Judicial review in EC Competition cases before the European Courts: - Avoiding *double renvoi.*

John Ratliff, WilmerHale*

Fiesole, June 2009

The object of this paper is to focus on judicial review before the European Court of First Instance ("CFI") and the European Court of Justice ("ECJ") [1] (together "the Courts", although in practice most comments here concern the CFI). My focus will be in relation to cartels, although I will also make some general remarks as to the overall framework of review, insofar as that appears relevant to the Courts' approach to the review of decisions imposing fines.[2]

General background

As well-known, there are two types of judicial review in competition cases: that based on Article 230 EC, which involves a "restricted review" based on defined grounds[3]; and that based on Article 229 EC, which gives the European Council by itself, or with the European Parliament, the power to adopt regulations giving the European Courts *unlimited jurisdiction* over fines or, as it is sometimes called, a "full review" power. This has been done through

---

* The views expressed in this paper are personal and do not necessarily reflect those of Wilmer Cutler Pickering Hale and Dorr LLP. With thanks to Sophia Lange and Gabriele Accardo for their assistance with research for this paper.

1 References here are as before the entry into force of the Lisbon Treaty in December 2009. The CFI is now the General Court of the European Union; the ECJ, the Court of Justice of the European Union and Articles 81 and 82 of the EC Treaty are now Articles 101 and 102 of the Treaty Establishing the European Union ("TFEU") respectively.

2 See generally, Gerard, "Judicial review of cartel decisions" in Siragusa and Rizza (Eds.) EU Competition Law Vol. III, Cartels (2007), Chapter 5; Bailey, "Scope of Judicial Review Under Article 81 EC", 41 Common Market Law Rev 1327. This paper does not deal with broader application of case-law on the European Convention of Human Rights.

3 The grounds set out in Article 230 EC are: (i) lack of competence; (ii) infringement of an essential procedural requirement; (iii) infringement of the EC Treaty or any rule of law relating to its application; or (iv) misuse of powers.

Article 31 of Council Regulation 1/2003[4] for general competition law and Article 16 of Council Regulation 139/2004[5] for merger control.

"Judicial review", as that term implies, does not involve a full rehearing of the case, in the sense that the facts are found again and the whole case re-examined on the merits. This is controversial, insofar as some think the CFI should do just that. However, in practice, many also argue that the various grounds for review still give the CFI an extensive basis to consider the facts and legal findings of the European Commission ("the Commission") in detail.

A key issue is whether the Commission has a discretion over some issues, which the Courts should not overrule. In the cartel area, this comes up mainly as regards fines, insofar as some argue that the Courts should be more interventionist concerning the Commission's perceived policy role and discretion to set fines. The issue also comes up frequently as regards the Courts' review of so-called "complex economic and technical assessments" or other areas of policy. (This is discussed more below.)

It is also useful to recall at the outset that the CFI was created, specifically to allow for more review of very fact intensive competition cases, leaving the ECJ to focus more on points of law.[6]

What is involved in the CFI's review varies according to the nature of the infringement alleged and the evidence to be reviewed. Cartel cases tend to turn more on facts, evidence and procedural issues, rather than economics. However, this is not always true. For example,

---

4 EC Official Journal ("O.J.") 2003 L1/1. The text of Article 229 EC provides that 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."

5 O.J. 2004 L24/1.

6 See Vesterdorf, "Judicial Review in EC Competition Law: Reflections on the Role of the Community Courts in the EC System of Competition Law Enforcement" [2005] Competition Policy International, Vol. 1, p.3 at pp. 13 and 14.

there are cases like "Woodpulp"[7], where conscious parallelism was considered in the context of reviewing whether a concerted practice had been established.

Judicial review in competition law also reflects two types of balancing process: First, whilst the defence is focussed on the assertion of its rights to the maximum, the Courts are concerned both with respect for such rights and balancing that with allowing the Commission the ability to fulfil its task of enforcing the competition rules effectively in the general interest.[8] Second, although the nature of the Commission's process is administrative, competition cases are often considered to have criminal characteristics, given the severity of sanctions and the nature of the infringement. As Judge Lenaerts puts it "this two-sided nature is now reflected in most cases brought before the Community courts in competition matters".[9] This is particularly so in cartel cases and all the more so recently in view of the developing related criminal sanctions on individuals in some national laws.

I now propose to offer some comments on how I see the CFI's exercise of its "restricted review", based on Article 230 EC, mainly in cartel cases and then turn to "full review" of fines.

How does the CFI exercise its "restricted review"?

The short answer is, in my view, "thoroughly".

Judicial review based on Article 230 EC is said to be a "restricted review", because it is not a full appeal or re-examination of the facts. In other words, the Courts generally take the view that it is not for the CFI to carry out its own analysis of the market. Instead the CFI is to

---

7 Case C-89/85 and Others, Ahlström [1993] ECR 1307. Interestingly, in this case the European Court sought its own economic reports to help it assess whether the Commission's assessment was correct; see also "Dyestuffs", Case 48/69 and Others, ICI [1972] ECR 619.

8 See Lenaerts, "Some Thoughts on Evidence and Procedure in European Community Competition law", 2006-2007, 30 Fordham Int. Law Journal, p.1463 at p.1494.

9 See Lenaerts, cited above, at p.1474, quoting AG Vesterdorf in the "Polypropylene" cases, Joined Case T-1/89 and Others, Rhône Poulenc [1991] ECR II-867 at pp. 884-885.

verify the correctness of the Commission's findings.[10] It is also said that the Commission has a "discretion" or "margin of appreciation" with which it may carry out its tasks.[11]

However, in practice the CFI does not leave a great deal of leeway to the Commission, since the CFI has to verify the core legal findings required for an infringement and, in practice, that means that there is what some call a "close" review. In particular, the Court has to be satisfied that the substantive elements of the infringement have been proven to the "required legal standard"; and that the essential procedural rights of those concerned have been observed.

As Judge Vesterdorf puts it: "*Control of primary facts by the CFI is intensive and … there is no margin for discretion on the part of the Commission. This is inherent in the nature of a control of the accuracy of facts. Either a fact is correct or it is not.*"[12] Or as Judge Legal puts it, the ordinary standard of review is "*maximum control over the legality of an act*", (while emphasising that this is not the "opportunité" (the appropriateness or merits) of the act amongst possible legal alternatives).[13]

The CFI also has to ensure that the Commission has respected its duty to state reasons for a decision, based on Article 253 EC.[14] Here defence counsel often debate whether the Courts' interpretation of that requirement is demanding enough. In particular, when frustrated that pages of defence submission in response to an allegation in a Statement of Objections are rejected with a single assertive sentence in a Commission decision and the Courts say that more was not required!

Nevertheless, the obligation on the Commission to state its reasons is a further basis for review of a Commission decision. As Judge Lenaerts puts it: "*Competition law is undoubtedly one of the areas of Community law where the obligation to state reasons in*

---

10 See e.g. Case T-68/89, Società Italiana Vetro [1992] ECR II-1403 at para. 160.

11 See generally, Bailey, cited above.

12 See Vesterdorf, "The CFI : Judicial Review or Judicial Control", St Gallen International Cartel Forum 2006, "Neueste Entwicklungen in europaïshen und internationalen Kartellrecht" p.21 at p.29.

13 See Legal, "Standards of Proof and Standards of Judicial Review in EU Competition Law", Annual Proceedings of the Fordham Corporate Law Institute, 2006, Chapter 5, p.107 at pp.109-110.

14 See now Article 296 TFEU.

individual decisions is quite extensive because of the Commission's broad discretion in finding and fining infringements of Community law in this area."[15]

It is also important to note that the Courts recognise a special duty to be careful in their review, given the presumption of innocence and the sanctions involved. As the CFI put it in Coats*: "Any doubt in the mind of the Court must operate to the advantage of the addressee of the decision finding an infringement. The Court cannot therefore conclude that the Commission has established the infringement at issue to the requisite standard if it still entertains any doubts on that point, particularly in proceedings for annulment of a decision imposing a fine … Given the nature of the infringements in question and the nature and severity of the ensuing penalties, the principle of the presumption of innocence applies in particular to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments…*".[16] (Emphasis added.)

The result is that every year we see many CFI judgments dissecting Commission decisions in minute detail. Partly, I think this is as defence counsel work hard to assert their clients' rights to the full, drawing the Court into that very "close" review of a multitude of issues. Partly, I think it is because, as noted, the CFI recognises the need to review thoroughly, especially when huge fines are at stake (as is the case these days).

The bedrock of relevant principles was set out in contested cartel cases, from WoodPulp[17] to the Plastics cartels (e.g. Polypropylene[18]) and Cement.[19] Many of those principles are still controversial, even if apparently established. More recently, because of leniency, most of the CFI's work is related to fine assessments, rather than actual findings of infringement, but the key point remains that, in my view, there is a very "close" attention to detail and evidence.

---

15 See Lenaerts, cited above, at p.1482.

16 Case T-36/05, Coats [2007] ECR I-110 at paras 69-70.

17 Case C-89/85 and Others, Ahlström v. Commission cited above.

18 Case T-1/89 and Others, Rhône-Poulenc cited above; there were some 14 appeals, see Bellamy & Child, "European Community Law of Competition", 5th Edition (2001) at para. 4-011 et seq.

19 Cases T-25/95 and Others, Cimenteries [2000] ECR II-491; Joined Cases C-204/00 P and Others, Aalborg Portland [2004] ECR 1-123; see again also Bellamy &Child, cited above, at para. 4-057 et seq.

Clearly I am also not saying that defence counsel agree with all the positions taken by the Courts! There are numerous cartel issues which are controversial with defendants. I will talk about some of the fining points later, but to note some leading themes on findings of infringement:

First, procedural errors which are found yet overlooked on the basis that they did not affect the ultimate outcome. For example, there was considerable surprise at the CFI's ruling in Bolloré that a failure to address a Statement of Objections to a parent company was not a breach of an essential procedural requirement, on the basis that Bolloré could still be liable as the parent of another company, Copigraph.[20] Rightly or wrongly, defence counsel often think that the CFI is too reluctant to find procedural mistakes which matter.

Second, the way that evidentiary presumptions have developed and are accepted (as described more fully in Fernando Castillo de la Torre's paper). Many feel that the Courts are too soft on the Commission in allowing it to use limited evidence to allege broad infringements, with various presumptions moving the evidentiary burden too easily to the defence.

The leading statement is from Aalborg Portland: "*in most cases, the existence of an anti-competitive agreement must be inferred from a number of coincidences and indicia, which taken together, may in the absence of other plausible explanation, constitute evidence of an infringement of the competition rules*".[21]

Third, beyond this are rules suggesting, for example, that a causal connection between an unlawful concerted practice and market behaviour is to be inferred if the companies concerned remain on the market.[22] Or accepting that the Commission does not have to show the specifics of an infringement, provided its existence has been established, because that

---

20 Joined Cases T-109/02 and Others, Bolloré [2007] ECR II-947. Since this paper was delivered, this judgment has been overturned by the ECJ, see Joined Cases C-322/07 P and Others, Papierfabrik August Koehler, Judgment of 3 September 2009.

21 Joined Cases C-204/00 P and Others, Aalborg Portland cited above, at para. 57.

22 See, e.g. Case T-8/08, T-Mobile, Judgment of 4 June 2009, at paras 44-53.

may be difficult.[23] Another frequent complaint in practice is the way that once cartel meetings are established, the Commission may list all the meetings between companies which it finds and then effectively oblige the defendants to show why those were not unlawful (when most may have been ordinary legal contacts). In general, this is seen as allowing the Commission too easily to avoid its burden of proving the infringement.

With these reservations, the key point is that the CFI generally exercises an extensive review over the Commission's findings. It may be that it does not "rehear" and "re-find" all the evidence and is too flexible with these presumptions, but in general it appears to undertake a very thorough review.

In my view the standard of proof required is also high. There are various formulations of this in the cases. The leading version appears to be that there must be "precise and consistent evidence" supporting the "firm conviction" that the alleged infringements involve an appreciable restriction on competition.[24] The formulations used turn around the same theme, that the evidence must be "reliable". The key point is that the "firm conviction" test implies a high standard of proof.

How is evidence assessed in practice?

The general approach to evidence is influenced by continental traditions.

First, there is an appraisal of the direct documentary evidence[25] to see how probative it is. Then, the other evidence available is assessed. Importantly, as noted in Aalborg Portland, in the area of cartels, the Courts have also stated that they are willing to accept indirect evidence. Again as explained above, this is controversial with defendants, because the perception is that the Commission is not put to strict enough proof as a result. It is argued that it is just too easy to construct a grand conspiracy from a few elements which, taken individually, may not prove that much at all.

---

23 See Joined Cases T-67/00 and Others, JFE Engineering [2004] ECR II-2501 at para. 203.
24 See Case T-36/05, Coats cited above at para.71.
25 See Case T-36/05, Coats cited above at para.73.

Clearly the key point is that, even if one accepts that an infringement can be proved from various pieces of circumstantial evidence, there still has to be a critical review of that evidence and no compromise with the need to prove all the elements of the infringement to the requisite standard. In other words, a "close" look is required at each element, the overall picture and other possible explanations.

The Courts also emphasise the need to look at the evidence as a whole. Clearly this is right since, if one only looks at isolated evidence, it is all too easy to develop a wrong impression. However, this overall appraisal is also something to be taken very carefully, since several pieces of weak evidence do not add up to a strong case.

In considering evidence in these cases, it is also often said that there is "free appraisal of evidential quality".[26] This means that the European Courts are not bound by particular rules from EU Member State systems and that, contrary to the approach taken in some Anglo-Saxon systems, the Court is not bound by formal rules on evidential quality (such as hearsay). This tends to worry Anglo-Saxon lawyers (as a licence for a court to consider anything). It is also controversial with defendants, notably where leniency statements are considered, without those affected having the opportunity to cross-examine the witness.

However, in practice, one sees both the Commission and the CFI applying what I would call "universal" evidentiary principles" to verify the quality of evidence. In other words, one sees references to questions such as: Is there corroboration? Was the document written contemporaneously or shortly after the event concerned? What were the incentives of the person making the statement?[27]

This is also not new. As Advocate-General Vesterdorf stated in Polypropylene[28]: "*in assessing the evidential value of a reporting document regard should be had first and*

---

[26] See, Lenaerts cited above, at pp. 1465-1470.

[27] See, e.g. Joined Cases T-76/00 and Others, JFE Engineering, cited above at paras 201-335; and Case T-337/94, Enzo-Gutzeit [1998] ECR II-1571 at para. 91.

[28] Case T-89, Rhône-Poulenc cited above, at p. 956; Joined Cases T-25/95 and Others, Cimenteries cited above, at para. 1838.

foremost to the credibility of the account it contains. Regard should also be had in particular to the person from whom the document originates, the circumstances in which it came into being, the person to whom it was addressed, and whether, on its face the document appears sound and reliable".

If the Commission fails to show this sort of evidential rigour, then quite rightly defendants seek judicial review and look to the CFI for protection.

Predictably, the appraisal of evidence remains a key part of applications for judicial review and a controversial area, as defence counsel focus on what is proved to the requisite standard. However, the overall theme is that, in my view, the CFI is very conscious of and careful with evidentiary issues, as you would expect of such a reviewing court.

The Commission's discretion

Up to now I have emphasised the rigour of judicial intervention, as I see it (even if, as explained some aspects remain controversial). A consideration of the CFI's role in restricted review, even in the context of cartels, would be incomplete however if we did not touch on the question of the extent to which the Commission has a "discretion" over some matters.

In particular, I refer to the line of cases, in which the Courts have said that the Commission has a "discretion" or "particular competence" over certain issues, so-called "complex technical or economic assessments", over which the Courts will only exercise a limited review for "manifest error". Such statements are frequent and range from older cases like Remia (on whether a non-competition clause was an appreciable restriction)[29] to, most recently, technical and economic assessments in Microsoft.[30] Here the European Courts traditionally have confined themselves to: "*Verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of powers*".[31]

---

29 Case 42/84, Remia [1985] ECR 2545.
30 Case T-201/04, Microsoft [2007] ECR II-1491 at paras 87-89.
31 See, e.g. Joined Cases C-204/00P and Others, Aalborg Portland, cited above at para 279.

My impression is that there are several things going on here: First, the Courts' deference to the Commission relates to a practical division of competence. In other words, reflecting the point that the Commission may be better placed to assess such issues and that it is the Court's task to review what the Commission does, not carry out the Commission's task itself.

Second, it appears to me that the Courts accept that any decision-maker should have some margin of appreciation, provided within the bounds of legality. To take Remia as an example, decision-makers may disagree as to whether a three year or four year non-compete is a restriction of competition in certain specific circumstances. That degree of variation may not be so significant that the Courts will intervene (although, in principle, I think they can, if for some reason one or other figure appears incorrect).

Nevertheless, overall the Courts have the last word, at least insofar as "policy" becomes "law". For example, consider the way that the Courts have stated that they do not wish a general balancing "rule of reason" approach in Article 81(1) EC, but consider that should occur in Article 81(3) EC[32]. That may be viewed as a policy matter, but ultimately it is a question of law and the Courts rule on it.

Third, even accepting that the Commission may have discretion in some matters, the Courts' review can be demanding. In particular, in recent years we have seen formulations of the Courts' review power, suggesting much more limited deference to the Commission in economic issues.

The leading statements are in Tetra Laval[33]. It may be recalled that this was the ECJ's ruling in a merger case, where the Commission brought an appeal, claiming that the CFI had gone too far in reviewing the Commission's assessment, in its discretion, of economic matters.

---

[32] E.g. Case T-112/99, Metropole Television (M6) [2001] ECR II-2459 and Case T-328/03, O2 (Germany) [2006] ECR II-1231.

[33] Case C-12/03 P, Commission v Tetra Laval [2005] ECR I-987.

Critically, the ECJ rejected the Commission's claim in very strong terms: *"Whilst the Court recognises that the Commission has a margin of discretion with regard to economic matters, that does not mean that the Community courts must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must the Community courts, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent, but also whether that evidence contains all the information which must be taken into account in order to asses a complete situation and whether it is capable of substantiating the conclusions drawn from it. Such a review is all the more necessary in the case of a prospective analysis required when examining a merger with conglomerate effect*".[34] (Emphasis added).

This passage is generally interpreted as applying to other anti-trust contexts.[35]

Advocate-General Tizzano made a similar statement in his Opinion which is, if anything, even stronger: *"… the fact that the Commission enjoys broad discretion in assessing whether or not a concentration is compatible with the common market does certainly not mean that it does not have in any case to base its conviction on solid elements gathered in the course of a thorough and painstaking investigation or that it is not required to give a full statement of reasons for its decision, disclosing the various passages of logical argument supporting the decision"* .[36] (Emphasis added)

The overall concept is therefore that the Commission should carry out these technical or economic assessments, but will be closely checked.

As Judge Vesterdorf has put it, if there is a choice between two approaches on which reasonable people may disagree, then the Courts may be expected to leave the Commission's assessment alone.[37] But not, if the information gathering is not up to scratch, or if there is

---

34 At para. 39.
35 See, Legal, cited above, at p.112.
36 [2005] ECR I-992, at paras 87-88.
37 See, Vesterdorf, "Judicial Review in EC Competition Law: Reflections on the Role of the Community Courts in the EC System of Competition Law Enforcement", cited above at p.13, footnote 22; and Legal, cited above, at p.115.

some real issue as to the validity of the economic approach taken by the Commission. Further, the Commission has to explain its reasoning on these issues also which, in my view, should include explanations why one particular economic approach is considered correct, while another is not.

This is one of the "hot issues" in judicial review today. As a defence counsel I would urge the Courts to be demanding, even if they feel the need to respect the "practical competence" and "margin of appreciation" issues noted above.

I say this because, when we are talking about whether an infringement is shown or not, these technical or economic "facts" have to be found, like any other fact, "complex" or not, even if shrouded in technical or economic jargon.

Further, if using different economic assessments makes a material difference to a finding and/or a fine, then clearly the decision which assessment is "the valid" one, or "the relevant" one in a particular case should be the subject of close judicial review. This is just part of assessment of the quality of evidence, as the Courts are doing so thoroughly with other facts. The Courts should not be deterred from carrying out their review of such issues, even if that means detailed hearings and calling economic witnesses from both sides to court to explain.

This brings me to what is the key theme of this paper: If the Courts do not take such an approach, there is a real concern that there would be "*double renvoi*", meaning that the Commission (and the defence) would rely for the integrity of the Commission's process on the Courts reviewing even economic facts; while the Courts would say that they will not interfere with the Commission's decisions, because of a perceived "discretion" of the Commission over "complex economics". That appears unacceptable in the world of "modern" competition law, where economics play such an important role.

I propose now to look generally at the Courts' "full review" of fines in its unlimited jurisdiction and the issue of Commission discretion in that context.

How does the CFI exercise its "unlimited jurisdiction" over fines?

Again, I think the short answer is "thoroughly".

The Courts look carefully at the Commission's findings and hold the Commission closely to its own Fining Guidelines. It may be useful to take some recent examples (recognising that there are many other cases one could also mention):

First, I would note Graphite Electrodes[38]. It may be recalled that the Commission's decision in this case related to a worldwide price-fixing and market-sharing cartel for electric arc furnaces, which are mainly used to make steel. Fines totalling some €220 million were imposed. Eight European, American and Japanese firms were involved. There were parallel proceedings in the United States and Canada.

There were seven appeals, leading to significant reductions of fines, essentially on the basis that the Commission had misapplied its own Fining Guidelines. In one case, the CFI also increased a fine, insofar as it modified the reduction in fine which the Commission had given the company. Overall, the fines on the seven companies concerned were reduced from €207.2 million to €152.8 million.

What I would highlight is that the CFI stressed that, whilst the Commission has a large measure of discretion in fining, the Commission must apply its own Fining Guidelines' methodology, and that the Court would review whether the fines were excessive.[39]

The Court then looked closely at the evidence which the Commission relied on for each element of the Fining Guidelines, in a judgment with some 100 pages of review in the Court reports, in order to see if there were errors. The result was that the CFI checked the Commission's positions in detail and, in several ways, disagreed with the Commission's findings, leading to significant reductions in almost all of the fines imposed. Amongst other things, the Court reviewed (and corrected): whether firms had been placed in the right

[38] Cases T-236/01 and Others, Tokai Carbon (I) [2004] ECR II-1181.
[39] See para. 164.

categories for the starting amount of fines; the amount of multiplier applied to a firm for deterrence; and the importance of the cooperation of companies to the Commission's case.

Second, I would mention Specialty Graphites[40], where the CFI again carried out an extensive review of the Commission's application of its Fining Guidelines, reducing the fine on SGL Carbon as regards isostatic speciality graphite from €18.94 million to €9.64 million. The CFI first found that SGL Carbon's conduct did not justify a 50% increase as ringleader and reduced the fine increase to 35%. The Court then found that the Commission had used the wrong figures to assess the starting amount for SGL Carbon's fine, so that this had to be reduced from €20 million to €11.3 million (with related knock-on effects in the overall fine calculation).

Third, I would note Belgian Beer[41], where the CFI overruled the Commission's finding that a threat by Danone had induced Interbrew to enter into a "non-aggression pact" after reviewing the circumstances. The Court also corrected the way that the Commission had applied a fine increase for aggravating circumstances, finding that the Commission had not applied it to the basic amount of the fine (as it should have done under its Fining Guidelines), but to a fine which had been adjusted already.

Fourth, in Vitamins, the CFI also overturned several Commission findings and reduced fines after a detailed review. As regards BASF[42] the Court found that the Commission had not shown adequately that BASF was an instigator or leader in four of the cartels and annulled the related 35% fine increase on the basic amount. As a result, the Court considered whether BASF qualified for leniency reductions in these cartels and, as regards two cartels, increased its fine reduction accordingly. So overall, BASF's fine was reduced from €296 million to €236 million.

---

40 Joined Cases T-71/03 and Others, Tokai Carbon (II) [2005] ECR II-10.

41 Case T-38/02, Group Danone [2005] ECR II-4407, at paras 295-313 and 521-523.

42 Cases T-15/02, BASF [2006] ECR II-497.

Fifth, again in Vitamins, as regards Daiichi[43] the Court found that the Commission had undervalued Daiichi's evidentiary contribution to the Commission's case in leniency and increased its fine reduction from 35% to 50%, giving an overall fine on Daiichi of €18 million, instead of €23.4 million.

Sixth, in Needles[44] the CFI found, amongst other things, that on the wording of the clauses relied on, the Commission had incorrectly found that certain bilateral agreements between Coats and Entaco were inter-conditional with, or intended to implement, market-sharing agreements entered into between Prym and Entaco. However, the CFI still found that Coats had facilitated the establishment of the cartel. Overall, the Court therefore reduced the fine on Coats by €10 million to €20 million.

Finally, in Sodium Gluconate[45], the CFI reduced a fine on Roquette Frères from €10.8 million to €8.1 million, since the Court found that Commission had incorrectly included sales from a product not covered by the cartel agreement in its fining base. However, the Court also increased the fine by €5000 on the basis that the company had been negligent in the information it provided to the Commission.

These cases show both the detail of review and that a wide range of issues are considered. Other issues reviewed recently include:

- Whether the Commission should have found one or more cartels.
- The classifications of defendants into bands for fining purposes.
- The equality of opportunity for defendants to qualify for leniency fine reductions. (For example, were they alerted to proceedings at the same time? Did they provide equivalent information at the same time?)

There are, however, two general aspects of the Court's review of fines which are controversial: the principle whether the Court should defer to a Commission discretion in

---

43 Case T-26/02, Daiichi Pharmaceuticals [2006] ECR II-713.
44 Case T-30/05, William Prym [2007] ECR II-107; Case T-36/05, Coats cited above.
45 Case T-322/01, Roquette Frères [2006] ECR II-3137 at paras 55 and 313-316.

setting fines; and whether and to what extent the CFI should increase fines. I propose to take these in turn.

The Commission's discretion

This situation is a little different to the discretion discussed above, concerning "manifest error" and deference in "complex technical or economic assessments", essentially because of the express declaration of unlimited jurisdiction for the Courts.

It may be useful to recall that the Commission is entitled under what is now Council Regulation 1/2003 to impose fines up to "10% of turnover" on infringing companies and has to have regard to the "gravity" and duration of an infringement.[46] Within those limits the Commission has adopted the practice of establishing Fining Guidelines, first in 1998[47], then in 2006[48], in which it has laid down how it will fine. It appears that this was partly at the suggestion of the Courts.[49]

As explained above, the CFI has also indicated that its approach is to see whether the Commission has followed its own Fining Guidelines, which the Courts consider binding on the Commission. So the Courts say that any departure from those Fining Guidelines has to be justified and supported by legal reasoning, or the Commission risks to infringe the general principles of equal treatment and the protection of legitimate expectations.[50] Further, the Courts insist on respect for the general overriding principles of proportionality and equal treatment.

The idea that the Commission has discretion in fining matters involves several points:

First, the Courts' general position is that the level of fine to apply is a matter of policy, on which it should defer to the Commission, even if it has "unlimited" jurisdiction over fines

---

46 Council Regulation 1/2003, cited above, Article 23(2) and (3).
47 OJ 1998 C9/3
48 OJ 2006 C210/2
49 See Case T-148/89, Tréfilunion [1995] ECR II-1063, para. 142.
50 See, e.g. Case T-279/02, Degussa [2006] ECR II-897, at para. 82.

under Article 229 EC. So in that sense the Commission has discretion over fines. In this context, it is said that Article 211 EC gives the Commission the task of ensuring that the provisions of the EC Treaty are applied; while the Court of Justice's task under Article 220 EC is to ensure that the law is observed.[51]

The Courts emphasise that it is the Commission's duty "to pursue a general policy designed to apply, in competition matters, the principles laid down by the Treaty and to guide the conduct of undertakings in the light of these principles".[52] The Courts also interpret this widely, considering that the Commission has the power to adjust the level of fines at any time to the needs of its competition policy, so a big increase in fining levels may be accepted. The Courts talk of the Commission having a "wide margin" to "steer" companies to compliance.

Importantly, Fining Guidelines may also be introduced, even if that is harder on the companies concerned and during a Commission procedure, provided that the texts concerned are legal, i.e. not contrary to the principles of non-retroactivity or the principle of legal certainty (and proportionality and equal treatment). Such changes are considered reasonably foreseeable[53].

Clearly this is highly controversial and repeatedly contested by the defence. Whilst one can understand the need for the Commission to change policy from time to time, it is hard to explain to companies that the sanctions can change so much during proceedings. For example, it is very hard to convince a company that it is reasonable that when they sought leniency (accepting the risk of some fine), fines were worked out according to one set of rules but, by the time that the Commission in fact fines them, other rules apply, which make a huge difference (e.g. as in the case of the 2006 Fining Guidelines, in comparison to the 1998 Fining Guidelines in respect of increases for duration, moving from 10% a year to 100% a year).[54]

---

51 See, e.g. Vesterdorf, "Judicial Review in EC Competition Law: Reflections on the Role of the Community Courts in the EC System of Competition Law Enforcement", cited above, at pp. 9-10.

52 Cases 100-103/80, Musique Diffusion Française ("Pioneer"), [1983] ECR 1825 at paras 105-6.

53 Joined Cases C-189/02 P and Others, Dansk Rørindustri [2005] ECR II-1681, at paras 222-231.

54 2006 Fining Guidelines, OJ 2006 C210/2, para. 24.

Second, the European Courts state that such an allocation of power between the Commission and the Courts is lawful because the Commission's decisions on fines are subject to the Courts' unlimited review.

The point here is that it is generally argued that the Courts must exercise a full review power for, if not, there would be conflict with Article 6 of the European Convention of Human Rights (to the extent taken over into Community law). Article 6 provides that if proceedings are criminal then the defence has a "right to a fair and public hearing…by an independent and impartial tribunal established by law".

The European Courts' approach is to say, also controversially, that the fines are not criminal (even if there are various statements to the contrary by eminent judges as noted above). [55]

The CFI emphasises that it undertakes an exhaustive review of both the Commission's substantive findings of fact and its legal appraisal of those facts. Even if the Commission has some discretion and has imposed some limits on itself, the Courts also say that does not prejudge the Courts from exercising its unlimited jurisdiction.[56]

In practice, what the Courts appear to be suggesting is that they are exercising their full review power over the Commission's fining approach and decision, with each ruling in the Courts' unlimited jurisdiction, even if that is to leave the Commission's decision alone. Here one may note, for example, the way the Courts confirm the legality of some aspect of a fine and then often finish with an additional phrase or sentence saying "and in its unlimited jurisdiction, the Commission upholds the fine" or something equivalent. In other words, the Court is saying "and in our own view, never mind the Commission's position, we consider this fine correct".

This is controversial because, if the Courts take the view that they should give way to the Commission as regards the level of fines and allow the Commission such wide discretion, how can one say that there is a full review, in unlimited jurisdiction?

---

55 See Case C-338/00 P, Volkswagen [2003] ECR I-9189 at para.97.

56 See, e.g. Joined Cases T-67/00 and Others, JFE Engineering, cited above, at para. 538.

Again, this also leads to the question of "*double renvoi*". In other words, to recap, the Commission relying on the European Courts to show that there is compliance with Article 6 of the European Convention of Human Rights; while the European Courts state that they defer to the Commission's "policy-making" role and related "discretion" over fines, as grounds for not intervening more fully.

Third, the Courts take the view that the Commission is, in principle, not bound by what it did in previous cases[57], which is often presented by the Commission as another type of discretion because, subject to the relevant Fining Guidelines and general principles such as equal treatment (discussed further below) they are free to vary the fine imposed.

One can argue that such liberty follows from the Commission's overall control of the "policy" level of a fine, but that is a little weak in my view, since I think that the Commission's policy should be reflected in any Fining Guidelines (i.e. the quasi-legislative act), rather than vary from case to case.

Or that such liberty is good because it allows the Commission to be very sensitive to circumstances and not overly tied down by what it did last time (an argument defence counsel may often want to use). The problem with that is how you reconcile it with predictability, consistency and the general overriding principle of equal treatment.

One can also argue that such liberty is necessary, because cases are so different that they are very difficult to compare[58], but that is also a little weak as an argument, since such considerations apply to all sorts of legal decision.

In practice, the Courts are willing to compare other cases, but this is more the exception than the rule. Such an approach is highly controversial because it gives a very limited meaning to "equal treatment", effectively looking only at the situation as amongst the cartel defendants in

---

57 See Case T-242/01, SAS [2005] ECR II-49 at para. 188.

58 E.g. Case T-59/02, Archer Daniels Midland ("Citric Acid") [2006] ECR II-3627, paras 316-317.

the specific case, not at similarities and differences between cases, even though they may appear relevant.

Fourth, the Courts have emphasised that the Commission's discretion to assess the gravity of an infringement is a multi-faceted one so that, for example, proportionality and equal treatment are not to be arithmetically linked to the differing turnovers of the infringing companies concerned.[59]

Finally, even on the Fining Guidelines themselves, the Commission has discretions, such as that to determine the amount of the "entry fee" addition to the basic amount (between 15% and 25%)[60]. Here, it appears that the Courts tend to review carefully for at least equal treatment.

Clearly all this is controversial with defence counsel and companies, because the Commission is given great discretion over both the fining approach and the application of the rules which the Commission has established.

On the existing case-law, it appears that the best way to challenge the policy approach (i.e. the merits or "opportunité" of the approach in Fining Guidelines) is a political one, which is why some have been lobbying recently for revision of Regulation 1/2003 in order to narrow the discretion given to the Commission.

As regards other decisions in "discretion", applying fines to particular circumstances, it is also difficult to challenge the Commission's decisions. However, it is done repeatedly by defence counsel as part of arguments based on the general principles of proportionality and equal treatment and to encourage the Court to exercise its unlimited jurisdiction in the defence's favour. What appears to work most often is specific pleading on how the Commission may have misunderstood facts going to the "discretionary" assessment, or wrongly evaluated evidentiary contributions on leniency by different parties.

---

59 Council Regulation 1/2003, cited above, Article 23(3); and Case T-23/99, LR AF [2002] ECR II 1705 at paras 278-281.

60 2006 Fining Guidelines, cited above, at para.25

The Courts' position on the legality of the Commission's approach in setting the rules also remains controversial. In particular, many were surprised at the idea that it was lawful to change the fining rules after the Statement of Objections in the Pre-Insulated Pipe case, considering the Court too flexible in favour of the Commission in the circumstances.[61] Others also argue that the "tariff approach" of the 1998 Fining Guidelines and the Commission's related discretion to assess the gravity of a case in the "sector" concerned (without strict reference to the products cartelised) has led to disproportionate and insufficiently certain fining levels. It is worth noting that when the 2006 Fining Guidelines were introduced the Commission only applied them to cases where no Statement of Objections had been issued and fines are now linked to the products sold.

Despite many rulings on the point, large conglomerates also still do not accept that it is fair to consider a whole group responsible for the purposes of fine assessment, when it may be only a small fraction of the group which has infringed (leading to huge "deterrence" increases in fines; and what are seen as artificial findings of recidivism, often combining to make large group fines extremely high)[62].

It is argued, in my view with force, that the Commission's approach in cases like BMW Belgium[63] and E.ON Energie[64] makes far more sense. It may be recalled that in BMW Belgium, the Belgian subsidiary of the car manufacturer was fined for blocking parallel exports (contrary to group policy). In the EON Energie case, dealing with the breach of a seal, the Commission focussed on the entity responsible (insofar as it controlled the relevant premises) rather than the E.ON group as whole.

It is time for more of this sort of approach, with more justification required for going higher in the group, rather than just jumping to the group as a whole on the basis of single economic

---

61 See Joined Cases C-189 and Others, Dansk Rørindustri, cited above, at paras 202, 226-232.

62 See, e.g. Case T-12/03, Itochu, judgment of 30 April 2009 (where in the Nintendo parallel imports case, a Japanese group saw its fine increased hugely for the activity of its very small Greek subsidiary, which was Nintendo's distributor in Greece).

63 OJ 1978 L46 at p.33.

64 The summary decision is available at OJ 2008 C240/6, with the full non-confidential version available on the Commission's website.

entity. Otherwise, the results appear patently disproportionate to the infringement activity and the real businesses concerned.

In sum, whilst I think that the Courts' review of fines is often demanding (particularly to the extent that the CFI checks whether the Commission has applied its own Fining Guidelines correctly), there is concern that the Court is too deferential to the extensive Commission discretions outlined above, in particular as regards equal treatment between cases and overall proportionality to the economic scale of the infringement. There appears to be a risk of *double renvoi* as matters stand.

Should the CFI increase fines?

There is also much debate about "unlimited jurisdiction", as people think about "How unlimited is unlimited"? For example some, faced with the now massive fines, think that the Court should simply reduce Commission fines for lack of proportionality in its own appraisal. Others argue that any change to a Commission fine should be closely linked to a finding of specific violation of the law and/or Fining Guidelines. Clearly defence counsel also do not want a significant risk of fines being increased.

In practice, there are various recent examples of the CFI changing fines "in its own appraisal", including increases. For example:

- The French Beef case[65], where the CFI substituted its own view as to what an overall reduction of fine on the French farmers for the special circumstances should be, increasing it from 60% to 70% and therefore reduced the overall fine.
- The Choline Chloride case[66], where the CFI varied the duration increase of BASF's fine from the Commission's approach of 10% per year of infringement and 5% for each additional full six months, to a proportionate approach taking into account that BASF had infringed for three years and ten months. The result was a 38% increase

[65] Joined Cases T-217/03 and Others, Fédération Nationale de la Coopération Detail et Viande [2006] ECR II-4987.

[66] Joined Cases T-101/05 and T-111/05, BASF and UCB [2007] ECR II-4949.

for duration to the starting amount (instead of 55% as applied by the Commission). This was a small but important detail, since the CFI showed that it would vary from the Commission's Fining Guidelines in its "unlimited jurisdiction" if it thought that appropriate.

- In the same case, after a reassessment of the scope and duration of the Choline Chloride cartel infringement, the CFI had to re-assess the value of leniency for the infringement found and reduced UCB's fine by 90% (i.e. by some €8.51 million).

In exercising its unlimited jurisdiction, the CFI may also bring new points to the assessment. For example, in Austrian Banks, when assessing the role of "lead institutions" as regards other banks in their sectors, at its own initiative, the CFI took into consideration an Austrian Constitutional Court judgment on the issue[67]. Again in Choline Chloride, the Court corrected the Commission on recidivism, noting that another previous infringement, Polypropylene had not been taken into account by the Commission.[68]

Some also argue that it is fundamentally unfair to expose applicants to any increase of any fine, since recourse to the courts is essential to compensate for the administrative nature of the Commission proceedings and where there is no other review by an independent tribunal. Further, that the risk of a fine increase will deter applicants from bringing legitimate claims.

As matters stand, it appears that the Court considers that it should use its power to increase a fine sparingly, generally where an increase follows to rectify what the Court sees as something wrong in the Commission's decision. In other words, more the BASF and UCB type of case, than the French Beef case.

All of this is in a delicate balance. Clearly the defence would like a greater willingness to reduce fines, in the Courts' review of the Commission's discretion or unlimited jurisdiction, but clearly also not a greater willingness to increase fines (or some might not dare take even good points on appeal).

---

67 Joined Cases T-259/02 and Others, Raiffeisen Zentralbank Österreich AG, [2006] ECR II-5169 at para. 391 et seq.

68 Joined Cases T-101/05 and T-111/05, BASF and UCB, cited above, at paras 70-72.

Striking features of applications

It may also be useful to note some of the more striking features of the applications made in the cartel area:

First, there are a huge number of applications. I think this is largely because the fines are so high; companies do not like the mixed role of the Commission as prosecutor and judge; and they do not feel they have had their "day in court" to explain themselves on any proposed fine. Statistically, my understanding is that fines are reduced in about 25% of cases and, overall, the average decrease is some 20%, but then clearly that is a figure of limited use because in some cases that may mean full annulment or very material changes, in others just a modest correction. The sense of an appeal turns on each case.

Second, there are very repetitious pleas. A particular issue is that, with each new set of Fining Guidelines, it may be expected that there will be a number of issues which are challenged. However, since it takes some years before the CFI rules on these issues, in the mean time each application on every cartel decision may cover similar ground. There are also issues on which companies simply do not give up, because they think the rule is wrong (e.g. for example, as regards *ne bis in idem* and fines based on worldwide sales; and the essentially automatic current parent/subsidiary fine increases for large groups). Here the repetitions should be seen as more of the beating of a protest drum!

Third, from most people's perceptions all of this takes much too long, both in front of the Commission and the European Courts. It is true that these cases involve complex assessments with huge files and huge fines so that such review takes time. It is also true that there are now small reductions in fines for delay based on principles of good administration. However, there are still too many cases where the whole process can last more than a decade, in some cases even longer. Five years for an appeal, having just faced some five years in front of the Commission is too long.

Fourth, it is somewhat strange to move from the Commission's "inquisitorial" system to a judicial review process. The Commission's system has the advantage of various possible defence contacts with the case-team. However, there may be worries that the case team has developed the wrong idea and cannot be shaken from it. There may also be some difficulty in evaluating what the Commission is thinking, at least until the Statement of Objections.

The judicial review process, on the other hand, is rather remote and, in most cases, the judges are met just once, at the hearing, which can be years after the case started. However, there are at least three rounds, two sets of pleadings (maybe some written questions) and a hearing, and each side hammers away, sometimes in much greater detail than before, at what they think is important, so there may develop a very clear idea of the issues. Sometimes you learn a number of new things about the Commission's position and reasoning on appeal and even find yourself feeling that you are dealing with a significantly different case!

Is this wrong? Maybe not, but for defendants it is striking. It may be argued that this is a sensible way of doing things, as the Commission carries out the broader administrative evaluation and then is subject to more intensive scrutiny on the bigger issues. Further, that the whole point of the judicial review is that there should be an intensive review and this is how you best achieve it.

Appeals to the European Court

This is a topic in itself. For present purposes, I note only that such appeals are on questions of law, rather than findings of fact, since the CFI is responsible for the assessment of the facts.[69] However, the ECJ can review the legal characterisation of the facts and the legal conclusions to be drawn from them.[70] The ECJ will also not substitute its own equitable appraisal of the facts, or the fine for that of the CFI[71].

---

69 Article 225 EC and Article 58 of the Statute of the European Court of Justice; Case C-185/95 P, Baustahlgewerbe [1998] ECR I-8417, at para. 23.

70 Case C-7/95P, John Deere [1998] ECR I-3113 at para. 21.

71 See, e.g. C-199/92 P, Hüls [1999] ECR I-4287 at para. 95.

In practice, the key issues are whether there is something the matter with the CFI's approach on the law and whether, in exercising its review of the Commission's findings, or in exercising its own unlimited jurisdiction, the CFI has "fundamentally misconstrued" or "materially distorted" the sense of the evidence[72]. Predictably this is not generally found, but it may occur. Certainly, on the bigger issues of principle, a further appeal may be justified (see, e.g. Bolloré[73], referred to above). Otherwise a great many pleas are inadmissible for not respecting these principles.

Conclusion

The most important conclusion here is that, for various reasons, the European Courts' review is generally close and demanding.

However, although there may be a need for mutual respect for institutional balance between the Commission and the Courts, there must also be no *double renvoi*: All key features of the Commission's findings for an infringement and the related process must be subject to legal review including, in the more "modern" competition world, the Commission's economic findings. Similarly, in the cartel area, the CFI should not overstate the degree of "policy deference" or the extent of "discretion" which it considers the Commission should have, given the Courts' unlimited jurisdiction and the need for effective independent review. In practice, there are good arguments for, at the least, a more open and assertive appraisal of the proportionality of fines and a wider approach to the interpretation of equal treatment.

© John Ratliff, 2009.

[72] See Case C-510/06 P, Archer Daniels Midland, Judgment of 19 March 2009, at paras 132-136; Case C-413/06P, Bertelsmann and Sony Corporation v. Impala [2008] ECR I- 4951 at para.29.

[73] See Joined Cases C-322/07 P and others, Papierfabrik August Koehler, Judgment of 3 September 2009.