect to a decision imposing a penalty necessarily comprises or includes a request for the annulment, in whole or in part, of that decision. Such an action must therefore be brought within the time-limit laid down by the fifth paragraph of Article 230 EC.”*²⁵

There was no appeal against that order. The General Court confirmed this analysis in the course of a number of preliminary observations on its unlimited jurisdiction in *Fuji Electric*.²⁶

This approach has the merit of ensuring that applications requesting the General Court to exercise its jurisdiction to review penalties are brought expeditiously and in tandem with any application to amend part or all of a decision imposing same. Moreover, the operation of such time limits does not appear to impede an applicant from asking the General Court to review a finding by the Commission concerning its ability to pay a fine or penalty by reference to facts that occurred between the adoption of decision under challenge and the delivery of judgment.

However if Article 261 TFEU enlarges the EU Courts’ jurisdiction to review penalties in the context of an annulment action, it seems to follow that, at the very least, those courts must have such an application before them in order to exercise unlimited jurisdiction. Ought it to be sufficient to bring an annulment action, even one that is doomed to fail, in order to be able to invoke the EU Courts’ unlimited jurisdiction? By looking to the form rather than to the substance such a requirement appears close to imposing a purely procedural formality, which approach EU law usually abhors. Or does this case law hint at a requirement of a more substantial character, whereby the EU Courts must be at least in a position to annul all or part of the decision before they can

EU:T:2009:142, paragraph 106; Case C-386/10 P, *Chalkor AE Epexergasias Metallon*, EU:C:2011:815, paragraph 67, and Case C-199/11, *Otis e.a. v Commission*, EU:C:2012:684, paragraph 63.

²⁴ Case T-252/03, *FNICGV v Commission*, EU:T:2004:326.

²⁵ Case T-252/03, *FNICGV v Commission*, EU:T:2004:326, paragraph 25.

²⁶ Case T-132/07, *Fuji Electric Co. Ltd v Commission*, EU:T:2011:344, paragraphs 206–207.

exercise unlimited jurisdiction? Does the exercise of unlimited jurisdiction depend upon the decision under review containing an error capable of justifying annulment? Is it sufficient for the General Court to find that the Commission made an error short of amounting to such an illegality? Or can the General Court review a decision imposing a penalty without concluding that the decision contains an error?

Consideration of this issue first requires a closer look at the terms by which the TFEU confers unlimited jurisdiction on the EU Courts. Article 261 TFEU states that regulations may give the EU Courts unlimited jurisdiction with regard to the penalties therein provided for. It is thus at least arguable that the text of the TFEU presents no obstacle to the Union Legislature conferring an autonomous jurisdiction to review penalties on the EU Courts. Moreover Article 31 of Regulation 1/2003 speaks of the EU Courts' "*unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment.*" The provision that in fact confers unlimited jurisdiction is thus silent as to whether it supplements, or is independent of, the action for annulment.

An answer to these questions must also take account of considerations of a systemic character, notably the necessity to render the mechanism for penalising breaches of EU competition rules compatible with the rights protected by the Charter.²⁷ Article 47 of the Charter declares that everyone whose rights and freedoms guaranteed by EU law are violated has the right to an effective remedy before a tribunal. Moreover, Article 49.3 of the Charter provides that the severity of penalties must not be disproportionate to the offence. Thus Advocate General Wathelet has opined that the unlimited jurisdiction to review Commission decisions imposing fines in competition matters requires the EU Courts to make their own assessments and "*...entails the power to quash in all respects, on questions of fact and law, the decision adopted and the jurisdiction to examine all questions of fact and law relevant to the dispute*".²⁸

Adopting a similar approach, the Court of Justice concluded that:

*"...in order to satisfy the requirements of conducting a review exercising its powers of unlimited jurisdiction for the purpose of Article 47 of the Charter with regard to the fine, the EU judiciary is bound, in the exercise of the powers conferred by Articles 261 TFEU and 263 TFEU, to examine all complaints based on issues of fact and law which seek to show that the amount of the fine is not commensurate with the gravity or the duration of the infringement."*²⁹

²⁷ See the examples referred to in Case C-295/12 P, *Telefónica SA & Telefónica de España SAU v Commission*, EU:C:2013:619, Opinion of Wathelet AG, paragraph 143. See also Forrester, pp. 185–189.

²⁸ Case C-295/12 P, *Telefónica SA & Telefónica de España SAU v Commission*, EU:C:2013:619, Opinion of Wathelet AG, paragraphs 109 – 110 and paragraph 204 of the judgment of the Court of Justice, which expressly refers to whether the exercise carried out by the General Court under its unlimited jurisdiction has complied with Article 47 of the Charter. See also Case C-501/11 P, *Schindler Holding v Commission*, EU:C:2013:522, paragraph 35.

²⁹ Case C-295/12 P, *Telefónica SA & Telefónica de España SAU v Commission*, EU:C:2014:2062, paragraph 200. See also Case C-386/10 P, *Chalkor AE Epexergasias Metallon v Commission*, EU:C:2011:815, paragraph 51; Case C-199/11, *Otis v Commission*, EU:C:2012:684, paragraph 47 and Case C-501/11 P, *Schindler Holding v Commission*, EU:C:2013:522, paragraph 36.

The Court of Justice merges the twin sources of the EU Courts' unlimited jurisdiction in this passage, thereby avoiding an analysis of the precise content and scope of its individual parts. Indeed the case-law of the Court of Justice on this point has not always presented a picture of consistency. On occasion it has favoured an interpretation whereby the EU Courts are vested with two independent jurisdictions, each with their own individual characteristics, rather than with an unlimited jurisdiction that, even impliedly, is supplemental to the action for annulment. For instance in *SCA Holding Ltd.*³⁰ the Court of Justice identified two sources of jurisdiction over actions challenging Commission decisions to impose fines for breaches of competition law. First, a power of review by reference to grounds for annulment in Article 263 TFEU. Second, an assessment of the appropriateness of size of any penalties imposed in the exercise of its unlimited jurisdiction. That the scope of the latter review was wider than the first could be gleaned from the observation that the exercise of unlimited jurisdiction might justify the production, and taking into account, of information that did not have to appear in the decision by reason of the duty to state reasons. In *Prym* the Court of Justice adopted a similar approach, holding that:

*“As regards the review carried out by the Community judicature in respect of Commission decisions on competition matters, it should be borne in mind that, more than a simple review of legality, which merely permits dismissal of the action for annulment or annulment of the contested measure, the unlimited jurisdiction conferred on the Court of First Instance by Article 31 of Regulation No 1/2003 in accordance with Article 229 EC authorises that court to vary the contested measure, even without annulling it, by taking into account all of the factual circumstances, so as to amend, for example, the amount of the fine (Joined Cases 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 EU:C:2002:582, paragraph 692).”*³¹

In *Prym* the Court of Justice examined how the Court of First Instance had exercised these distinct powers of review. It approved of the Court of First Instance taking into account the defect it had identified and considering its impact upon the amount of the fine in the exercise of its unlimited jurisdiction.³² This seems to imply that, in the exercise of their unlimited jurisdiction, EU Courts may take into account defects that would not justify the annulment of the decision under review but which could have an impact upon the level of the penalty at issue. Indeed although nothing in the applicable provisions expressly requires the presence of an irregularity in order to exercise unlimited jurisdiction, it is a legitimate question to ask whether the EU Courts ought to

³⁰ Case C-297/98 P, *SCA Holding Ltd. v Commission*, EU:C:2000:633, paragraphs 53–55.

³¹ Case C-534/07 P, *William Prym GmbH & Co. KG and Prym Consumer GmbH & Co. KG v Commission*, EU:C:2009:505, paragraph 86.

³² Case C-534/07 P, *William Prym GmbH & Co. KG and Prym Consumer GmbH & Co. KG v Commission*, EU:C:2009:505, paragraphs 87–88.

have a power to replace an assessment by a body with power to do so, unless it can be persuaded that that assessment is vitiated by some form of error?

This last question may explain statements in the Court of Justice's judgment in *Kone* to the effect that, when reviewing the legality of Commission decisions imposing fines for infringements of the EU competition rules, the EU Courts cannot encroach upon the Commission's discretion by substituting their own assessment of complex economic circumstances but must show that the way in which the Commission reached its conclusions was legally unjustified. Such a demonstration consists in establishing whether the evidence relied upon was factually accurate, reliable and consistent, ascertaining whether that evidence contained all of the information that must be taken into account in the assessment of a complex situation and whether it was capable of substantiating the conclusions drawn therefrom.³³

On balance, there would appear to be scope to conclude that the General Court may be able to review a decision imposing a penalty without identifying an error in the decision. In practice, when the General Court alters a fine or penalty in the exercise of its unlimited jurisdiction, it almost invariably finds that the decision under review contained an error touching on a relevant issue.³⁴

Reliance upon the Fining Guidelines

The Court of Justice has held that the Commission's Fining Guidelines set out rules of practice from which the latter may not depart in an individual case without giving reasons compatible with the principle of equal treatment. By adopting such rules and announcing that they will apply to the cases to which they relate, the Commission imposes a limit on the exercise of its discretion. It may thus depart from them in clearly identifiable circumstances only without running the risk of breaching general principles of law, such as equal treatment or the protection of legitimate expectations.³⁵ In contrast, the EU Courts are not bound by the Fining Guidelines in the exercise of their unlimited jurisdiction, as that does not involve the application of a specific method in order to set fines but rather to a consideration as to whether the penalty may be justified by reference to the individual circumstances before them, taking into account all relevant matters of fact and of law.³⁶ Accordingly, the Court of Justice upheld a finding by the General Court that a 10% increase for the duration of an infringement that had

³³ Case C-510/11 P *Kone Oyj v Commission*, EU:C:2013:696, paragraphs 27–28.

³⁴ Case T-393/10, *Westfälische Drahtindustrie GmbH, Westfälische Drahtindustrie Verwaltungsgesellschaft mbH & Co. KG and Pampus Industriebeteiligungen GmbH & Co. KG v Commission*, EU:T:2015:515, (under appeal C-523/15 P), paragraphs 324 & 332. At paragraphs 346 to 358 of the judgment the General Court conducted its own assessment of the applicants' circumstances by reference to the criteria at paragraphs 35 of the Fining Guidelines.

³⁵ Case T-27/10, *AC Treuhand AG v Commission*, EU:T:2014:59, paragraph 296, affirmed by Case C-194/14 P, *AC Treuhand AG v Commission*, EU:C:2015:717.

³⁶ Case C-70/12 P, *Quinn Barlo Ltd, Quinn Plastics NV, & Quinn Plastics GmbH v Commission*, EU:T:2011:560, paragraph 53; Case T-11/06, *Romana Tabacchi Srl v Commission*, EU:C:2013:351, paragraph 266. Case C-510/11 P *Kone Oyj v Commission*, EU:C:2013:696, paragraphs 28–29.

lasted 11 months and 28 days reflected its gravity, notwithstanding that the Fining Guidelines did not envisage an increase in respect of an infringement lasting less than 12 months.³⁷ In *Romana Tabacchi* the General Court more than halved a fine of €2.05M after having reached “an equitable assessment of all the circumstances of the case”.³⁸ This assessment included findings that the applicant was a small undertaking, that neither it nor its two shareholders (a married couple) were in a position to provide a bank guarantee to pay the original fine and that it had to sell assets to cover the risk of having to pay a fine of €1M, thereby reducing the value of its immovable assets below the level of the fine imposed by the Commission but staving off its being wound-up as a consequence of the capital maintenance requirements of Italian law. The General Court held that these circumstances could lead to the applicant’s liquidation and create significant economic repercussions: however, in reaching that conclusion it did not purport to apply what has since become paragraph 35 of the 2006 Fining Guidelines.³⁹

The assessment of ability to pay is a particularly good example of the exercise the EU Courts are enjoined to carry out in the exercise of unlimited jurisdiction since it requires an assessment of factual issues in respect of which it is reasonable to anticipate that informed opinion may differ. It is one thing to assess, by reference to the burden of proof and such materials as are before it, whether the Commission has shown that it was more likely than not that a director of a firm attended meetings at which competitors discussed prices. It is quite another to ascertain the upstream and downstream financial effects of a fine upon third parties, or the social impact of the possible liquidation of a business. Nonetheless the General Court has observed that the assessment of ability to pay is a practical application of the principle of proportionality in the field of sanctions for breaches of competition law.⁴⁰

Paragraph 35 of the Fining Guidelines represents that, when setting fines for breaches of competition law, the Commission may, upon request and in exceptional cases, take account of an undertaking’s ability to pay in a specific social and economic context. Such reductions are granted solely by reference to objective evidence that the imposition of the fine under the Guidelines would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all of their value. The reference to a specific social and economic context is, notably, to the consequences of the payment of the fine for employment and for the viability of other upstream and downstream undertakings.⁴¹ The total loss of the assets of an undertaking describes a situation where, as a result of the fine, the enterprise does not, or is unlikely to, continue trading; its assets are broken up and offered for sale separately and it is probable they will either not find a buyer or will be sold at a low price.⁴²

³⁷ Case T-11/06, *Romana Tabacchi Srl v Commission*, EU:C:2013:351, paragraph 266.

³⁸ Case T-11/06, *Romana Tabacchi Srl v Commission*, EU:T:2011:560, paragraph 284.

³⁹ Case T-11/06, *Romana Tabacchi Srl v Commission*, EU:T:2011:560, paragraphs 281–283.

⁴⁰ Case T-393/10, *Westfälische Drahtindustrie GmbH, Westfälische Drahtindustrie Verwaltungsgesellschaft mbH & Co. KG and Pampus Industriebeteiligungen GmbH & Co. KG v Commission*, EU:T:2015:515 (under appeal C-523/15 P), paragraph 296.

⁴¹ Case T-400/09, *Ecka Granulate et non ferrum Metallpulver v Commission*, EU:T:2012:675, paragraph 99.

⁴² Case T-400/09, *Ecka Granulate et non ferrum Metallpulver v Commission*, EU:T:2012:675, paragraph 98.

The application of these considerations requires a detailed assessment of the applicant's financial circumstances and the social and economic context in which it operates. Applicants may request the EU Courts to carry out that assessment in the exercise of their unlimited jurisdiction.⁴³ That assessment is made on the basis of the elements the applicant submits in support of the pleas advanced on its behalf, without reference to the margin of appreciation the Commission enjoyed when it made its assessment.⁴⁴ Moreover, unlimited jurisdiction is to be exercised on the basis of the law and the facts as they stand at the time when the EU Court, not the Commission, takes its decision.⁴⁵ One could anticipate that increasing the number of judges at the General Court from 28 to 56 in the course of the next four years will lead to a further reduction in the duration of proceedings in competition cases (already reduced from 60.6 months in 2009 to 41.6 months in 2016). However since the average duration of the written procedure in such actions was 7 months in 2016 and such cases usually involve complex factual and legal argument (as evidenced by the average length of the General Court's judgments), most oral hearings take place approximately 24 months after the impugned decision has been adopted. A lot can happen in two years to change the circumstances of an economic sector, to say nothing of the ability of an individual undertaking to pay a fine. Thus in those cases where the applicant pleads inability to pay, the evidence may engage facts that arose after the Commission had taken the decision under review. As a consequence, the General Court may be required to adjudicate upon and assess complex financial, economic and social issues in the context of assessing a litigant's ability to pay. This raises the interesting issue as to whether the EU Courts ought to conduct assessments of a similar character when asked to adjudicate on aspects of decisions imposing fines for breaches of the competition rules other than the size of the fine.⁴⁶

The General Court has been the target of criticism for allegedly showing undue deference to the Commission's exercise of its various discretions under the Fining Guidelines and of reviewing Commission decisions in the exercise of its unlimited jurisdiction solely by reference to the Commission's compliance with that instrument.⁴⁷ I do not propose to enter into that debate since it is not seriously contested that the Fining Guidelines may provide a source of inspiration for the EU Courts in the exercise of their unlimited jurisdiction. The issue is the legal justification for such reliance.

⁴³ Case T-393/10, *Westfälische Drahtindustrie GmbH, Westfälische Drahtindustrie Verwaltungsgesellschaft mbH & Co. KG and Pampus Industriebeteiligungen GmbH & Co. KG v Commission*, EU:T:2015:515 (under appeal C-523/15 P), paragraph 297.

⁴⁴ Case T-393/10, *Westfälische Drahtindustrie GmbH, Westfälische Drahtindustrie Verwaltungsgesellschaft mbH & Co. KG and Pampus Industriebeteiligungen GmbH & Co. KG v Commission*, EU:T:2015:515 (under appeal C-523/15 P), paragraph 301.

⁴⁵ Case T-393/10, *Westfälische Drahtindustrie GmbH, Westfälische Drahtindustrie Verwaltungsgesellschaft mbH & Co. KG and Pampus Industriebeteiligungen GmbH & Co. KG v Commission*, EU:T:2015:515 (under appeal C-523/15 P), paragraph 302 and the case law there cited.

⁴⁶ Case C-295/12 P, *Telefónica SA & Telefónica de España SAU v Commission*, EU:C:2013:619, paragraphs 44–45, make it clear that “...the scope of the unlimited jurisdiction conferred by Article 31 of Regulation No 1/2003 is confined to the parts of such decisions imposing a fine or a periodic penalty payment.”

⁴⁷ Forrester, pp. 194–196.

The exercise of Union competences is subject to compliance with the general principles of EU law. Amongst these is the principle of equal treatment, expressed as precluding comparable situations from being treated differently and different situations from being treated identically,⁴⁸ save where that difference in treatment can be objectively justified.⁴⁹ In *Quinn Barlo*, the Court affirmed its case-law according to which unlimited jurisdiction cannot lead to a difference in treatment between undertakings that participated in an agreement contrary to Article 101(1) TFEU. The General Court must thus give reasons when it departs from a method of calculation the Commission had relied upon to calculate a fine in respect of one party to an infringement as compared with other parties to that infringement.⁵⁰ However this requirement applies only in circumstances where a number of parties are involved in the infringement. In *Volkswagen v Commission* the Court of Justice held that, in the exercise of its unlimited jurisdiction in proceedings that involve a single party, the Court of First Instance was entitled to recalculate the fine without being bound by the method the Commission had adopted.⁵¹ Moreover it should be emphasized that this line of authority does not prevent the General Court, in the exercise of its unlimited jurisdiction, from applying a different yardstick than that envisaged in the Fining Guidelines, but merely obliges it to give reasons why it decided not to follow them.⁵² It might thus be asked whether this requirement adds anything to the general obligation on the General Court to deliver reasoned judgments.⁵³

In any event, it is submitted that the principle of equal treatment is of limited application in the assessment of penalties. It is a core principle of sentencing policy⁵⁴ that penalties are appropriate to the individual circumstances of the infringement. Equal treatment thus applies only insofar as it requires the adjudicator to ensure that the individual circumstances of each undertaking are fully taken into account when imposing a fine. In practice, equal treatment operates so as to ensure that elements of anti-competitive activity as are common to the parties are punished in an identical manner. Reliance upon the Fining Guidelines on the ground that they ensure that any alteration of penalties in the exercise of unlimited jurisdiction complies with the principle of equal treatment thus appears, to be as a somewhat weak justification.

Another principle which could justify recourse by the EU Courts to the Fining Guidelines is legal certainty, the requirements of which are to be observed strictly where the application of rules has financial consequences.⁵⁵ Whilst the Commission's

⁴⁸ E.g. Case 106/83 *Sermide SpA v Cassa Conguaglio Zuccheri*, EU:C:1984:394, paragraph 28.

⁴⁹ E.g. Case C-189/01 *Jippes v Minister van Landbouw, Natuurbeheer en Visserij*, EU:C:2001:420, paragraph 129; Case C-149/96 *Portugal v Council*, EU:C:1999:574, paragraph 91.

⁵⁰ Case C-70/12 P, *Quinn Barlo Ltd, Quinn Plastics NV, & Quinn Plastics GmbH v Commission*, EU:C:2013:351 paragraph 46; Case C-338/00 P, *Volkswagen v Commission*, EU:C:2003:473, paragraph 146.

⁵¹ Case C-338/00 P *Volkswagen v Commission*, EU:C:2003:473, paragraph 147, referring to Case 322/81, *Michelin v Commission*, EU:C:1983:313, paragraph 111.

⁵² For instance in Case C-441/11 P, *Commission v Verhuizingen Coppens NV*, EU:C:2012:778, paragraph 82, the Court of Justice gave no less than five reasons for reducing the fine.

⁵³ E.g. Case C-280/08 P, *Deutsche Telekom v Commission*, EU:C:2010:603, paragraphs 136 - 137.

⁵⁴ Joined Cases T-122/07 to T-124/07 *Siemens Österreich and Others v Commission*, paragraph 122 and the case-law there cited.

⁵⁵ E.g. Case 325/85, *Ireland v Commission*, EU:C:1987:546, paragraph 18.

adherence to its Fining Guidelines complies with that principle⁵⁶ does this apply equally to the exercise of unlimited jurisdiction? In order to do justice in individual cases unlimited jurisdiction requires a court to take all relevant factual circumstances into account.⁵⁷ It follows the Court may be invited to determine the amount of a fine by reference to matters that did not exist at the time the Commission adopted the decision under review. Nor is it an answer to refer to the obligation to give reasons for deviating from the Fining Guidelines, since legal certainty is directed primarily at ensuring that the law is certain and its application foreseeable.⁵⁸ It seems to follow that reliance upon the Fining Guidelines in the exercise of unlimited jurisdiction may not be justified in reliance upon the principle of legal certainty.

A general principle of EU law that appears to lean against reliance upon the Fining Guidelines is that of proportionality. Proportionality may be invoked in the context of the review of Commission decisions imposing fines on undertakings in two distinct ways. As a general principle of EU law, it may be relied upon to annul measures adopted by EU institutions that exceed the limits of what is appropriate and necessary in order to attain legitimate objectives pursued thereby, where the least onerous of several appropriate measures was not adopted or where disadvantages consequential upon a decision are not disproportionate to the aims pursued thereby.⁵⁹ Of greater relevance here is where proportionality is invoked as a rationale for, and essential element of, the exercise of unlimited jurisdiction.

After referring to the general principles of EU law, Article 49(3) of the Charter and the *Menarini* judgment of the European Court of Human Rights, Advocate General Wathelet concluded in *Telefonica* that:

*“In procedures implementing competition rules, application of the principle of proportionality requires that the fine imposed on a company should not be disproportionate in relation to the objectives pursued by the Commission and that the amount of the fine should be proportionate to the infringement, account being duly taken, inter alia of the seriousness of the latter. To that end, the General Court must examine all the relevant facts, such as the conduct of the undertaking and the role it played in establishing the anti-competitive practice, its size, the value of the goods in question or the profit that it made as a result of the infringement committed, as well as the objective of deterrence pursued and the risks posed by offences of that kind to the objectives of the EU.”*⁶⁰

⁵⁶ Case C-167/04 P, *JCB Service v Commission*, EU:C:2006:594, paragraphs 207–09.

⁵⁷ Case C-534/07 P, *William Prym GmbH & Co. KG and Prym Consumer GmbH & Co. KG v Commission* EU:C:2009:505, paragraph 86.

⁵⁸ E.g. Case 325/85, *Ireland v Commission*, EU:C:1987:546, paragraph 18.

⁵⁹ See, *inter alia*, Case C-331/88, *R. v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex p. Fedesa*, EU:C:1990:391, paragraph 13; Joined Cases C-133/93, C-300/93 and C-362/93 *Crispoltoni v Fattoria Autonoma Tabacchi*, EU:C:1994:364, paragraph 41; Case C-189/01 *Jippes v Commission*, EU:C:2001:420, paragraph 81.

⁶⁰ Case C-295/12 P, *Telefónica SA & Telefónica de España SAU v Commission*, EU:C:2013:619, Opinion of Wathelet AG, paragraph 117.

He continued by stating that “*the General Court must exercise its unlimited jurisdiction fully when assessing the proportionality of the amount of the fine.*”⁶¹

Moreover distinctly different outcomes may follow depending whether proportionality is applied in the context of a review of the legality of a decision or in the exercise of unlimited jurisdiction. The *Romana Tabbacci* judgment provides a remarkable example. The General Court dismissed the action to annul the decision by reason of the Commission’s alleged failure to take account of the applicant’s real ability to pay the fine at issue contrary to principle of proportionality on three grounds. First, it held that the Commission was not required, when determining the amount of the fine, to take into account the poor financial situation of an undertaking, as such a duty would afford an unjustified advantage to uncompetitive undertakings. Second, Article 23(2) of Regulation No 1/2003 did not require that, where several undertakings involved in the same infringement are fined, those imposed on SMEs must not be greater, as a percentage of turnover, than those imposed on larger undertakings. Third, since the applicant had not raised an issue as to its ability to pay during the administrative procedure, it could not impugn the legality of the Commission’s decision on that ground in its legal action.⁶² Yet, as we have already seen, the General Court reduced substantially the fine in the exercise of its unlimited jurisdiction by reliance upon a proportionality test that took particular account of the first and third of the grounds it had categorically rejected in the annulment action.

In conclusion it seems that whilst the General Court is free to take the Fining Guidelines into account in the exercise of its unlimited jurisdiction and may hold that the Commission has acted unlawfully in failing to comply therewith, no principle of EU law requires the General Court to rely upon the Fining Guidelines in the exercise of its unlimited jurisdiction.

⁶¹ Case C-295/12 P, *Telefónica SA & Telefónica de España SAU v Commission*, EU:C:2013:619, Opinion of Wathelet AG, paragraph 118 (emphasis in original).

⁶² Case T-11/06, *Romana Tabacchi Srl v Commission*, EU:T:2011:560, paragraphs 255 - 264.

ANTHONY MICHAEL COLLINS

SOME REFLECTIONS ON THE UNLIMITED JURISDICTION OF
THE EU COURTS TO REVIEW PENALTIES IN COMPETITION
CASES

(Summary)

This contribution examines three aspects of the law pertaining to the EU Courts' exercise of their unlimited jurisdiction with regard to fines and penalties: the judicial character of unlimited jurisdiction and its consequences for litigants; the autonomous character of unlimited jurisdiction and its relationship to the action for annulment and the rationale by which the EU Courts may have recourse to the Commission's Fining Guidelines in, exercise of their unlimited jurisdiction.