Unlimited jurisdiction

A look at how the European Courts review European Commission competition law penalties

*by **John Ratliff****

The object of this article is to focus on how the European Union Courts interpret the unlimited jurisdiction, which is conferred on them by article 261 of the treaty on the functioning of the European Union (TFEU) and article 31 of Regulation 1/2003, with regard to the penalties provided for in that regulation.

Background

It may be recalled that, through these provisions, the EU Courts are given the right to cancel, reduce or increase a fine or periodic penalty payment imposed by the European Commission (EC). In doing so, they are empowered to substitute their own appraisal for that of the EC.

It may also be recalled that this power is considered to be a key part of the effective judicial protection applicable to EC decisions, in order to ensure compliance with article 47 of the EU Charter of Fundamental Rights, which provides for review by an independent tribunal.

When we say the "EU Courts", that means the General Court in the first place, which has the power to ensure that an EC decision reflects what the General Court considers to be the fair assessment, taking into account all the circumstances. The Court of Justice will not substitute its own assessment as to the fairness of a penalty for that of the General Court, unless the level of penalty is excessive to the point of being disproportionate and it appears therefore that the General Court erred in law (see *Schindler*, paras 164-166).

It is also important to recall that the General Court does not undertake a full rehearing of all the facts on an appeal of an EC decision. The General Court exercises an administrative law review, essentially determining whether the EC has acted within its powers, has applied the relevant procedural and substantive rules and has assessed the evidence before it correctly. It is in that process that the General Court has this specific review power as regards penalties.

In recent years, we have also seen the European Courts taking a stronger line in judicial review. This has led to rejection of the view that the EC has a wide discretion to appraise the facts, which is not susceptible to review by the EU Courts, save in cases of "manifest error".

The EU Courts now state that they have to carry out a full review as to whether the EC has taken into account all the relevant facts and circumstances (see recently *Schindler*, paras 155-158). This also appears to be leading the EU Courts to use and explain their unlimited jurisdiction more. So for example this year, in judgments related to the EC's Marine Hose cartel decision, we have seen summaries of the nature of the General Court's review and the General Court's application of that power (see *Manuli Rubber Industries* (MRI), paras 345-360).

It may also be recalled that, in seeking judicial review of an EC decision, companies and the EU Courts face something of a dilemma. Generally, companies appeal in order to convince the reviewing court to *reduce* the fine that has been imposed. If, however, companies fear that the EU Courts may *increase* the fine imposed upon them, they may be deterred from bringing such appeals. It is therefore a delicate point, because applicants should not be deterred from seeking their fundamental right to independent judicial review, yet the EU Courts clearly do have the right to increase fines, if they think that is appropriate and fair.

As a result of all this, companies and their lawyers watch the EU Courts' cases carefully, especially for signs as to when the EU may be willing to increase a fine.

Current practice

The following appear to be the main principles of current practice, as explained in recent cases.

- **The EU Courts do not consider themselves bound by the EC's fining guidelines.** So, in *Quinn Barlo*, the Court of Justice upheld a General Court judgment in which the General Court had increased a fine for duration by 10%, even though that was for an infringement of just under 12 months and, in such a case, under the EC fining guidelines, no increase was applicable. Practically, the General Court found that the infringement had lasted 11 months and 28 days and decided that a 10% increase for duration reflected the gravity of the infringement. As the Court put it, the EC fining guidelines do not lay down an imperative rule and, in any event, cannot bind the Court in its exercise of unlimited jurisdiction (see paras 52-53).
- **The EU Courts are quite prepared to substitute their own assessment for that of the EC.** So, for example, in *French Beef (FNCDV)*, the Court of First Instance substituted its own view as to what an overall reduction of fine on the French farmers concerned should be in the circumstances, increasing that reduction from 60% to 70% and therefore reducing the overall fine.

Similarly this year, in *Del Monte* and *Weichert*, an appeal as regards the European Commission's Bananas decision, the General Court increased the reduction of Del Monte/Weichert's fine by 10% to 20%. This was partly to reflect its assessment of the relative gravity of Del Monte/Weichert's participation and partly on the basis that its bilateral communications with another cartel participant, Dole, were less harmful to competition than those between

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Dole and Chiquita, given Chiquita's economic strength (see paras 814-817).

▌**The General Court has denied reductions of fines where the Court considered that overall the reduction would be wrong.**

An interesting example of this occurred last year in the *MRI* case. Here, the General Court found that the EC should have accorded MRI a greater reduction of fine for its co-operation (40% instead of 30%). However, the General Court also considered that MRI could have had a higher fine, insofar as the EC could have considered that Manuli Rubber Industries had participated in a repeated infringement and fined MRI for an earlier period of infringement before a break, which earlier period the EC had treated as covered by prescription. As a result, the General Court decided that to reduce MRI's fine further went too far and it left the fine at the same level set by the EC (see paras 357-359).

Similarly, in *Duravit*, an appeal against the EC's Bathroom Fittings cartel decision, the General Court decided that the EC had been wrong to find that those companies had participated in an infringement in Austria, Italy and The Netherlands. However, the Court still decided to keep Duravit's fine at the same level, since the Court considered that, in view of the duration and gravity of the infringement in which those companies took part, that was still an appropriate penalty. Gravity had been set previously at 15% for six member states, but there were still three concerned and 15% was the bottom end of the scale for value of sales for this type of infringement.

▌**Applicants need to be aware that, in its unlimited jurisdiction, the General Court may take into account evidence which is not admissible to the Courts' review of the *legality* of the EC's decision.** Thus, in the recent *Galp Energia* case, which was an appeal against the EC's Spanish Bitumen cartel decision, the General Court took into account evidence which had been raised before the Court by the applicant in its pleadings, showing that Galp was aware or should reasonably have foreseen certain facets of the cartel (see paras 615 to 624). As a result, the Court upheld the EC's decision as to the starting amount of the fine, despite finding that the EC had not itself shown these points in its decision.

▌**The EU Courts are developing rules as to how they may exercise their unlimited jurisdiction.** Thus, the General Court has stated that, although it has the ability to set fines in its unlimited jurisdiction, it may choose to draw on the EC fining guidelines, so that there is no discrimination between the case in hand and other companies in the same cartel who have had fines imposed based on those guidelines (see *Wabco*, para 186).

The Courts emphasise, however, that they are not bound by the European Commission's calculations and that they make their own assessment in the circumstances. Notably, the Courts are not bound by the principle of legitimate expectation to a specific method of calculation (unlike the EC). Rather, they consider on a case-by-case basis the situations before them, taking into account all the matters of fact and law concerned (see *Quinn Barlo*, para 53).

The Courts also consider that they should give reasons if they depart from the EC fining guidelines, which have been applied to others. For example, in *Coppens*, the General Court set out some five reasons for its determination of the appropriate fine (see para 82).

▌**The EU Courts only exercise unlimited jurisdiction if the issue of a penalty is raised before the Court.** In practice, that usually means that the applicant has asked the Court to reduce its fine, or the Court has annulled an EC decision in all or part and therefore has to amend a fine.

▌**It is worth recalling again the *Romana Tabacchi* (RT) appeal against the EC's Italian Bananas decision.** After various findings that the EC had erred, the General Court looked at the proportionality of the fine for a small family business, noting that RT had already sold a factory in order to pay the fine and that a fine of €2.05m would have forced RT into liquidation and out of the market.

Although the Court held that the EC was not obliged to take such matters into account and noted that RT had not raised them before the EC, the Court found that it would be a "just appreciation of the circumstances" to lower the fine to €1m, an amount which it appeared RT could pay (see paras 281-285). While applicants should not assume that the EU Courts will always be so favourably disposed, it is very interesting to see such an equitable approach.

Conclusions

The main conclusions of this review are threefold:

- If practitioners want the EU Courts to look at the proportionality or the fairness of a penalty, whether related to a specific aspect of an European Commission decision, or overall, in the hope that the penalty will be reduced, then they should plead that the Court should use its unlimited jurisdiction.
- However, practitioners should think carefully about whether that could backfire, if there is an argument which could result in an increase of the applicants' fine, since the EU Courts can also do that.
- There is not some defined category of unlimited jurisdiction. The concept implies that there is scope for other, different applications in the future, depending on the circumstances. It is also not likely that the Courts will want to restrict the safety valve which they have to provide for equitable results where needed. This is to be welcomed, not only by defence counsel, but also by the EC, since it ensures compliance with fundamental rights and the rule of law.

References

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