

**A Challenge for Europe's Judges: The Review
of Fines in Competition Cases**

By

Ian Forrester

Reprinted from European Law Review
Issue 2, 2011

Sweet & Maxwell
100 Avenue Road
Swiss Cottage
London
NW3 3PF
(Law Publishers)

SWEET & MAXWELL

A Challenge for Europe's Judges: The Review of Fines in Competition Cases

Ian S. Forrester*

Queen's Counsel at the Scots Bar

[☞] Appeals; Competition policy; Court of Justice of the European Union; EU law; European Commission; Fines; Judicial review; Proportionality

Abstract

When considering appeals against fines in competition cases, the EU Courts generally rely on whether the European Commission respected its own guidelines. Formerly, by contrast, the Courts considered fully the merits and proportionality of the penalty. Commission enforcement against competition law infringements exhibits the characteristics of serious criminal procedures. The imposition of severe fines other than by an independent and impartial tribunal is a breach of the Charter and the Convention. Alternatively and in any event, penalties for offences falling into the category of “soft” breaches of legal norms without “coloration pénale” require full review of facts and law on appeal. That review should no longer be a control of legality but a full merits appeal (“was it just and proportionate to the gravity of the offence?”). A limited judicial check on compliance with administrative guidelines and policies does not reach the requisite level of intensity. In either event, reassessment in light of the Lisbon Treaty is necessary.

Introduction

This article examines the EU Courts' practice on the judicial review of fines and addresses the question of how the EU Courts should exercise their “unlimited jurisdiction” under the Treaty of Rome as amended most recently by the Treaty of Lisbon. I will suggest that many recent judgments of the Courts have essentially done no more than verify whether the Commission had acted within its ascribed competence, and that this intensity of judicial review is not adequate.

When I first began practice in Brussels, fines were counted in the tens of thousands.¹ Nowadays, tens of millions of Euros are regarded as routine; hundreds of millions of Euros are interesting, noteworthy and severe; and the billion Euro level has now been passed. In a perfect world, the appropriate level of fines would be just high enough to ensure the appropriate level of deterrence.² Though the fines have

* QC, LL.D.; Honorary Professor, University of Glasgow; White & Case, Brussels. I thank my colleagues Stratigoula Sakellariou of the Athens bar and Dr Katarzyna Czapracka and Emma Roarty of the New York bar, as well as others not named. Like other practitioners in Brussels, I have been involved in a number of appeals against fines, some of them mentioned—I hope neutrally—in this article. The opinions expressed are wholly personal.

¹ *WEA Filipacchi* ECU 60,000 (FRF 333,257) ([1972] OJ L303/52); *GM Continental* ECU 100,000 (BEF 5,000,000) ([1975] OJ L29/14; *Miller* ECU 70,000 (DM 256,200) ([1976] OJ L357/40); *AROW/BNIC* ECU 160,000 (FRF 1,049,144) ([1982] OJ L379/1); *Moët & Chandon* ECU 1,100,000 (GBP 624,977.10) ([1982] OJ L94/7).

² On the deterrence point see also W. Wils, “Optimal Antitrust Fines: Theory and Practice” (2006) 29 *World Competition* 183; European Competitions Authorities' (ECA) Working Group Paper on *Sanctions* published in May 2008, at http://www.autoritedelaconurrence.fr/doc/eca_principles_uk.pdf [Accessed March 3, 2011]; and F. de la Torre, “The 2006 Guidelines on Fines: Reflections on the Commission's Practice” (2010) 33 *World Competition* 359.

increased, so too has the number of cases, so it is not obvious that ever-harsher penalties are having the desired deterrent effect. Criminal liability involving the risk of prison terms is now well established in several Member States. The sheer magnitude of the consequences of being found guilty of an infringement demands serious reflection on whether the current framework for imposing and judicially reviewing such measures is constitutionally acceptable.

National judges are often expected to participate in discussions on sentencing, custodial policy and related questions, but the European judiciary's role in that debate has so far been rather limited, save that the Courts have consistently upheld the Commission's powers to impose fines at a higher level. There are unfortunately few occasions when the Courts explicitly discuss the policy issues presented by competition fines.

The European Commission's fining powers and policy

The statutory framework accords to the Commission broad discretion in the field of fining policy. Both Regulation 17/62,³ which established the original procedural framework for the enforcement of competition rules, and its successor, Regulation 1/2003,⁴ set the upper limit of the fine at 10 per cent of the company's turnover in the previous year.⁵ Like Regulation 17, Regulation 1/2003 does not prescribe any intermediate steps for the calculation of the fine. It simply states that "in fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement".⁶ Questions of negligence and intention and liability for employees' actions are only rarely mentioned explicitly, though the concepts must be in the mind of enforcers and judges.

Though the legislation on fines has remained virtually unchanged since 1962, fining policy has changed a great deal. No fines were imposed between 1962 and 1969, when the participants in the Quinine cartel were fined ECU 500,000,⁷ a figure reduced on appeal by ECU 65,000.⁸ Until the end of the 1970s the Commission's fines were by today's standards very modest. Most were imposed for parallel trade infringements.⁹ In 1980, another parallel trade case, the *Pioneer* decision, was a turning point.¹⁰ The fines imposed by the Commission on five of the European subsidiaries and independent distributors of the Japanese hi-fi manufacturer Pioneer totalled nearly €7 million: the first fine to exceed \$10 million.¹¹ The

an excellent summary of Commission theories on the subject of fining policy and deterrence. See also J. Connor and R. Lande, "The Size of Cartel Overcharges: Implications for US and EU Fining Policies" (Winter 2006) 51 *Antitrust Bull.* 983; R. White, "'Civil Penalties': Oxymoron, Chimera and Stealth Sanction" (2010) 126 *L.Q.R.* 593.

³ Regulation 17, First Regulation implementing Articles 85 and 86 of the Treaty, as amended [1962] OJ L3/204.

⁴ Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2004] OJ L1/1.

⁵ Article 15(2) of Regulation 17/1962 and art.23(2) of Regulation 1/2003. See for example *Musique Diffusion française v Commission (Pioneer)* (100/80) [1983] E.C.R. 1825; [1983] 3 C.M.L.R. 221 at [119], regarding the non-limitation to the product turnover; *Tipp-Ex v EC Commission (C-279/87)* [1990] E.C.R. I-261 at [39], regarding the non-limitation to EEA turnover.

⁶ Article 23(3) of Regulation 1/2003; see also art.15(2) of Regulation 17/1962.

⁷ Case IV/26.045—*Quinine* [1969] OJ L192/5: horizontal market sharing, quota arrangements and price fixing—the Commission's first cartel case.

⁸ See *ACF Chemiefarma NV v Commission of the European Communities (Quinine)* (41/69) [1970] E.C.R. 661 at [153]; *Boehringer Mannheim GmbH v Commission of the European Communities* (45/69) [1970] E.C.R. 769 at [44]; and *Buchler & Co v Commission of the European Communities* (44/69) [1970] E.C.R. 733 at [40].

⁹ See, e.g. Case IV/27.010—*Deutsche Philips GmbH* [1973] OJ L293/40 (ECU 60,000; DM 219,600) and Case IV.29.430—*Kawasaki* [1979] OJ L16/9 (ECU 100,000; GBP 67,081.40).

¹⁰ Case IV.29.595—*Pioneer Hi-Fi Equipment* [1980] OJ L60/21.

¹¹ Some of the fines represented up to 4% of the companies' total turnover, whereas prior to *Pioneer*, fines were steadfastly pegged at below 2% of the total turnover of an undertaking. See Opinion of A.G. Sir Gordon Slynn in *Pioneer* (100/80) [1983] E.C.R. 1825 at 1946.

Commission announced that it “intended to reinforce the deterrent effect of fines by raising the general level thereof in cases of serious infringements”.¹² Upon confirmation by the Court of Justice (albeit with reduced fines) in 1983,¹³ the Commission announced that it would continue to impose high fines,¹⁴

“to impose a pecuniary sanction on the undertaking for the infringement and prevent a repetition of the offence, and to make the prohibition in the Treaty more effective.”¹⁵

These changes in fining policy were followed by other major changes. The Commission’s priority regarding cartels had hitherto been rather equivocal: cartels were a known and undesirable feature of economic life, but attacking a national champion was likely to be controversial, and getting good evidence was not easy. Putting it briefly and simplistically, about 20 years ago, the United States moved away from an enforcement model which pursued cartel operators on foreign soil regardless of local reservations about comity or territorial jurisdiction. Instead, it endorsed a model of positive comity where several jurisdictions adopted common goals and co-operatively pursued the operations of international cartels. Separately, the United States successfully promoted its leniency programme whereby the first company to confess would receive immunity from prison for the guilty individuals. Those others who were successfully prosecuted as the result of leniency confessions were very likely to receive prison sentences. That combination of phenomena engendered a huge surge in confessions about cartels. Many cartels cross borders and continents. The Commission wholeheartedly joined the quest against cartels, as being a primary task of a competition law enforcer.

The Competition Directorate General undertook a modernisation programme and replaced Regulation 17/62 with Regulation 1/2003. The reform introduced by Regulation 1/2003 and the abolition of the notification system also enhanced the Commission’s investigation powers. The 2002 Leniency Notice *proposed a reinforced incentive for cartel members to approach the Commission to volunteer confessions*.¹⁶ The statistics tell the rest: the Commission adopted 11 cartel decisions from 1992 to 1995, 8 from 1996 to 1999, 26 from 2000 to 2003,¹⁷ and 36 since then.¹⁸

The methodology by which fines were determined, as well as their absolute size, provoked controversy. I recollect being astounded in 1991 by a fine of €2 million for a largely formal textual infringement (textual meaning that the infringement consisted of prohibited words which were never implemented in practice).¹⁹ As a response to these concerns, the Commission adopted Guidelines in 1998 on the method of setting fines.²⁰ The finable basis (the basic amount) reflected the duration and gravity of the infringement, and was then increased or reduced according to mitigating or aggravating circumstances. Thus the process

¹² Case IV.29.595—*Pioneer Hi-Fi Equipment* [1980] OJ L60/21.

¹³ *Pioneer* (100/80) [1983] E.C.R. 1825 at [104]–[108]: “conduct of that kind can only be deterred by fines which are heavier than in the past”. However, the Court reduced the fines to ECU 3,200,000 on the grounds that the Commission had incorrectly assessed the duration of the infringement; see [123]–[124] of the judgment (“The duration of the concerted practices established by the Court will enter into the general assessment to be made by it within the framework of its powers of unlimited jurisdiction”).

¹⁴ *XIII Report on Competition Policy* (1983).

¹⁵ *XIII Report on Competition Policy* (1983), paras 62–66.

¹⁶ Commission Notice on immunity from fines and reduction of fines in cartel cases [2002] OJ C45/3–5. The previous leniency notice (1996 Commission Notice on the non-imposition or reduction of fines in cartel cases [1996] OJ C207/4) did not encourage many leniency applications.

¹⁷ See L. Ortiz Blanco, *EC Competition Procedure* (Oxford University Press, 2006), p.477.

¹⁸ At February 3, 2011; see European Commission, *Cartel Statistics*, at <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf> [Accessed March 3, 2011]. See also <http://ec.europa.eu/competition/cartels/cases/cases.html> [Accessed March 23, 2011].

¹⁹ Case No IV/32.879—*Viho/Toshiba* [1991] OJ L287/39.

²⁰ Commission Guidelines on the method of setting fines imposed pursuant to Article 15(2) Regulation 17 [1998] OJ C9/3.

was meant to move from the personal assessment of the Commissioner and staff to a more neutral, objective and consistent method.

The adoption of the 1998 Guidelines was followed by the infliction of very severe penalties. In 2001 the Commission imposed fines totalling €1.84 billion on 56 companies, nearly half of the sum being imposed in the *Vitamins* case.²¹ From 2000 to 2003 the Commission imposed fines totalling €3.33 billion, compared with the period 1996 to 1999 where the fines imposed totalled €552 million.²² Despite the application of the Guidelines, in these cases the actual amount of fine to be imposed was still difficult to predict in advance: the Commission maintained a wide margin of discretion in determining the basic amount and the Court had made it clear that the Commission was not bound by its previous practice.²³ The paragraphs of decisions which dealt with the fine were usually short and uninformative.

The 1998 Guidelines were followed by new fining Guidelines in 2006.²⁴ The 2006 Guidelines also established a basic amount for each undertaking, then adjusted it depending on individual circumstances, whereas the 1998 Guidelines had determined the starting point by the nature of the infringement, not the infringer's turnover. The key factor in the 2006 Guidelines is the value of sales of the product to which the infringement relates.²⁵ Under the new regime, for an offence of "normal gravity", a tariff of 16 per cent (the usual percentage) is applied to the relevant annual turnover. An "entry fee" of the same amount is then added. Thus even if the offending conduct lasted one month, the fine will be 16 per cent of the relevant turnover. If it lasts 12 months, it will be twice that figure. The figure is multiplied by the number of years the infringement lasted. These "neutral" factors are then adapted to reflect aggravating and mitigating circumstances. The adoption of the 2006 Guidelines was followed by another peak in fine levels. According to the statistics published by the Commission, the amount of fines imposed in cartel cases alone reached the level of €3.34 billion in 2007, €2.27 billion in 2008 and €1.62 billion in 2009.²⁶ The Commission's quest against cartels has continued in 2010: the fines imposed have surpassed 2009 figures.²⁷ Similarly vast fines have been imposed in cases of dominance. In *Microsoft* for example, an initial fine of €497 million imposed in 2004 was increased by a further €899 million in 2008,²⁸ and in *Intel* a fine of over €1 billion was imposed.²⁹

The infringements punished today seem not in essence more serious than those of 10 or 20 years ago, but the fines have become many times heavier each decade. In 1984, 1994 and 2004, fines were imposed respectively totalling EUR/ECU 41 million, 395 million and 895 million.³⁰ The principal reason offered is deterrence.³¹ This is explicitly and repeatedly confirmed by the Fining Guidelines³² and more recently in the Commission's report on the functioning of Regulation 1/2003, in which it states that:

²¹ COMP/E-1/37.512—*Vitamins* [2003] OJ L6/01 (Hoffman La Roche AG was fined €462 million).

²² L. Ortiz Blanco, *EC Competition Procedure*, supra, p.477.

²³ *Michelin v Commission* (T-203/01) [2003] E.C.R. II-4071; [2004] 4 C.M.L.R. 18 at [292].

²⁴ Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003 [2006] OJ C210/2.

²⁵ J. Killick, "The 2006 Fining Guidelines: Two Steps Forward but One Step Back?", *Competition Law Insight*, September 26, 2006.

²⁶ For example a €896 million fine was imposed on Saint Gobain in 2008.

²⁷ European Commission, *Cartel Statistics*, at <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf> [Accessed March 3, 2011].

²⁸ Case COMP/37.792—*Microsoft* [2007] OJ L32/23.

²⁹ Case COMP/37.990—*Intel* [2009] OJ C227/13.

³⁰ Figures, to the nearest million, are derived from Commission decisions and the author's annual reviews of EC Competition Law in the *Yearbook of European Law* (Oxford University Press, 1981).

³¹ Recent public statements of the Commission are littered with reference to deterrence, for example at the confirmation hearing before the European Parliament of Commissioner Almunia: the Commission "will continue to use fines as a deterrence. So far so good".

³² Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003 [2006] OJ C210, which refer to the objective of deterrence at paras 4, 7, 25, 30, 37.

“Fines with sufficient deterrent effect, coupled with an effective leniency program, constitute the most efficient weapon in the Commission’s armoury to fight cartels. In particular, deterrent fines prevent companies from entering into cartel agreements and entice cartelists to blow the whistle on existing cartels in return for immunity or a reduced fine under the leniency notice.”³³

The Commissioner’s discourse, and the Commission’s, suggest that if companies continue to infringe, especially under the current economic climate, the Commission will continue to increase the penalties so that they will become so grave that companies will abandon their “incentive to collude with their competitors”.³⁴

The increasing level of fines has certainly made senior executives more anxious about compliance, but it does not appear to have reduced the number of instances of offending conduct. A possible explanation is that cartels are operated by individuals who are unthreatened by the penalties which might be inflicted on their employers. Penalties elsewhere in the world may be rising, though Europe’s are significantly higher than anywhere else on earth for the moment. It is doubtful if the leaders of a company will be more motivated to preach and to practise compliance if there is a risk of a fine of €5 million, €15 million or €500 million. For present purposes, the legally relevant questions are whether such heavy fines can be disproportionately severe, and whether they are set making sufficient distinction between guilty leaders and imprudent marginal participants.

I now turn to the Court’s competence in reviewing the fines imposed by the Commission.

The scope of judicial competence

There is broad consensus that the Commission has the power to decide its competition policy, and the level of fines appropriate to ensure the implementation of that policy.³⁵ The Courts have recognised this principle from the early days of *Pioneer*:

“The fact that the Commission, in the past, imposed fines of a certain level for certain types of infringement does not mean that it is estopped from raising that level within the limits indicated in Regulation 17 if that is necessary to ensure the implementation of community competition policy. On the contrary, the proper application of competition rules requires that the Commission may at any time adjust the level of the fines to the needs of that policy.”³⁶

As A.G. Slynn clarified in the same case:

³³ Commission Staff Working Paper accompanying the Report on the functioning of Regulation 1/2003 (SEC(2009) 574 final), April 29, 2009, paras 124–125.

³⁴ See for instance Commissioner Almunia’s speech “Competition and consumers: the future of EU competition policy”, European Competition Day, Madrid, May 12, 2010. See also former Competition Commissioner Kroes’s speech “The Lessons Learned” at the 36th Annual Conference on International Antitrust Law and Policy, Fordham University New York, September 24, 2009: “Fines were not deterrent in previous decades. Just think about that for a moment ... year after year we would catch a cartel and impose a fine that would have little or no effect on a company’s incentives. What is the point of that? Now ... we fine in order to deter, linking the fine to the relevant sales of the infringing company. If we catch recidivists — the French glass company Saint-Gobain is a good example — the fine increases are severe. So, in adopting a clear policy basis for deterrent fines and a focus on the most serious infringements of course the fines have increased!”

³⁵ *Pioneer* (100/80) [1983] E.C.R. 1825; see also *Dansk Rørindustri v Commission* (C 189/02 P, C 202/02 P, C 205/02 P to C 208/02 P and C 213/02 P) [2005] E.C.R. I-5425; [2005] C.M.L.R. 17 at [169]; *Archer Daniels Midland v Commission* (C-510/06 P) [2009] E.C.R. I-1843; [2009] 4 C.M.L.R. 20.

³⁶ *Pioneer* (100/80) [1983] E.C.R.1825 at [109].

“The Commission explained at the hearing that it is now applying a new policy in respect of fines. That policy, which entails higher fines, has been applied, it is said, by the Commission, though not accepted by the applicants, in all cases subsequent to the present one. For this reason, the Commission regards this as a ‘crucial test case for the competition policy of the Community’.”³⁷

Although the fining guidelines may not be regarded as rules of law which the Commission is always bound to observe, they nevertheless form rules of practice from which the administration may not depart in an individual case without giving reasons that are compatible with the principle of equal treatment.³⁸

Articles 261 and 263 of the Treaty on the Functioning of the European Union (TFEU) give the European Courts the legal basis to review decisions of the Community institutions. Article 263 TFEU (ex art.230 EC) provides four grounds of review of legality:

“The Court of Justice of the European Union shall review the legality of ... acts ... of the Commission ...
... on grounds of *lack of competence, infringement of an essential procedural requirement, infringement of this Treaty* or of any rule of law relating to its application, or *misuse of powers*.”

The grounds establish a limited review of the lawfulness of how a decision has been taken rather than the merits of the decision itself. By contrast, art.261 TFEU contemplates “unlimited jurisdiction” with regard to penalties. Article 31 of Regulation 1/2003 accordingly provides:

“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.”

Unlimited jurisdiction (“*une compétence de pleine juridiction*”) echoes French law, under which a “*recours de pleine juridiction*” permits revising the administrative act and even awarding damages against the authority. This can be contrasted with a “*recours de légalité*” which merely seeks annulment of a decision. The Court of Justice has stated:

“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.*”³⁹

³⁷ See Opinion of A.G. Sir Gordon Slynn in *Pioneer* (100/80) [1983] E.C.R.1825 at 1946–1947.

³⁸ See Opinion of A.G. Sir Gordon Slynn in *Pioneer* (100/80) [1983] E.C.R.1825 at 1946–1947; see also *HFB v Commission* (T-9/99) [2002] E.C.R. II-1487 at [418] and *LR AF 1998 v Commission* (T-23/99) [2002] E.C.R. II-1705; [2002] 5 C.M.L.R. 10 at [27] (“[the guidelines] determine, generally and abstractly, the method which the Commission has bound itself to use in assessing the fines imposed by the decision and, consequently, ensure legal certainty on the part of the undertakings”).

³⁹ *William Prym GmbH & Co KG and Prym Consumer GmbH & Co KG v Commission* (C-534/07 P) [2009] E.C.R. I-7415; [2009] 5 C.M.L.R. 21 at [86] (citing *Limburgse Vinyl Maatschappij v Commission* (C-238/99 P) [2002] E.C.R. I-8375; [2003] 4 C.M.L.R. 10 at [692]) (emphasis added, internal citations omitted). A slightly different formula is to be found in *BASF and UCB v Commission* (T-101/05 and T-111/05) [2007] E.C.R.-II-4949; [2008] 4 C.M.L.R. 13 (“by virtue of the unlimited jurisdiction conferred on it by Article 31 of Regulation No 1/2003, the Community judicature is empowered, in addition to carrying out a mere review of the lawfulness of the penalty, *to substitute its own appraisal for the Commission’s* and, consequently, to cancel, reduce or increase the fine or penalty payment

Thus the European Courts have broad powers to disagree with a decision imposing fines. As we will see, the implementation of this uncontroversial but important principle in particular cases has not been consistent. The Courts have been faced with scores of appeals by companies who have incurred fines in the application of the competition rules. The experience of those challenging fines in the European Courts has been diverse. Judicial pronouncements vary from robustly independent and critical (early cases) to tolerant and deferential to the Commission.

Some observers (including present or former judges) consider that judges are influenced by a metaphorical sense of smell and instinct. If they feel that the Commission has been unfair or a bit severe, they may seek a rationale for granting some relief. It is difficult to tell whether in an individual case the reduction of the fine was due to the fact that the Commission made a technical error or due to the fact that the Commission seemed to the judges to have been harsh or uneven in its treatment of guilty companies. If the latter, the troubled judge may have sought a legal rationale to redress the problem. However, and by contrast, the words of recent judgments are generally focused on “technical” details rather than broader, higher questions of relative guilt or innocence.

The Court’s practice

The Luxemburg Courts have a large workload, and the General Court like the CFI before it suffers from serious arrears. Appeals are voluminous, and nearly always involve hotly disputed facts. Language delays are inevitable in a multilingual system. I have separately argued⁴⁰ against judicial deference or “light judicial review” and have encouraged rigorous appellate review in competition cases. We must accept that such thoroughness inevitably comes at a cost in terms of time. So sheer pressure of time may be part of the explanation of the apparent increase in formalism in how fine cases are handled.

It is, however, striking to observe an evolution in the level of apparent thoroughness with which the appellate function is discharged. In the early fine cases, there is usually a review of the strengths and weaknesses of the evidence and a prudent calibration of all pertinent factors, without deference. In the more recent cases, the judicial inquiry addresses principally whether the Commission had discretion to impose the fine rather than whether that fine was appropriate. At the deferential end of the scale one may note numerous judgments which do no more than accurately record that the fine imposed lay within the range of discretion attributable to the Commission. At the robust end of the scale, one may find judgments where the Court substitutes its own assessment for the Commission’s.⁴¹ In a number of cases the Courts have declined to consider arguments about whether the fine was appropriate. While at least one of these judgments seems to be wrong in part, it seems clear that the Courts apply a more deferential level of review today than was the case in the first 30 years of the history of the European Community.

Merits adaptation of the fine

There are many examples in the recent jurisprudence where the Court of First Instance has limited its review to the legality of the fine and has not considered proportionality. Although the judges are not legally

imposed where the question of the amount of the fine is before it. In that context, *it must be borne in mind that the Guidelines are without prejudice to the assessment of the fine by the Community judicature when it exercises that unlimited jurisdiction.*”) (Emphasis added.)

⁴⁰ See I. Forrester, “A Bush in Need of Pruning: the Luxuriant Growth of ‘Light Judicial Review’” in C.D. Ehlermann and M. Marquis (eds), *European Competition Law Annual 2009: Evaluation of Evidence and its Judicial Review in Competition Cases* (Oxford: Hart Publishing, 2011).

⁴¹ See for example *Groupe Danone v Commission (Belgian Beer)* (T-38/02) [2005] E.C.R. II-4407; [2006] 4 C.M.L.R. 25 (upheld on appeal in (C-3/06 P) *Groupe Danone v Commission* [2007] E.C.R. I-1331; [2007] 4 C.M.L.R. 18 at [53]–[54] and [61]).

bound by the fining guidelines, they consistently merely verify compliance with them. By contrast, some robustly independent approaches are manifested in early judgments of the Courts.

In *Quinine* the Court engaged in a robust examination of the totality of the circumstances by taking into account the nature of the restrictions of competition, the number and the 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 was committed.⁴² The Court concluded that the error in duration did not “appreciably diminish the gravity of the restrictions of competition arising from the agreement” and therefore justified only “a slight reduction of the fine”,⁴³ from ECU 500,000 to ECU 435,000, a slightly more conservative reduction than the one proposed by A.G. Gand, whose opinion was a good example of the interventionist approach.⁴⁴

Equally, the judgment in *Pioneer* and the opinion of A.G. Slynn is a good example of what we might call a full merits review of the penalty. The Advocate General looks at all the evidence and comes to the conclusion that there were errors and that the appropriate penalty taking account of all the issues to be reviewed should be reduced from ECU 6.95 million to ECU 3.55 million:

“At the end of the day the assessment of the appropriate fine is a matter of judgment and balance rather than of calculation. It would be wrong to ‘tinker’ with the fines imposed if the conclusions to which I had come suggested minor changes. In light of the relevant considerations referred to by the regulation, and by the Court (eg. duration and gravity of the infringement, the intent, the respective participation and financial standing of the parties) and from the factors to which I have referred it seems to me that the fines ought to be varied. After long consideration in light of all that it seems that the fines should be reduced to the following amounts”

This is a powerful example of the sort of approach we would call rigorous. The Court did not limit its appraisal to the duration of the infringement but “entered into the general assessment to be made by it within the framework of its powers of unlimited jurisdiction”.⁴⁵ It thus found that it was “appropriate to reduce the fines considerably on that ground”⁴⁶ and engaged in a detailed appraisal of the particular circumstances of each undertaking,⁴⁷ and went further than A.G. Slynn had proposed.

A similar adaptation of the fine on the merits is found almost ten years later in *Dunlop Slazenger* where the Court, in light of an error in calculating duration, reduced the fine by 40 per cent:

“It follows from all the above that the fine imposed on the applicant must be upheld in principle but reduced on the ground that the applicant’s infringements must be regarded as lasting from 1985 to 1990, as regards the general export ban, and from 1985 to 1989, as regards the various measures taken in order to ensure compliance with that prohibition (see paragraphs 153 to 157 above). *However, the Court considers that the reduction of the fine does not necessarily have to be proportionate to the amount by which the Court has reduced the duration of the infringements, given the Commission’s findings as to the gravity and the cumulative nature of the infringements while they were being actually committed.*

⁴² See *Quinine* (41/69) [1970] E.C.R. 661 at [176] and [180]–[188].

⁴³ *Quinine* (41/69) [1970] E.C.R. 661 at [188]; *Boehringer v Commission* (45/69) [1970] E.C.R. 769 at [59]; and *Buchler v Commission* (44/69) [1970] E.C.R. 733 at [57].

⁴⁴ Opinion of A.G. Gand in *Quinine* (41/69) [1970] E.C.R. 661.

⁴⁵ *Pioneer* (100/80) [1983] E.C.R. 1825 at [123]–[124].

⁴⁶ *Pioneer* (100/80) [1983] E.C.R. 1825 at [123]–[124].

⁴⁷ *Pioneer* (100/80) [1983] E.C.R. 1825 at [131]–[135].

... the Court considers, in the exercise of its unlimited jurisdiction, that reducing the fine to be imposed on the applicant from ECU 5 000 000 to ECU 3 000 000 would represent a fair assessment of the circumstances of the case.”⁴⁸

Although the Court has sometimes engaged in a full review of the fine in cases brought after the adoption of the Guidelines,⁴⁹ it nowadays seems more timid in doing so, as we shall see.

Assessment of proportionality

The CFI has occasionally recognised its duty to examine the proportionality of the fine in relation to the gravity and duration of the infringement in addition to examining whether the Commission followed the methods prescribed by its Fining Guidelines:

“It should be recalled that 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 of fines, without there being any binding or exhaustive list of the criteria which must be applied ... *The Court of First Instance is, however, under a duty to verify whether the amount of the fine imposed is proportionate in relation to the gravity and duration of the infringement, and to weigh the gravity of the infringement and the circumstances invoked by the applicant.*”⁵⁰

In two cases the Court of First Instance reduced the fine based on a proportionality review. In *Parker Pen* the Court concluded that the fine was “inappropriate” having regard to the low turnover to which the infringement was related.⁵¹

Equally, in *Greek Ferries*,⁵² the Court found that for reasons of “equity and proportionality” the fine should be reduced. The Commission found that Ventouris had participated only in the infringement relating to the ferry routes between Patras and Bari and between Patras and Brindisi and to the tariffs applicable to goods vehicles, and not the infringement relating to the line between Patras and Ancona, which also included tariffs for passengers and cars. Yet the Commission calculated the basic amount of Ventouris’ fine by reference to the turnover achieved by that company in the whole of the market for roll-on roll-off ferry services between Greece and Italy. On appeal, the Court of First Instance reasoned that the:

“Commission calculated the fines starting from a single basic amount for all companies, adapted according to their relative size but with no distinction being made according to whether the company concerned had participated in one cartel or both.”⁵³

The Court held that by doing so the Commission punished in like manner companies that should have been treated differently.⁵⁴ As we will see, the Courts appear rarely to make such reviews.

⁴⁸ *Dunlop Slazenger International Ltd v Commission* (T-43/92) [1994] E.C.R. II-441 at [178]–[179] (emphasis added).

⁴⁹ See for example the detailed review of the fine in *Tokai Carbon* or the reversal of several fines in the *Cement* cartel, March 2000.

⁵⁰ *Brasserie Nationale v Commission* (T-49/02 to T-51/02) [2005] E.C.R. II-3033; [2006] 4 C.M.L.R. 8 at [169]–[170] (emphasis added, internal citations omitted).

⁵¹ *Parker Pen v Commission* (T-77/92) [1994] E.C.R. II-549; [1995] 5 C.M.L.R. 435 at [92]–[95].

⁵² *Ventouris Group Enterprises SA v Commission* (T-59/99) [2003] E.C.R. II-2519; [2005] 5 C.M.L.R. 29.

⁵³ *Ventouris* (T-59/99) [2003] E.C.R. II-2519 at [217].

⁵⁴ *Ventouris* (T-59/99) [2003] E.C.R. II-2519 at [219].

Technical adaptation of the fine

There are occasions where the Court, having found an error, adapted the fine, using the methodology of the Commission's Guidelines.

For example, in one of the *BASF* cases the Court set aside the increase of 35 per cent of the basic amount of the fines imposed on BASF on the ground that BASF was not a ringleader in respect of the infringements relating to certain vitamin markets (vitamins C and D3).⁵⁵ The Court also increased the reduction of the fines under the Leniency Notice, from 50 per cent to 75 per cent, finding that, since BASF was not a ringleader, it merited a higher reduction. In this case the Court limited its review to legality and cured the Commission's errors by recalculating the amount of the fine based on the methodology of the Fining Guidelines. It further rejected arguments based on the principles of proportionality and equal treatment.

Equally, in *Austrian Banks* the fine was reduced because the Commission fixed the basic amount of the fine on exaggerated market shares.⁵⁶ The Court accepted evidence that the applicant's market shares were lower than those used by the Commission when calculating the basic amount of the fine. The Court set a new basic amount of the fine in light of the lower market shares, following however the methodology that the Commission had adopted in its decision. In other cases, the rationale for the reduction is not arithmetically evident.⁵⁷

Deference to the Commission's discretion

On many occasions, the Court has elected not to exercise its unlimited jurisdiction and interfere with matters where the Commission has a wide degree of discretion within the Guidelines, such as the amount of increase for duration, the amount of increase for purposes of deterrence, the amount of reduction for co-operation, the existence of attenuating circumstances which are not listed in the Fining Guidelines, or indeed the appropriateness of the fine in specific cases. In recent years, the CFI has not often engaged in significant proportionality review of the fines.⁵⁸ Equally the ECJ has consistently declined to review the proportionality of fines with a view to overruling positions taken by the Court of First Instance,

“while ... the Court cannot substitute, on grounds of fairness, its assessment for that of the Court of First Instance giving judgment in the exercise of its unlimited jurisdiction as to the amount of the fines imposed on undertakings by reason of their infringement of Community law”⁵⁹

I respectfully question whether this posture is consistent with the Treaty of Rome as amended, in the light of the actual and future obligations of the European institutions.

In *Vitamins*, the Court of First Instance went so far as to suggest that its unlimited jurisdiction is only activated when there is illegality:

⁵⁵ *BASF AG v Commission (Vitamins)* (T-15/02) [2006] E.C.R. II-497; [2006] 5 C.M.L.R. 2.

⁵⁶ *Raiffeisen Zentralbank Österreich AG v Commission (Austrian Banks)* (T-259/02 to T-264/02 and T- 271/02) [2006] E.C.R. II-5169; [2007] 5 C.M.L.R. 13.

⁵⁷ See for example *Chalkor v Commission* (T-21/05) May 19, 2010 (currently on appeal C-389/2010).

⁵⁸ See for example *Tokai Carbon v Commission (Specialty graphite)* (T-71/03, T-74/03, T-87/03 and T-91/03) [2005] E.C.R. II-10; [2005] 5 C.M.L.R. 13; *Belgian Beer* (T-38/02) [2005] E.C.R. II-4407; *FNCBV v Commission of the European Communities (French beef)* (T-217/03 and T-245/03) [2006] E.C.R. II-4987; [2005] 5 C.M.L.R. 5; and *Vitamins* (T-15/02) [2006] E.C.R. II-497; *Degussa v Commission (Methionine)* (T-279/02) [2006] E.C.R. II-897; [2008] 5 C.M.L.R. 1 where proportionality pleas were dismissed.

⁵⁹ *Erste Group Bank AG v Commission* (C-125/07 P) [2009] E.C.R. I-8681 [2010] 5 C.M.L.R. 9 at [187]; see also *Società Finanziaria Siderurgica Finsider v Commission* (C-320/92 P) [1994] E.C.R. I-5697 at [45]–[46]; *BPB Industries and British Gypsum v Commission* (C-310/93 P) [1995] E.C.R. I-865; [1997] 4 C.M.L.R. 238 at [34]; *Limburgse Vinyl Maatschappij v Commission* (C-238/99 P) [2002] E.C.R. I-8375 at [617].

“It is possible for the Court to exercise its unlimited jurisdiction under Article 229 EC and Article 17 of Regulation No 17 only where it has made a finding of illegality affecting the decision, of which the undertaking concerned has complained in its action, and in order to remedy the consequences which that illegality has for determination of the amount of the fine imposed, by annulling or adjusting that fine if necessary.”⁶⁰

This goes beyond deference into error, I suggest. I will now offer some examples where the Court elected not to interfere with the Commission’s discretion.

In one of the *BASF* cases it was argued that a cartel participant who voluntarily withdrew prior to the Commission’s investigation should be given credit for ending the infringement by voluntary withdrawal. The Court effectively declined to consider the applicant’s argument and contented itself by noting that the Commission’s Guidelines did not help the applicant:

“The fact that BASF voluntarily brought the infringement to an end before the Commission initiated its inquiry was taken sufficiently into account by the calculation of the duration of the infringement period found against BASF, so that it cannot rely on the third indent of point 3 of the Guidelines. Indeed, termination of the infringement as soon as the Commission intervenes can logically constitute an attenuating circumstance only if there are reasons to suppose that the undertakings concerned were encouraged to cease their anti-competitive activities by the interventions in question, *whereas a case where the infringement has already come to an end before the date on which the Commission first intervenes is not covered by that provision of the Guidelines.*”⁶¹

Now, it may be true that under the Fining Guidelines only termination after the initiation of the Commission’s investigation qualifies as an attenuating circumstance. It is also true that in a regime where the penalty is sharply influenced by duration, the penalty on a company which withdraws from the infringement will be lower for that reason alone. But that is not dispositive. In a criminal case, the fact that the offender had voluntarily left a conspiracy would count in his favour. The voluntary renunciation of prohibited behaviour in which other infringers persist should deserve recognition; at least the point deserves judicial consideration.

Another example of judicial deference can be found in *Tokai Carbon*, where the applicant argued that it deserved credit for supplying decisive evidence that the immunity applicant had not provided. In assessing that submission the Court said:

“To the extent that each of the two undertakings further submits that its cooperation was of greater value than that of the other members of the cartel, while it is settled case-law that, in assessing the cooperation provided by the members of a cartel, the Commission cannot ignore the principle of equal treatment, *the Commission nevertheless has a wide discretion in assessing the quality and usefulness of the cooperation provided by the various members of a cartel, and only a manifest abuse of that discretion can be censured.*”⁶²

The suggestion here that only a “manifest abuse” of the Commission’s discretion is capable of being censured by the Courts seems surprising. The proper exercise of the Court’s unlimited jurisdiction requires the Court to correct any abuse or error that it detects in the Commission’s reasoning, manifest or otherwise.

⁶⁰ *Vitamins* (T-15/02) [2006] E.C.R. II-497 at 582 (emphasis added, internal citations omitted). This *BASF* judgment is probably wrong as it contradicts the notion of unlimited jurisdiction.

⁶¹ *BASF and UCB v Commission (Choline chloride)* (T-101/05 and T-111/05) [2007] E.C.R. II-4949; [2008] 4 C.M.L.R. 13 at [128] (emphasis added, internal citations omitted).

⁶² *Tokai Carbon v Commission* (T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01) [2004] E.C.R. II-1181; [2004] 5 C.M.L.R. 28 at [371] (emphasis added, internal citations omitted); upheld on appeal *SGL Carbon v Commission* (C-328/05 P) [2007] E.C.R. I-3921; [2007] 5 C.M.L.R. 1 at [88].

While it is true that the prosecution is best placed to assess the value of a guilty party's confession, and while it may be difficult for a court to reach a conclusion about the value of testimony, it might be argued that the usefulness of any information or other assistance ought to be capable of objective ascertainment. This aspect of the Commission's decision therefore seems no less susceptible in principle to an intense standard of review than any other.

In *Wieland-Werke* the Court stated:

“In areas such as determination of the amount of a fine imposed pursuant to Article 15(2) of Regulation No 17, 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.”⁶³

Again, the Court here appears to start from a presumption that the Commission enjoys a “discretion” with which the Court will be reluctant to interfere “in absence of manifest error of assessment”. The ECJ regularly uses language such as “[T]he Court cannot substitute, on grounds of fairness, its assessment for that of the Court of First Instance”.⁶⁴ Such abstention from the merits can no longer be constitutionally correct.

Gravity, duration, intention and negligence

Jurisdictions around the world have wrestled with the problem of reconciling the dangers of rigidity (imposing draconian penalties on the relatively innocent) and arbitrariness (imposing personalised justice *à la tête du client*). Guidelines can serve one concern but risk the other. The Commission's Guidelines do not focus on how to differentiate between leaders and followers, more guilty and less guilty. In actual practice relative degrees of gravity are not usually calibrated.

“Duration” is reasonably straightforward. Once the evidence is convincing (“Did Mr. Dupont attend the gathering with the ringleaders in the hotel room on 13 January 2006?”), years and half-years are easy to count.

Gravity is not easily quantifiable, as any criminal court judge will confirm. As the Court of First Instance explained in *Degussa*:

“In assessing the gravity of an infringement regard must be had to a large number of factors the nature and importance of which vary according to the type of infringement in question and the particular circumstances of the case.”⁶⁵

These considerations call for examination of, for example, the extent to which the appellant instigated or played a leading role in the cartel (ringleader? follower?), the duration of its participation, the intensity of that participation (a peripheral attender on a few occasions? or an active leader?), the extent to which it benefited from its involvement, the extent to which its conduct harmed consumers, the circumstances under which it joined the cartel, and whether it voluntarily ended the breach.

⁶³ *Wieland-Werke v Commission* (T-116/04) [2009] E.C.R. II-1087 at [32]–[33]. See also *Scandinavian Airlines System v Commission* (T-241/01) [2005] E.C.R. II-2917 at [79] cited in *Wieland-Werke* (“It next has to be examined whether the Commission's assessment of the seriousness of the infringements, having regard to the three factors of their nature, the extent of the geographic market concerned and their actual impact on the market, is vitiated by obvious error.”).

⁶⁴ See *Erste Group Bank* (C-125/07 P) [2009] E.C.R. I-8681 at [187].

⁶⁵ *Degussa* (T-279/02) [2006] E.C.R. II-897 at [95] (citing *Pioneer* (100/80) [1983] E.C.R. 1825 at [120]) (emphasis added); see also *Erste Group Bank* (C-125/07 P) [2009] E.C.R. I-8681 at [91]–[92].

The Fining Guidelines, in para.5 of the Preamble, provide for the value of sales of goods or services to which the infringement relates as the basis for assessing gravity,⁶⁶ but these factors “*should not be regarded as the basis for an automatic and arithmetical calculation method.*”⁶⁷ If market shares and turnover are given too great weight, those who are less guilty and those who are more guilty will be subject to the same arithmetical calculation of the fine. A.G. Tizzano raised the problem of non-individualisation of guilt and unfair punishment of smaller companies by the uniform application of the Fining Guidelines in *Dansk Rørindustri A/S*. While under the former Guidelines, the starting number reflected “guilt” and under the new guidelines the starting number reflects “turnover”, his concerns apply equally to the present ones. He doubted the fairness of the fining system, stating:

“It does not seem to me to be fully consistent with the requirements of individualisation and progressiveness of the ‘penalty’ — two principles of cardinal importance in any punitive system, both in the criminal and the administrative spheres — that ... some of the calculation operations are essentially formal and abstract in character.”

And he was doubtful whether the resulting fines were “in conformity with the general requirements of reasonableness and fairness”.⁶⁸

The question the Courts should ask, but do not usually ask, is not whether the Commission erred in applying its Guidelines but whether the punishment imposed on an undertaking corresponded to the individual gravity of misconduct.

Summary as to current judicial practice

The Courts of the Community and the Union have not often in the past 20 years exercised unlimited jurisdiction in its purest form: reducing the fine for being excessive or unjust. Although they did so for “reasons of equity and proportionality” in *Greek Ferries*⁶⁹ and because the fine was “inappropriate” in *Parker Pen*,⁷⁰ most proportionality claims have been rejected. In a few cases, the applicant was exonerated.⁷¹ The Court increased the fine once, not because it felt the penalty was too mild, but to correct arithmetically certain lapses of assessment.⁷² Since the adoption of the Guidelines the Courts have usually elected not to engage in an independent consideration of whether the fine was appropriate under the totality of the circumstances.

Bo Vesterdorf, the second President of what is now called the General Court, in an article regarding the unlimited jurisdiction of the Court, reaches similar conclusions:

⁶⁶ 2006 Fining Guidelines, para.5: “It is appropriate for the Commission to refer to the value of the sales of goods or services to which the infringement relates as a basis for setting the fine”.

⁶⁷ 2006 Fining Guidelines, para.6 (emphasis added).

⁶⁸ Opinion of A.G. Tizzano in *Dansk Rørindustri A/S* (C-189/02 P) [2005] E.C.R. I-5425 (internal citations omitted).

⁶⁹ *Ventouris* (T-59/99) [1999] E.C.R. II-2519.

⁷⁰ *Parker Pen* (T-77/92) [1994] E.C.R. II-549.

⁷¹ See for example *Cimenteries CBR SA v Commission* (T-25/95) [2000] E.C.R. II-491; [2000] 5 C.M.L.R. 204 where the Court held that the Commission had not adequately proved the participation of some undertakings in the unlawful agreement (notably Titan).

⁷² *BASF and UCB* (T-101/05 and T-111/05) [2007] E.C.R. II-4949. However, that came as the result of the General Court’s rejection of the Commission’s characterisation of a global and a European cartel arrangement as a single and continuous infringement. The Court concluded that the parties had “committed two separate infringements of Article 81(1) EC and not a single continuous infringement”. This had the result that the global arrangements became time-barred. As a consequence, BASF was no longer entitled to the 10% reduction in the fine for the information it had provided in relation to the global arrangements. This had the curious effect that, despite the shortened duration of the infringement, the overall level of the fine was increased by €54,000.

“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 paragraph 32.”⁷³

[32] and [33] of *Wieland-Werke* read as follows:

“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.”

“Nor, in principle, does the discretion enjoyed by the Commission and the limits which it has imposed in that regard prejudice the exercise by the Court of its unlimited jurisdiction.”⁷⁴

This sentence mentions unlimited jurisdiction, but does not explain its consequences. Does the Court suggest that the wider the scope of the Commission’s discretion, the less scope there is for the Courts to alter the amount of the fine? Does it suggest that in areas where the Commission has discretion the reviewing Court must defer, or that the Court chooses to defer?

We know that the Commission has discretion to choose how to calculate fines.⁷⁵ But this does not mean that the Courts *should* defer to the way in which the Commission has exercised that discretion. Such an approach would have the unfortunate consequence of reinforcing the anxieties elsewhere expressed about the absence of constraints upon the Commission.⁷⁶ To caricature the concern by oversimplifying it, the prosecuting authority decides if its own accusation is convincing, selects the fine to be imposed, and is subject to deferential judicial review, which essentially confirms that the prosecutor had the power and discretion to select that fine.

Now, it is true that the burden on the Courts of assessing *de novo* every appealed fine with a fresh perspective must be immense, which may explain why the European Courts have often adopted a restricted view of their power of judicial review. It must also be recognised that it cannot be easy for a court, which has not met the individuals whose behaviour is at stake and which is confronted with thousands of pages of pleadings and annexes, to conclude on whether a penalty was appropriate. So we should not pretend that judges are endowed with magical insights to determine what penalty should have been imposed. Fining is not like calculating a tax liability, nor should it be. Nor should we assume that severe penalties are automatically objectionable.

Another concern, with which I would disagree, may be that the fight against cartels would be compromised by judicial setbacks for the prosecutor. In every democracy, the courts are accused of being “soft” on crime if the burglar is released because the constable erred. We may note that such concerns of weakness in enforcing the law have been advanced in the case of anti-terrorism measures: but being severe

⁷³ See B. Vesterdorf, “The Court of Justice and Unlimited Jurisdiction: What Does it Mean in Practice?” (GCP, June 2009), pp.2–3, at <http://www.globalcompetitionpolicy.org/index.php?id=2115&action=600> [Accessed March 3, 2011].

⁷⁴ *Wieland-Werke* (T-116/04) [2009] E.C.R. II-1087 at [32]–[33].

⁷⁵ *LR AF 1998* (T-23/99) [2002] E.C.R. II-1705 at [231].

⁷⁶ See I. Forrester, “Due Process in EC Competition Cases: A distinguished Institution with Flawed Procedures” (2009) 34 E.L. Rev. 817. See also Working Paper and a Report of the Global Competition Law Centre (GCLC) of the College of Europe: D. Slater, S. Tomas and D. Waelbroeck, “Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?”, Global Competition Law Centre Working Papers Series, GCLC Working Paper 04/08 (GCLC Working Paper) at <http://www.coleurope.eu/content/gclc/documents/GCLC%20WP%2004-08.pdf> [Accessed March 3, 2011], also published in (April 2009) *European Competition Journal* 97; for a robust alternative view, see F. Castillo de la Torre, “Evidence, Proof and Judicial Review in Cartel Cases” in M. Marquis and C.-D. Ehlermann (eds), *European Competition Law Annual 2009: The Evaluation of Evidence and its Judicial Review in Competition Cases* (Oxford: Hart Publishing, 2011).

on suspected terrorists has not been an unmitigated success. And indeed the case of *Kadi*⁷⁷ confirms the relevance of due process principles in European law. I submit that rigorous judicial review is a valuable element of quality control, not “disloyal” in any way. With hindsight, we can see that the famous triple reversal of the Commission in three merger cases (*Tetra Laval*, *Schneider/Legrand*, *Airtours*) had a wholesome effect on the rigour of Commission analysis in subsequent merger cases. I would submit that if the Court is willing to be robust in the field of reviewing whether decisions about mergers were well founded, without deferring to the Commission’s discretion, it should be even more ready to intervene when considering cases of guilt or innocence, a fortiori, when penalties have been imposed.

Judges may believe that they are not necessarily well placed to decide what penalty should be imposed for a given complex offence. The advocate is thus faced with a curious phenomenon: a court endowed with unlimited jurisdiction which frequently elects not to exercise that power, electing instead to defer to the exercise of the authority’s discretion, and checking only for the absence of manifest error. The judges’ reluctance to exercise full jurisdiction leads us to the acceptability of the fining practices of the European Union in light of its international obligations.

The new constitutional order

The Treaty of Lisbon amended yet again the Treaty of Rome, with effect from December 1, 2009. It provides that the European Union will accede to the ECHR, a process likely to take a year or two. The Treaty also adopts into EU law the provisions of the Charter of Fundamental Rights and provides that the jurisprudence of the Strasbourg Court will be dispositive for the Courts in Luxembourg. This means that a challenge relating to the legality of fining practices under what might be called higher standards of justice will for the next couple of years be most naturally heard by the EU Courts in Luxembourg. The Strasbourg Court will become directly competent to control matters in the future. The Luxembourg Courts are already bound by the case law of the ECtHR and by the Charter. In EC cases thus far, they have held that the rules and procedures applicable under Community law in competition matters were adequate to satisfy the standards of the ECHR.

The penal characteristics of how fines are imposed

The European Commission is a large administration which is divided into Directorates General. The DG for Competition is unique in that it has power to enforce the competition rules directly against businesses and their employees. It may open lock-fast places, put questions to individuals, seize documents, search electronic files, issue formal demands for information, conduct “dawn raid” inspection visits and announce that such raids have been conducted. Its powers to investigate in this way extend to private homes.⁷⁸ The Commission also has the power to interview individuals about suspected infringements.⁷⁹ Telling falsehoods to the competition officials, refusing to reply to their questions or damaging a seal left overnight during an inspection visit can all give rise to a fine.⁸⁰ Dawn raids can be conducted by more than a dozen people, and are commonly timed to coincide with raids in other countries by different officials. The atmosphere during a raid is tense and often confrontational, similar to a criminal enquiry. Email messages are nowadays a source of vast amounts of data, which Commission specialists, when making inspection visits, copy for subsequent study. The Commission also makes regular and extensive use of so-called “Article 18 requests”

⁷⁷ *Kadi and Al Barakaat International Foundation v Council and Commission* (C-402/05 P and C-415/05 P) [2008] E.C.R. I-6351; [2008] 3 C.M.L.R. 41.

⁷⁸ Article 21 of Regulation 1/2003.

⁷⁹ Article 19 of Regulation 1/2003.

⁸⁰ €38 million was inflicted on E.ON Energie for apparent breach of an adhesive seal, *E.ON Energie v Commission* (T-141/08) December 15, 2010 .

to obtain wide-ranging information from parties under investigation and third parties.⁸¹ Thus an apparatus of fact-gathering apt to a criminal investigation exists and is regularly used.

The announcement of the ultimate decision imposing a fine is made publicly by the Competition Commissioner, who may state that the guilty company has cheated consumers, “ripped-off” the public, acted unfairly or dishonestly, and must suffer. The accusations can lead to criminal charges before national courts for the persons involved. Prison terms are routine in the United States and are gradually emerging in Europe, though not yet routine. The financial penalties can be increased heavily for recidivism. (These enormous sums of money reduce the costs of the EU budget and thus help the Commission do its job. It seems unfortunate that the institution levying the fine in effect benefits thereby, a further reason for rigorous judicial scrutiny.)

The foregoing phenomena collectively suggest that the regime of European competition law has criminal characteristics in that it is intended to impose a high level of moral condemnation and disapproval, to inflict severe punishment, to deter future wrongdoing by others,⁸² and to unravel unlawful conspiracies.⁸³ The non-compensatory nature of the fines has also been confirmed by the Commission’s efforts to promote private damages actions. While 50 years ago, there may have been a case for regarding competition fines as then imposed as “administrative”, that is no longer a credible assertion, which brings us to the question of how to characterise fines in European competition cases, and how they are judicially controlled.

Summary of the human rights analysis

The European Courts in Luxembourg so far do not apply the ECHR and the case law of the European Court of Human Rights in Strasbourg (ECtHR) directly, since the ECHR as such is as yet not part of Community law.⁸⁴ This has led to some subtle but real divergences between ECHR and EC law.⁸⁵ However, with the advent of the Lisbon Treaty in December 2009, the Charter of Fundamental Rights (CFR) has become part of the EU constitutional order with the same legal effect as the Treaties.⁸⁶ Pursuant to art.52(3)CFR, the CFR guarantees a level of protection at least equivalent to that of the ECHR. According to the Official Explanations published at the same time as the CFR, “the level of protection afforded by the Charter may never be lower than that guaranteed by the ECHR”.⁸⁷ The Explanations further confirm that “the meaning and the scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case-law of the European Court of Human Rights”.⁸⁸ Thus, the CFR incorporates into EU law the entire *acquis* of the ECHR as interpreted by the ECtHR. For present purposes, it guarantees the right to a “fair and public hearing within a reasonable time by an independent and impartial tribunal” (art.47 echoing art.6 ECHR), and the presumption of innocence (art.48), and provides that penalties shall

⁸¹ Article 18 of Regulation 1/2003,

⁸² See for example *2006 Guidelines*, paras 4, 25, 30–31.

⁸³ See for example Wils, “Optimal Antitrust Fines: Theory and Practice” (2006) 29 *World Competition* 183 (2006).

⁸⁴ *Mannesmannröhren-Werke AG v Commission* (T-112/98) [2001] E.C.R. II-729; [2001] 5 C.M.L.R. 1 at [59].

⁸⁵ Compare for instance the ECtHR’s wide application of the privilege against self-incrimination, covering also indirect incrimination through the duty to respond to questions of fact which would establish an infringement, in *Saunders v United Kingdom* (1997) 23 E.H.R.R. 313 ECtHR with the ECJ’s limited approach set out in 374/87 *Orkem v Commission* [1989] E.C.R. 3283 at [29]. This is discussed in Aslam and Ramsden, “EC Dawn Raids: A Human Rights Violation?” (2008) 5 *Competition Law Review* 61. See also the review of *Orkem* by Forrester and Norall (1989) 9 Y.E.L. 305.

⁸⁶ Article 6(1) TEU.

⁸⁷ Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17, explanation on art.52. These explanations recording the legislator’s intent are very relevant to the interpretation of the text of the CFR in the same way as the recitals are to the interpretation of a piece of legislation. See for example, *Apostolides v Orams* (C-420/07) [2009] E.C.R. I-3571; [2010] All E.R. (Comm) 959 at [73], which construes a regulation by reference to its recitals. Moreover, according to the Preamble of the CFR, the “Explanations” must be given “due regard”.

⁸⁸ Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17, explanation on art.52.

not be disproportionate (art.49). These rights are broadly equivalent to the rights established by the Convention, and it is the case law of the Strasbourg Court which shall guide the Luxembourg Courts in case of doubt. Governments have been obliged by art.6 ECHR in numerous respects to change how they determine civil or criminal controversies. As we shall see, the availability and intensity of judicial review are, under the ECHR, relevant to the administrative acceptability of the proceedings.

“Administrative” or “criminal”?

Article 23(5) of Regulation 1/2003, echoing its predecessor Regulation 17/62, provides that fines imposed for competition infringements “shall not be of a criminal law nature”. Several members of the Luxembourg Courts have noted their characteristics and proposed that they be treated as criminal.⁸⁹ It is thus irrelevant that Regulation 17/62 and Regulation 1/2003 labelled competition fines as “administrative”.

The factors to determine whether proceedings are criminal are: (1) the domestic classification of the offence; (2) the nature of the offence; and (3) the nature and severity of the penalty.⁹⁰ Proceedings are “criminal” if one of the criteria is met. Based on these criteria, commonly referred to as the *Engel* criteria, the ECtHR has found in a number of cases that administrative proceedings and sanctions imposed in such proceedings were of a criminal nature, even though they were not labelled as “criminal” under the relevant domestic laws. The sanctions are imposed by general legal provisions which aim at ensuring deterrence and punishment under statutory powers of enforcement.⁹¹ It is difficult to deny that competitive fines would be criminal for purposes of the ECHR. Wouter Wils, a considerable authority, argues⁹² that competition fines do not carry the distinguishing characteristics of penalties under national criminal law, namely: imprisonment of individuals, criminal intent, moral condemnation, relationship between the size of the penalty and the extent of the harm, criminal powers of investigation and criminal rights of defence.⁹³ The alternative view is that European competition law cases have many such characteristics: criminal-like investigations; severe moral stigma; huge penalties; possible national imprisonment; and public disgrace. The conduct of a raid by Commission investigators presents many questions which arise in a purely

⁸⁹ See Opinion of A.G. Mayras in *Boehringer v Commission* (7/72) [1973] C.M.L.R. 864; [1972] E.C.R. 1281 at 1302 (“Ainsi a-t-on pu affirmer que les amendes communautaires, formellement administratives, ont, au point de vue matériel, la nature de sanctions pénales”); Opinion of A.G. Vesterdorf in (T-1/89 to T-4/89, T-6/89 to T-15/89) *Rhône Poulenc v Commission* (C-185/95 P) [1991] E.C.R. II-867 at 885; Opinion of A.G. Léger in *Baustahlgewebe v Commission* (C185/95 P) [1998] E.C.R. I-8417; [1999] 4 C.M.L.R. 1203 at [31]; Opinion of A.G. Kokott in *Autorità Garante della Concorrenza e del Mercato v Ente Tabacchi Italiani — ETI SpA* (C-280/06) [2007] E.C.R. I-10893; [2008] 4 C.M.L.R. 11 at [71].

⁹⁰ *Engel v The Netherlands* (1979–80) 1 E.H.R.R. 647 ECtHR at [82].

⁹¹ See *Bendenoun v France* (1994) 18 E.H.R.R. 54 ECtHR at [47]; *Benham v United Kingdom* (1996) 22 E.H.R.R. 293 ECtHR at [56]; *Jussila v Finland* (2007) 45 E.H.R.R. 39 ECtHR at [38] (emphasis added): “the tax surcharges were not intended as pecuniary compensation for damage but as a punishment to deter re-offending. It may therefore be concluded that the surcharges were imposed by a rule whose purpose was deterrent and punitive. Without more, the Court considers that this establishes the criminal nature of the offence. The minor nature of the penalty renders this case different from Janosevic and Bendenoun as regards the third Engel criterion but does not remove the matter from the scope of Article 6. Hence, Article 6 applies under its criminal head notwithstanding the minor nature of the tax surcharge.”

⁹² See W. Wils, “The Increased Level of EU Antitrust Fines, Judicial Review and the European Convention on Human Rights” (2010) 33 *World Competition* 12; W. Wils, “Is Criminalisation of EU Competition Law the Answer?” (2005) 28 *World Competition* 4. One of the enjoyable features of the present important debate is reading such robustly written legal articles.

⁹³ See study by Prof. Jürgen Schwarze with Dr Rainer Bechtold and Dr Wolfgang Bosch for Gleiss Lutz, “Deficiencies in European Competition Law — Critical analysis of the current practice and proposals for change” (2008), p.23, at <http://www.gleisslutz.com> [Accessed March 4, 2011], to the effect that the intention of the legislator in describing the fines as administrative was to make clear that the European Community does not unduly claim a criminal law competence.

criminal case; individuals who are convicted of participation in infringing activity can go to prison; there is a very public chastisement of companies which are found guilty; the penalties are established to punish and to deter the wrongdoer as well as other enterprises; and the extent of the right to remain silent, the duty to co-operate, the consequences of not telling the truth, the availability of any kind of presumption of innocence, and other rights of defence are parallel to clearly criminal law. The extent to which guilt can be attributed without proof of intent, and guilt of the company for actions of its employees are two further questions of a criminal law nature. There are thus strong arguments to support the proposition that the application of the competition rules⁹⁴ by the European Commission is a matter of hardcore criminal law enforcement within the meaning of the ECHR.⁹⁵ Commission experts disagree.⁹⁶

Pursuant to art.6(1) ECHR, those accused of a criminal offence are entitled to have their case heard at first instance in public by an impartial tribunal, independent of the administration, which accords the presumption of innocence, and which hears all sides of the case in public with impartiality.

Now, the European Commission is an administrative body, not a tribunal. Commission decisions are adopted by a political body, the College of Commissioners. There is no externally discernible separation between the roles of investigator of the facts, prosecutor and decision-maker; the prosecutor thus both accuses and determines guilt; and imposes punishment. The Commission enjoys a large margin of discretion in gathering evidence and only the Commission has the power to compel evidence from third parties. There is no public hearing before a neutral decision-maker. There is no procedure at which the accused can present his case and be heard on a basis equal to that of the prosecutor. At the hearing, the case team is invited to consider the possibility that it might be wrong: that is not the same as the presumption of innocence.

In competition cases the facts are almost always profoundly controversial; they are prosecutions often turning on the credibility of a rival who has an interest in seeing the conviction and punishment of its competitor. Commission decisions and inspections are extensively covered in both specialised and popular media. The condemnation, and even the mere launch of an EU competition law investigation, produces negative consequences for the reputation of the company. Recidivists are punished with particular severity. Competition law fines can amount to hundreds of millions of Euros and can threaten the future of the fined companies. A small number of companies have been rendered insolvent, or at least assert that they have been. Competition cases leading to the imposition of enormous penalties cannot easily qualify as “minor” offences.

Thus I would disagree with the proposition that European competition cases fall outside the “hard core of criminal law”. Truly criminal penalties cannot in a democracy be imposed by an administration. I would submit that EU competition decisions, being akin to serious criminal cases in several respects, ought not

⁹⁴ The Explanations relating to the Charter of Fundamental Rights, [2007] OJ C303/17, explanation on art.52: “Articles where the meaning is the same as the corresponding Articles of the ECHR, but where the scope is wider: ... — Article 47(2) and (3) corresponds to Article 6(1) of the ECHR, but the limitation to the determination of civil rights and obligations or criminal charges does not apply as regards Union law and its implementation.” This appears to state that the guarantees of art.6(1) of the Convention are available in administrative matters more readily and more broadly than under the Convention.

⁹⁵ See *Société Stenuit v France* (1992) 14 E.H.R.R. 509 ECtHR. See also the conclusions reached by the ECJ in *Hüls v Commission* (C-199/92 P) [1999] E.C.R. I-4287; [1999] 5 C.M.L.R. 1016 at [150] and *Montecatini SpA v Commission* (C-235/92) [1999] E.C.R. I-4539; [2001] 4 C.M.L.R. 18 at [176]; “given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, the principle of the presumption of innocence [in art.6(2) ECHR] applies to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines.”

⁹⁶ Wils contends that competition law fines are merely quasi-criminal like other civil infringements. See W. Wils, “The combination of the investigative and prosecutorial function and the adjudicative function in EC antitrust enforcement: A legal and economic analysis” (2004) 27 *World Competition* 8; Wils, “The Increased Level of EU Antitrust Fines, Judicial Review and the European Convention on Human Rights” (2010) 33 *World Competition* 12.

to be adopted as is the current practice. The biggest inconvenience for the Commission if it were to lose this debate would be that determination of guilt and the imposition of a “criminal sentence” in the form of a fine could not lawfully be taken by the administration which is the College of EU Commissioners. A prosecution before an independent and impartial tribunal would be necessary. There would not be a paralysis in enforcement, although there would be inconvenience and procedural anxiety while the Commission established a procedure which would accord the presumption of innocence to the accused. The matter could probably be remedied by the establishment of a proper hearing by, for example, an administrative law judge empowered to make factual findings after hearing both sides on an equal footing.⁹⁷

Other problems of non-judicial condemnations

The problem of non-judicial condemnations is not unique to competition cases. It has arisen in numerous national matters involving other sanctions. For example, in *Dubus v France*,⁹⁸ the ECtHR found that disciplinary proceedings before the French Banking Commission were of a criminal nature. After citing the *Engel* criteria, the Court noted that, while the penalty which had been imposed was categorised in domestic law as an administrative sanction, the penalty was removal from the register of traders or a fine up to the level of the offender’s minimum capital, or both. It considered that such significant financial consequences can be regarded as penal sanctions. The penal nature of a sanction depends on the gravity of the *potential* sanction, and the sanction was such as to affect the credit of the company and involved grave consequences. The Court took the view that the Banking Commission, in condemning Mr Dubus, should be regarded as a “tribunal” for the purpose of art.6(1) ECHR and that the sanction had a “*coloration pénale*” and was a criminal charge for the purpose of that article.⁹⁹ Thus the prosecution of Mr Dubus was fundamentally flawed.

“Quasi-criminal”, “soft criminal” offences and civil penalties

In applying the protections of art.6 of the Convention, a distinction is made between the “hard core of criminal law”, and “cases not strictly belonging to the traditional categories of the criminal law”, which “differ from the hard core of criminal law”.¹⁰⁰ As just noted, if a competition fine involves real criminal law, then the current procedure is flawed and needs change. By contrast, some administrative sanctions,¹⁰¹ such as tax surcharges or other penalties or loss of benefits, may be imposed in the first instance by an administrative body,¹⁰² provided there is the possibility of appeal before a judicial body of full jurisdiction

⁹⁷ The procedural problems are discussed and possible solutions proposed in Forrester, “Due Process in EC Competition Cases” (2009) 34 E.L. Rev. 817.

⁹⁸ *Dubus SA v France* (5242/04) June 11, 2009 ECtHR.

⁹⁹ The relevant parts of the judgment, only available in French, are as follows: “*Par ailleurs, il résulte des paragraphes précédents que cette sanction, dans les circonstances de l’espèce, avait une ‘coloration pénale’.* Ainsi, la Commission bancaire a statué en tant que ‘tribunal’ et sur le ‘bien-fondé d’une accusation en matière pénale’, au sens de l’article 6 § 1 de la Convention. Partant, l’exception d’incompatibilité ratione materiae soulevée par le Gouvernement doit être rejetée.” *Dubus v France* (5242/04) June 11, 2009 at [37]–[38] (emphasis added).

¹⁰⁰ *Jussila v Finland* (2007) 45 E.H.R.R. 39 at [43]: “it is self-evident that there are criminal cases which do not carry any significant degree of stigma. There are clearly ‘criminal charges’ of differing weight. Tax surcharges differ from the hard core of criminal law; consequently, the criminal-head guarantees will not necessarily apply with their full stringency (see *Bendenoun* and *Janosevic*, § 46 and § 81 respectively, where it was found compatible with Article 6 § 1 for criminal penalties to be imposed, in the first instance, by an administrative or non-judicial body: *a contrario*, *Findlay v the United Kingdom*, cited above).”

¹⁰¹ See Wils, “The Increased Level of EU Antitrust Fines, Judicial Review and the European Convention on Human Rights” (2010) 33 *World Competition* 12.

¹⁰² *Janosevic v Sweden* (2004) 38 E.H.R.R. 22 ECtHR at [81] “The tax authorities are administrative bodies ... Contracting States must be free to empower tax authorities to impose sanctions like tax surcharges even if they come

with “the power to quash in all respects, on questions of fact and law, the decision of the body below”. Thus the ECtHR has found that for certain kinds of case (“soft criminal” is one label) it may be acceptable for a penalty to be imposed by an administration, provided that there is the possibility of an adequate review on appeal. The Strasbourg Court’s cases have so far limited this exception to offences¹⁰³ carrying little or no “stigma”.¹⁰⁴ Now, the public stigma of being condemned for competition infringement is much greater than losing an argument with the tax authorities. Citizens who have to pay tax penalties, or civil penalties for putting out rubbish on the wrong day or for customs irregularities, are not exposed to public disgrace. In tax cases the facts in dispute are usually narrowly limited and the dispute turns on how to characterise them. The frequency and circumstances under which tax investigations are conducted substantially differ from the way the Commission conducts its competition investigations. Nor does the tax authority encourage private lawsuits against the infringer.

Several Strasbourg judgments concern controversies over how states have conducted the “determination” of citizens’ rights and obligations in matters which are not hard-core criminal. To satisfy the Charter, decisions would have to be “subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6 para. 1”.¹⁰⁵ Under *Schmautzer*, “full jurisdiction” includes the power to quash in all respects, on questions of fact and law, the decision of the administrative body.¹⁰⁶ Thus even if, contrary to the contentions of this article, an EU competition decision were not a truly hard-core criminal matter, this would not change the need for full and effective judicial review of the level of the fines imposed.¹⁰⁷

In *Kyprianou*, the ECtHR ruled on whether the review by the Cypriot Supreme Court of a condemnation (of a lawyer!) for contempt of court could cure the flaws that affected the trial before the lower court. Noting the Supreme Court lacked competence to deal *de novo* with the case, the ECtHR concluded that the defects were not cured by the availability of the appeal:

to large amounts ... [provided that there is an appeal to] a judicial body that has full jurisdiction, including the power to quash in all respects, on questions of fact and law, the challenged decision ... ”

¹⁰³ *Öztürk v Germany* (1984) 6 E.H.R.R. 409 ECtHR at [56] (internal citations omitted): “Conferring the prosecution and punishment of minor offences on administrative authorities is not inconsistent with the Convention provided that the person concerned is enabled to take any decision thus made against him before a tribunal that does offer the guarantees of Article 6.”

¹⁰⁴ *Jussila v Finland* (2007) 45 E.H.R.R. 39 at [43].

¹⁰⁵ *Albert and Le Compte v Belgium* (1983) 5 E.H.R.R. 533 ECtHR at [29] (emphasis added). This case concerns disciplinary sanctions (suspension of medical licence) imposed on two doctors, Dr Albert and Dr Le Compte. The Court held that although these were disciplinary actions, the applicants were entitled to have their cases heard by a “tribunal” satisfying the conditions laid down in art.6(1): “In many member States of the Council of Europe, the duty of adjudicating on disciplinary offences is conferred on jurisdictional organs of professional associations ... either the jurisdictional organs themselves comply with the requirements of Article 6 para. 1 (art. 6-1), or they do not so comply but are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6 para. 1 (art. 6-1)”.

¹⁰⁶ *Schmautzer v Austria* (1996) 21 E.H.R.R. 511 ECtHR at [25]–[26], [36]; see also *Le Compte v Belgium* (1982) 4 E.H.R.R. 1 ECtHR at [51]. In *Schmautzer* the applicant was stopped by the police while driving his car because he was not wearing his safety-belt. In a “sentence order” the federal police authority imposed on him a fine of 300 Austrian schillings with 24 hours’ imprisonment in default of payment, for an offence under the Motor Vehicles Act. The fact that the penalty was criminal was not disputed by the Austrian Government. The Court held that there was a violation of art.6 since the applicant was not heard by a tribunal of “full jurisdiction”. The Court set out the defining characteristics of a “judicial body that has full jurisdiction”. See also *Ravon v France* (18497/03) February 21, 2008 ECtHR.

¹⁰⁷ *Le Compte v Belgium* (1982) 4 E.H.R.R. 1 at [51] (internal citations omitted); “... the ‘right to a court’ and the right to a judicial determination of the dispute cover questions of fact just as much as questions of law. Yet the Court of Cassation does not have jurisdiction to rectify factual errors or to examine whether the sanction is proportionate to the fault. It follows that Article 6 par. 1 (art. 6-1) was not satisfied unless its requirements were met by the Appeals Council itself.” See also *Schmautzer v Austria* (1996) 21 E.H.R.R. 511 at [36].

“As a court of appeal, the Supreme Court *did not have full competence to deal de novo with the case, but could only review the first instance judgment for possible legal or manifest factual errors*. It did not carry out an *ab initio, independent determination of the criminal charge* ... Furthermore, the Supreme Court found that it could not interfere with the judgment of the Assize Court, accepting that that court had a margin of appreciation in imposing a sentence on the applicant.”¹⁰⁸

Thus the Court found that Cyprus had been in breach of its obligations in that the appellate recourse available to the punished person was limited to a review of legality. In a less sensitive case, involving the termination of employment, Austria was found to have breached its obligations in that the determination of the administration as to the justification for dismissing a disabled person was without “effective” review by the courts, which merely checked for legality.¹⁰⁹

There is a wide spectrum of cases on such setbacks as loss of housing benefits (*Tsafyo v United Kingdom*),¹¹⁰ loss of employment (*Crompton v United Kingdom*),¹¹¹ and other controversies with a public authority. The more the matter consists of assessing needs in light of policies, the less it is apt for judicial second-guessing; the more the matter consists of the receiving by a prosecutor of a complaint or a confession, the investigation of the evidence of guilt and the acceptance or rejection of contradictory evidence, the more scrutiny is a necessity.

A decision on whether to deny a social security benefit should not demand the same level of appellate scrutiny as a decision imposing a fine intended to punish the guilty and deter others. As to the former, a court is not likely to be able to reach a better conclusion than the state’s official. As to the latter, the more severe the penalty the greater the need for (and right to demand) appellate scrutiny. A more rigorous appellate review forms part of the regular practice of the United Kingdom’s Competition Appeals Tribunal, which takes advantage of its full jurisdiction and makes an intense judicial review when a fine is challenged.¹¹² The *Napp* judgment is a good example:

“It follows, in our judgment, that the Tribunal has a full jurisdiction itself to assess the penalty to be imposed, if necessary regardless of the way the Director has approached the matter in application of the Director’s Guidance. Indeed it seems to us that, in view of Article 6(1) of the ECHR, an undertaking penalised by the Director is entitled to have that penalty reviewed *ab initio* by an impartial and independent tribunal able to take its own decision unconstrained by the Guidance. Moreover, it seems to us that, in fixing a penalty, this Tribunal is bound to base itself on its own assessment of the infringement in the light of the facts and matters before the Tribunal at the stage of its judgment.”¹¹³

¹⁰⁸ *Kyprianou v Cyprus* (2007) 44 E.H.R.R. 27 ECtHR at [44] (emphasis added).

¹⁰⁹ *Obermeier v Austria* (1991) 13 E.H.R.R. 290 ECtHR. See also, on the subject of limited judicial review (no “*contrôle de pleine juridiction*” in a tax case), *Silvester’s Horeca Service v Belgium* (47650/99) March 4, 2004 ECtHR. By contrast, *Bryan v United Kingdom* (1995) 21 E.H.R.R. 342 ECtHR, a planning matter was regarded as a “typical example of the exercise of discretionary judgment in the regulation of citizens’ conduct”, and there had been no breach of art.6(1).

¹¹⁰ *Tsfayo v United Kingdom* (2009) 48 E.H.R.R. 457 ECtHR.

¹¹¹ *Crompton v United Kingdom* [2010] 50 E.H.R.R. 36 ECtHR. See also *Savino v Italy* (17214/05, 20329/05, 42113/04) April 28, 2009 ECtHR, concerning the rights of employees of the Italian Parliament, which was held not to be an independent tribunal for purposes of art.6(1).

¹¹² See, for example, *National Grid Plc v Gas and Electricity Markets Authority* [2009] CAT 14 at [208]–[220]; further comprehensive review on the merits by Richards L.J. in the Court of Appeal, *National Grid Plc v Gas and Electricity Markets Authority* [2010] EWCA Civ 114; [2010] U.K.C.L.R. 386 at [90]–[115]. See also *Sepia Logistics Ltd v Office of Fair Trading* [2007] CAT 13; *Umbro Holdings Ltd v Office of Fair Trading* [2005] CAT 22; *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CAT 1; *Argos & Littlewoods v Office of Fair Trading* [2005] CAT 13.

¹¹³ *Napp* [2002] CAT 1 at [499].

The Primagaz precedent

Just 12 months after the entry into force of the Lisbon Treaty, the ECtHR has found that France had breached its obligations under art.6(1) in a competition case.¹¹⁴ The Court condemned as inadequate the appellate review available to challenge the grant of a warrant to conduct a raid against suspected members of a French cartel. The appeal against the raid did not involve a review of the factual merits, only a procedurally tardy review of legality. The Court thus confirmed that limited judicial review (or deferential judicial review) of an interlocutory step in a competition case was not enough to satisfy art.6(1) ECHR. That the Strasbourg Court, which is so overloaded that it can render judgment in only a tiny fraction of its cases, chose to select a competition case seems significant. It is interesting that the ECtHR chose to examine a national competition case so as to advance the law on judicial oversight. The matter concerned an interlocutory appeal. A fortiori, the infliction of a severe penalty in a competition case must require intense judicial scrutiny. Whether the competition decisions are “hard” criminal or “soft” criminal, an appellate review which refuses to consider proportionality and which is confined to certifying administrative discretion is constitutionally unacceptable.

The problem in summary

If Commission fines are truly and seriously criminal in nature, their imposition is a breach of the Charter and the Convention in that the punishment has not been determined by an “independent and impartial tribunal”. To remedy matters it will be necessary for the Commission to modify its practices. The Courts should be willing to take action to require the process of reform to begin. If, to the contrary, the fines can be regarded as civil penalties or soft-criminal penalties, their review on appeal by the Courts of the Union must take account of the ECHR and the Charter. That review must involve a full examination of the underlying merits. For the reasons already set forth, a deferential or limited review of compliance of fines with administrative guidelines does not satisfy this standard. In either case, robustly intense legal review in Luxembourg is necessary.

Proportionality

A separate reason for doubting the legality of current arrangements is the need for an examination of the proportionality of the fine. The need for a proportionality review is highlighted by the coming into legal force of art.49(3) of the Charter, which provides that “[t]he severity of penalties must not be disproportionate to the criminal offence”.

The evidently severe level of the penalties clearly calls for examination as to proportionality. It is by the assessment of proportionality that judicial scrutiny is applied. Reviewing “manifest error” is not a review of proportionality. The Court has declined to review proportionality in some cases,¹¹⁵ a practice which I suggest must now be unconstitutional.

A review of the proportionality of punishments, as guaranteed by the Charter, is now part of the judicial duty of the EU Courts. Fairness and proportionality should be relevant in a judicial review. Competition fines are determined without a hearing on the level of penalty. The method of calculation attributes much weight to turnover and duration and little weight to degree of moral guilt. A company which makes one product, or a marginal participant, may be relatively severely treated by comparison to a multi-product company or a leading conspirator. These factors of fairness would seem pertinent to the proportionality of a sentence thus imposed. Refusing to consider proportionality arguments and instead limiting the

¹¹⁴ *Compagnie des gaz de pétrole Primagaz v France* (29613/08) December 21, 2010 ECtHR.

¹¹⁵ See *Vitamins* (T-15/02) [2006] E.C.R. II-497; *BASF v Commission (Choline chloride)* (T-101/05 and T-111/05) [2007] E.C.R. II-4949; [2008] 4 C.M.L.R. 13.

analysis to the absence of “manifest error” is not the exercise of unlimited jurisdiction. Indeed, the practice raises the question of whether courts can have discretion to decide when they will perform effective judicial review and when they will not. The Courts should actively exercise their unlimited jurisdiction to decide if penalties were justly inflicted in a proportionate manner.

Competition law proceedings would be in compliance with the Lisbon Treaty only if they fell into the category of “minor offences” without “*coloration pénale*” and if they were subject to the existence of a full review on appeal by a court that entirely complies with all art.6 ECHR requirements. Thus, to ensure compliance with the Lisbon Treaty, the Courts in Luxembourg should now perform full review of competition cases on the merits. The review should no longer be a control of legality (“was it lawful?”), but a full appeal (“was the fine just and proportionate to the gravity of the offence?”).

Unlike the administrative changes which the Commission would have to make if its procedures are truly criminal, there would be no administrative changes for the Courts (although there would be more judicial work) if they were to revert to their early practice of reviewing fines on the merits in light of such considerations as fairness and proportionality.

Conclusion

Enterprises are entitled to expect a consistent approach to fining by the Commission; and the Courts should be equally consistent. However, having looked at many judgments of the Court reviewing fines and decisions imposing fines, I respectfully observe that it is difficult to see consistency. Sometimes the Court merely notes consistency with the Commission’s guidelines; sometimes the Court reviews the substance of the appeal. While in a few past cases, the Courts went to the propriety of the fine, to its fairness and proportionality, I would submit that such a robust approach is now a constitutional necessity. It cannot be right for the Courts to have a discretion over whether to exercise the competence constitutionally attributed to them.

The Court, when assessing the fine, should reach its own independent conclusions, as a national criminal court would do. This is not an easy task. Indeed, unlike individuals convicted of wrongdoing, perpetrators of competition law violations have “no soul to be damned; no body to be kicked”.¹¹⁶ The Court should examine the following questions: Did the company’s actions amount to a serious breach or a minor one? Had its participation been distinctive in degree of intensity, of duration, number of meetings and the like? Were consumers damaged by the company’s conduct? Was competition vigorous despite the alleged misconduct? Was the fine imposed proportionate to the severity of the infringement? Is the penalty comparable to the penalties inflicted on other economic crimes in our society? Is there present the unfairness noted by A.G. Tizzano that, owing to the Commission’s mechanical method in setting fines, different degrees of guilt are punished equally? The judgments of the Court should indicate how the Court reflected these basic considerations in annulling, upholding or modifying a fine.

I respectfully suggest that these matters deserve anxious reflection in light of the Treaty of Lisbon and the new constitutional regime it established for reviewing the infliction of penalties. Judicial examination of the proportionality of punishment is in any event a constitutional necessity. It would be most unfortunate if the Union were to be found wanting in respect for the European continent’s standards of due process as set forth in the Convention.

¹¹⁶“Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?”: Edward, First Baron Thurlow (1731–1806), quoted in J. C. Coffee Jr, “No Soul to Damn: No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment” (1980) 79 Mich. L. Rev. 386.