

# The Increased Level of EU Antitrust Fines, Judicial Review, and the European Convention on Human Rights

Wouter P.J. Wils\*

forthcoming in  
World Competition, Volume 33, No. 1, March 2010  
and accessible at  
<http://ssrn.com/author=456087>

*Some lawyers and businesses have claimed that, because of an increase in the level of antitrust fines imposed by the European Commission in recent years, these fines have become criminal in nature, and that the current institutional and procedural framework in which fines are imposed by the European Commission, with subsequent judicial review by the EU Courts, is no longer compatible with the European Convention on Human Rights. This paper critically examines those claims. The main point to be retained is that the case-law of the European Court of Human Rights distinguishes between, on the one hand, the hard core of criminal law, and, on the other hand, cases which are "criminal" within the autonomous meaning of the European Convention on Human Rights but which do not belong to the hard core of criminal law. Irrespective of any increase in their level, the antitrust fines imposed by the European Commission only belong to the second, broader category of criminal penalties, and the European Court of Human Rights has consistently held that it is compatible with the European Convention on Human Rights for such penalties to be imposed, in the first instance, by an administrative or non-judicial body such as the European Commission.*

---

\* Member of the Legal Service of the European Commission, Visiting Professor at King's College London. I am grateful to Michael Adam, David Bailey, Margaret Bloom, André Bouquet, James Bourke, Fernando Castillo de la Torre, Theofanis Christoforou, John Connor, Vittorio Di Bucci, Manuel Kellerbauer, Nicholas Khan, Peter Oliver, Felix Ronkes Agerbeek, Piet Van Nuffel, Christian Vollrath and Richard Whish for their comments on an earlier draft of this paper. All views expressed in this paper are strictly personal, and should not be construed as reflecting the opinion of the European Commission, its Legal Service or any of the above mentioned persons. The paper was completed on 15 October 2009. Comments are welcome at [Wouter.Wils@ec.europa.eu](mailto:Wouter.Wils@ec.europa.eu).

## TABLE OF CONTENTS

I.	INTRODUCTION AND OVERVIEW .....	3
A.	Overview .....	3
B.	The European Commission's antitrust fining powers .....	4
C.	The European Convention on Human Rights (ECHR) .....	8
D.	The increased level of fines .....	9
II.	COMPATIBILITY WITH THE EUROPEAN CONVENTION ON HUMAN RIGHTS .....	12
A.	The criminal nature of the European Commission's antitrust fines .....	12
B.	The different applicability of the ECHR criminal-head guarantees to the hard core of criminal law and to cases not belonging to the hard core of criminal law .....	15
C.	Outside the hard core of criminal law, criminal penalties can be imposed, in the first instance, by an administrative or non-judicial body combining investigative and decision-making powers .....	16
D.	Conclusions as to the European Commission's antitrust fining powers .....	17
III.	JUDICIAL REVIEW BY THE EU COURTS OF THE EUROPEAN COMMISSION'S ANTITRUST FINING DECISIONS .....	19
A.	Article 6 ECHR does not require two levels of judicial review, judicial review beyond the pleas raised by the parties, <i>de novo</i> trials or automatic suspensive effect .....	19
B.	The meaning of "full" jurisdiction: scope and intensity of judicial review .....	23
C.	Judicial review by the EU Courts in the area of cartels .....	24
D.	Unlimited jurisdiction with regard to fines in practice .....	27
E.	Complex economic and technical assessments .....	29
IV.	SUMMARY AND CONCLUSIONS .....	31

# I. INTRODUCTION AND OVERVIEW

## A. Overview

Some lawyers and businesses have claimed that, because of an increase in the level of antitrust fines imposed by the European Commission in recent years, these fines have become criminal in nature, and that the current institutional and procedural framework in which fines are imposed by the European Commission, with subsequent judicial review by the EU Courts, is no longer compatible with the European Convention on Human Rights ("ECHR").<sup>1</sup> This paper critically examines those claims.<sup>2</sup>

This paper does not discuss the questions whether the current institutional and procedural framework is more efficient than a system under which the European Commission would act as a prosecutor before the EU Courts,<sup>3</sup> what level or

---

<sup>1</sup> These claims have in particular been made in a 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*, accessible at <http://www.coleurope.eu/content/gclc/documents/GCLC%20WP%2004-08.pdf> ("GCLC Working Paper"), also published in (April 2009) *European Competition Journal* 97, and A. Andreangeli, O. Brouwer, D. De Feydeau, I. Forrester, D. Geradin, A. Komninos, K. Hofstetter, Y. Katsoulacos, C. Lemaire, M. O'Regan, L. Ortiz Blanco, D. Slater, S. Thomas, D. Ulph, D. Waelbroeck and U. Zinsmeister, 'Enforcement by the Commission – The decisional and enforcement structure in antitrust cases and the Commission's fining system', draft report presented at the Fifth Annual Conference of the Global Competition Law Centre, 11-12 June 2009, <http://www.coleurope.eu/template.asp?pagename=gclcfifthannual> ("GCLC Report"); see also International Chamber of Commerce, 'The fining policy of the European Commission in competition cases', ICC Document No. 225/659 of 2 July 2009.

<sup>2</sup> See also A. Bouquet, 'The compatibility of the Commission's role in competition procedures with the fundamental rights: a real pressing legal problem or just a question of opportunity? A critical view on the (draft) report of Working Group 3 of the Global Competition Law Center (GCLC)', forthcoming in M. Merola and D. Waelbroeck (eds), *Towards an optimal enforcement of competition rules in Europe – time for a review of Regulation 1/2003? – GCLC Annual Conference 2009* (Bruylant 2010), and F. Castillo de la Torre, 'Evidence, Proof and Judicial Review in Cartel Cases', paper presented at the 14<sup>th</sup> Annual EU Competition Law and Policy Workshop (Florence, 19-20 June 2009), <http://www.eui.eu/DepartmentsAndCentres/RobertSchumanCentre/Research/CompetitionPolicyMarketRegulation/CompetitionWorkshop/Index.aspx>, forthcoming in C.D. Ehlermann and M. Marquis (eds), *European Competition Law Annual 2009: Evaluation of Evidence and its Judicial Review in Competition Cases* (Hart 2010).

<sup>3</sup> See J. Steenbergen, 'Decision-making in Competition Cases: The Investigator, the Prosecutor and the Judge', in L. Gormley (ed.), *Current and Future Perspectives on EC Competition Law – A Tribute to Professor M.R. Mok* (Kluwer Law International 1997), 101; my paper 'The Combination of the

amount of fines is optimal (from the perspectives of efficient enforcement and proportional justice),<sup>4</sup> whether it is optimal to enforce the antitrust prohibitions exclusively through fines on undertakings, or whether such fines should be combined with sanctions for individuals, such as director disqualification or imprisonment,<sup>5</sup> nor the questions whether fines should be reduced to reflect companies' compliance efforts,<sup>6</sup> or because of compensation paid to the victims of the antitrust infringements.<sup>7</sup>

## **B. The European Commission's antitrust fining powers**

Articles 81 of the EC Treaty prohibits agreements that restrict competition without redeeming virtue. Article 82 EC prohibits abuse of a dominant position.<sup>8</sup>

---

Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis' (2004) 27 *World Competition* 201, and Chapter 6 of my book *Principles of European Antitrust Enforcement* (Hart Publishing 2005); OECD Country Studies, *European Commission – Peer Review of Competition Law and Policy* (2005); D. Edward, 'Quality Control of Competition Decisions', in M. Bulterman, L. Hancher, A. McDonnell and H. Sevenster (eds), *Views of European Law from the Mountain: Liber Amicorum Piet Jan Slot* (Kluwer Law International 2009), 143; and (text accompanying) note 74 below.

- <sup>4</sup> See my paper 'Optimal Antitrust Fines: Theory and Practice' (2006) 29 *World Competition* 183, and Chapter 3 of my book *Efficiency and Justice in European Antitrust Enforcement* (Hart Publishing 2008), as well as, in particular on the issue of recidivism, my paper 'The European Commission's 2006 Guidelines on Antitrust Fines: A Legal and Economic Analysis' (2007) 30 *World Competition* 197, and Chapter 4 of *Efficiency and Justice in European Antitrust Enforcement*, as above.
- <sup>5</sup> See my paper 'Is Criminalization of EU Competition Law the Answer?' (2005) 28 *World Competition* 11, and chapter 6 of *Efficiency and Justice in European Antitrust Enforcement*, as note 4 above; *The deterrent effect of competition enforcement by the OFT*, Report prepared for the U.K. Office of Fair Trading by Deloitte, OFT 962 (November 2007); B. Vesterdorf, 'Are fines the final answer to cartels in Europe?' (2009) *Concurrences*, No 2 – 2009, 1; and P. Lowe, 'Cartels, Fines, and Due Process', *Global Competition Policy* (June 2009, Release 2), [www.globalcompetitionpolicy.org](http://www.globalcompetitionpolicy.org), at 6-7.
- <sup>6</sup> See *An assessment of discretionary penalties regimes*, Report prepared for the Office of Fair Trading by London Economics, OFT 1132 (October 2009), at 22-23, 'Optimal Antitrust Fines: Theory and Practice', as note 4 above, at 200-201, and *Efficiency and Justice in European Antitrust Enforcement*, as note 4 above, at 67-68.
- <sup>7</sup> See European Parliament, Resolution on the White Paper on damages actions for breach of the EC antitrust rules, A6-0123/2009, adopted on 26 March 2009, paragraph 11; European Competition Authorities (ECA) Principles for convergence on Pecuniary sanctions imposed on undertakings for infringements of antitrust law (May 2008), accessible at [http://www.nmanet.nl/Images/ECA%20Principles\\_tcm16-117437.pdf](http://www.nmanet.nl/Images/ECA%20Principles_tcm16-117437.pdf), paragraph 18; and my paper 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages' (2009) 32 *World Competition* 3, at 19-21.
- <sup>8</sup> Merger control is not considered in this paper. On both the substantive content and the enforcement of Articles 81 and 82 EC, see generally R. Whish, *Competition Law*, 6<sup>th</sup> edition (Oxford University Press 2008), P. Roth and V. Rose (eds), *Bellamy & Child – European Community Law of Competition*, 6<sup>th</sup> edition (Oxford University Press 2008), J. Faull and A. Nikpay (eds), *The EC Law of Competition*, 2<sup>nd</sup> edition (Oxford University Press 2007), and G. Hirsch, F. Montag and F.J. Säcker,

These prohibitions are enforced by the European Commission, by the competition authorities of the EU Member States,<sup>9</sup> and through private litigation.<sup>10</sup> The procedural rules governing enforcement by the European Commission are laid down in the EC Treaty, Council Regulation 1/2003,<sup>11</sup> Commission Regulation 773/2004,<sup>12</sup> various Commission notices or guidelines, and the case-law of the EU Courts.<sup>13</sup>

Article 23(2) of Regulation 1/2003 provides that the Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently, they infringe Article 81 or Article 82 EC. For each undertaking and association of undertakings participating in the infringement, the fine may not exceed 10 % of its total turnover in the preceding

---

*Competition Law: European Community Practice and Procedure Article-by-Article Commentary* (Sweet & Maxwell 2008); on the enforcement of Articles 81 and 82 EC, see generally L. Ortiz Blanco (ed.), *EC Competition Procedure*, 2<sup>nd</sup> edition (Oxford University Press 2006), C.S. Kerse and N. Khan, *EC Antitrust Procedure*, 5<sup>th</sup> edition (Sweet & Maxwell 2005), E. Gippini-Fournier, Community Report for the FIDE XXIII Congress 2008, in H.F. Koeck and M.M. Karollus (eds), *The Modernisation of European Competition Law: Initial Experiences with Regulation 1/2003* (Nomos 2008), F. Arbault and E. Sakkers, 'Cartels', in J. Faull and A. Nikpay (eds), as above, 745-1128, and my books *The Optimal Enforcement of EC Antitrust Law* (Kluwer law International 2002), *Principles of European Antitrust Enforcement* (Hart Publishing 2005) and *Efficiency and Justice in European Antitrust Enforcement* (Hart Publishing 2008).

- <sup>9</sup> As can be seen from the statistics published on the webpages of the European Competition Network, which groups the European Commission and the competition authorities of the EU Member States, <http://ec.europa.eu/competition/ecn/statistics.html>, for every case of suspected infringement of Articles 81 or 82 EC investigated by the European Commission, some five cases are investigated by the competition authorities of the EU Member States.
- <sup>10</sup> On the private enforcement of EU antitrust law, see European Commission, White Paper on damages actions for breach of the EC antitrust rules, COM(2008)165 of 2 April 2008, and accompanying Commission Staff Working Paper, SEC (2008)404; European Parliament, Resolution on the White Paper on damages actions for breach of the EC antitrust rules, A6-0123/2009, adopted on 26 March 2009; A.P. Komninos, *EC Private Antitrust Enforcement – Decentralised Application of EC Competition Law by National Courts* (Hart Publishing 2008), and my paper 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages', (2009) 32 *World Competition* 3.
- <sup>11</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1, last amended by Council Regulation (EC) No 1419/2006 [2006] OJ L269/1. Also relevant is Council Regulation No 1 determining the languages to be used by the European Economic Community [1958] OJ B17/385 (Special English Edition 1952-58, p 59), last amended by Council Regulation (EC) No 1791/2006 [2006] OJ L363/1.
- <sup>12</sup> Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty [2004] OJ L123/18, last amended by Commission Regulation (EC) No 622/2008 of 30 June 2008 as regards the conduct of settlement procedures in cartel cases [2008] OJ L171/3.
- <sup>13</sup> For a full description of these procedural rules, see the literature listed in note 8 above.

business year.<sup>14</sup> Article 23(3) of Regulation 1/2003 provides that, in fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.

The Commission has published Guidelines setting out the methodology it uses for setting the amount of fines. The current Guidelines date from 2006.<sup>15</sup> The Commission has also published a Leniency Notice, in which it commits itself to granting immunity from fines or reduction of fines in cartel cases to undertakings which cooperate with the Commission in voluntarily providing intelligence and/or evidence of the infringement, in accordance with the criteria set out in that notice.<sup>16</sup>

Before adopting a decision finding an infringement and imposing fines, the Commission addresses to the companies concerned a statement of objections, setting out its preliminary findings. The companies have the opportunity to respond both in writing and at an oral hearing to the allegations set out in the statement of objections. As a matter of internal organisation within the Commission,<sup>17</sup> the investigation is conducted by officials of the Commission's Directorate-General for Competition ("DG Competition"), working under the authority of the Member of the Commission with special responsibility for competition matters ("the Competition Commissioner"). The sending of a statement of objections is normally decided by the Competition Commissioner, after consultation of the Chief Competition Economist, and of the Commission's Legal Service, which operates under the authority of the President of the Commission, and, where appropriate, also after consultation of other Commission services. The oral hearing is presided over by a Hearing Officer, an official who does not belong to DG Competition but who also reports to the Competition Commissioner.<sup>18</sup> The hearing is not attended by any Member of the

---

<sup>14</sup> Where the infringement of an association relates to the activities of its members, the fine may not exceed 10 % of the sum of the total turnover of each member active on the market affected by the infringement of the association.

<sup>15</sup> Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, [2006] OJ C210/2; see H. de Broca, 'The Commission revises its Guidelines for setting fines in antitrust cases' (Autumn 2006) *Competition Policy Newsletter* 1, my paper 'The European Commission's 2006 Guidelines on Antitrust Fines: A Legal and Economic Analysis' (2007) 30 *World Competition* 197, and Chapter 4 of *Efficiency and Justice in European Antitrust Enforcement*, as note 8 above. These Guidelines replaced earlier Guidelines dating from 1998.

<sup>16</sup> Commission Notice on Immunity from fines and reduction of fines in cartel cases [2006] OJ C298/17; see Arbault and Sackers, as note 8 above, my article 'Leniency in Antitrust Enforcement: Theory and Practice' (2007) 30 *World Competition* 25-64, and chapter 5 of *Efficiency and Justice in European Antitrust Enforcement*, as note 8 above.

<sup>17</sup> See further my paper '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* 201, and Chapter 6 of *Principles of European Antitrust Enforcement*, as note 8 above.

<sup>18</sup> The Hearing Officer also has a wider role of safeguarding the right to be heard throughout the administrative procedure; see Commission Decision of 23 May 2001 on the terms of reference of

Commission, but rather by the officials from DG Competition dealing with the case, sometimes by officials from other Commission services, and by officials of the competition authorities of the Member States. The Commission's final decision is drafted by officials from DG Competition, normally the same officials who conducted the investigation and drafted the statement of objections. It is adopted by the Commission, on a proposal of the Competition Commissioner, and after consultation of the Legal Service and sometimes other Commission services, as well as of the Advisory Committee, composed of representatives of the competition authorities of the EU Member States.

The Commission's decision is binding upon the companies it is addressed to. They can however bring an action for annulment of the decision before the EU Court of First Instance.<sup>19</sup> The application for annulment can be based on both factual and legal grounds. If the Court annuls the Commission decision on merely procedural grounds, the Commission may, correcting the procedural defect, readopt the decision, which can then again be subjected to judicial review.<sup>20</sup> With regard to the fines, Article 31 of Regulation 1/2003 provides that the Court of First Instance has unlimited jurisdiction.<sup>21</sup> It may cancel, reduce or increase the fine imposed. A further appeal, on questions of law only, lies before the EU Court of Justice.<sup>22</sup>

Actions before the EU Courts have no suspensory effect, but the companies can add to their application for annulment a request for suspension of the application of the Commission's decision or for other interim measures.<sup>23</sup> Such a request will however only be granted by the Courts if it is established that their adoption is *prima facie* justified in fact and in law, that their adoption is necessary to avoid serious and irreparable damage, and that the balance of interests favours such an

---

hearing officers in certain competition proceedings, [2001] OJ L162/21. The Hearing Officer's final report on the course of the procedure and the respect of the right to be heard is also communicated to the Advisory Committee, the Commission and the addressees of the final decision.

<sup>19</sup> Article 230 EC; see further below, text accompanying notes 82 and following.

<sup>20</sup> Judgment of 15 October 2002 in Joined Cases C-238/99 P etc. *Limburgse Vinyl Maatschappij (LVM) and Others v Commission* [2002] ECR I-8616; see further my paper 'The Principle of *Ne Bis in Idem* in EC Antitrust Enforcement: A Legal and Economic Analysis' (2003) 26 *World Competition* 131, and Chapter 3 of *Principles of European Antitrust Enforcement*, as note 8 above; see also (text accompanying) note 74 below.

<sup>21</sup> Article 229 EC; see further below, text accompanying notes 89 and following.

<sup>22</sup> According to settled case-law, it is not for the Court of Justice, when ruling on questions of law in the context of such an appeal, to substitute, on ground of fairness, its own assessment for that of the Court of First Instance exercising its unlimited jurisdiction on the amount of the fines; see Judgment of 28 June 2005 in Joined Case C-189/02 P etc. *Dansk Rorindustri and Others v Commission* [2005] ECR I-5425, paragraph 245.

<sup>23</sup> Articles 242 and 243 EC; see F. Castillo de la Torre, 'Interim Measures in Community Courts: Recent Trends' (2007) 44 *Common Market Law Review* 273.

order.<sup>24</sup> With regard to fines, the Commission has developed a practice of allowing companies that have brought an action for annulment before the Courts to avoid paying the fine immediately, on condition that they provide an acceptable bank guarantee covering both the fine and subsequent interest.<sup>25</sup>

### C. The European Convention on Human Rights (ECHR)

According to Article 6(2) EU: "The [European] Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law". The EU Court of Justice has made it clear in its case-law that, in thus ensuring respect for the fundamental rights laid down in the European Convention on Human Rights, the EU Courts must take into account the case-law of the European Court of Human Rights.

The rights as they result from the European Convention on Human Rights have been reaffirmed by the European Parliament, Council and Commission in the Charter of Fundamental Rights of the European Union ("EU Charter").<sup>26</sup> Article 52(3) of the EU Charter provides that, in so far as the EU Charter contains rights which correspond to rights guaranteed by the European Convention on Human Rights, the meaning and scope shall be the same as those laid down by the said Convention. As to EU antitrust enforcement, recital 37 of Regulation No 1/2003 provides that "[t]his Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. Accordingly, this Regulation should be interpreted and applied with respect to those rights and principles".

In *Bosphorus v Ireland*, the European Court of Human Rights, considering in general the protection of fundamental rights by EU law, has found that "the protection of fundamental rights by EC law can be considered to be [...] "equivalent" ["comparable"] to that of the Convention system".<sup>27</sup>

---

<sup>24</sup> See further below, text accompanying note 77.

<sup>25</sup> If the company has immediately paid the fine, and the fine is subsequently canceled or reduced by the Courts, the Commission must reimburse the fine with interest, but if the company chooses to provide a bank guarantee instead of paying the fine, it will not receive reimbursement of the bank guarantee charges; see Judgment of the Court of the Justice of 19 April 2007 in Case C-282/05 P, *Holcim (Deutschland) v Commission*, [2007] ECR I-2941, and further below, text accompanying note 76.

<sup>26</sup> [2007] OJ C303/1 and earlier [2000] OJ C364/1.

<sup>27</sup> Judgment of the European Court of Human Rights of 30 June 2005 in Case of *Bosphorus v Ireland*, Application no. 45036/98, paragraphs 165 and 155; see also the lecture by J.P. Costa, President of the European Court of Human Rights, "The Relationship between the European Convention on Human Rights and European Union Law – A Jurisprudential Dialogue between the European Court of Human



Article 6(1) ECHR reads as follows: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing [...] by an independent and impartial tribunal [...]." Article 47, second paragraph, of the EU Charter correspondingly states: "Everyone is entitled to a fair and public hearing [...] by an independent and impartial tribunal [...]"<sup>28</sup>

#### D. The increased level of fines

To find out whether, or to what extent, the level of EU antitrust fines has increased, one cannot simply compare nominal figures of fines imposed in different cases at different points in time. First, figures should be corrected for inflation. When comparing with fines imposed in old cases such as the *Sugar cartel* decision of 1973,<sup>29</sup> this makes a significant difference. The fine of 1.5 million units of account imposed on Tirlomontoise in that case would correspond to a fine of around € 7.5 million today, five times higher in nominal terms.<sup>30</sup> Secondly, the amount of the fine should be assessed in proportion to the scale of the infringement. Optimal deterrence and proportional justice require that fines are higher in cases which concern infringements covering large volumes of trade in big markets, causing very substantial economic harm, than in smaller cases.<sup>31</sup> The fine of € 1.06 billion which the European Commission recently imposed on Intel may appear quite high in nominal terms, but it represents only around 1 % of Intel's sales during the violation period.<sup>32</sup> Indeed, over the last few years, the European Commission has increasingly focused its antitrust enforcement activity on very large cases. Since the entry into application of Regulation 1/2003 five

---

Rights and the European Court of Justice' (King's College London, 7 October 2008), accessible at [http://www.echr.coe.int/NR/rdonlyres/DA4C4A2E-0CBE-482A-A205-9EA0AA6E31F6/0/2008\\_Londres\\_King\\_s\\_College\\_7\\_10.pdf](http://www.echr.coe.int/NR/rdonlyres/DA4C4A2E-0CBE-482A-A205-9EA0AA6E31F6/0/2008_Londres_King_s_College_7_10.pdf).

<sup>28</sup> According to the Explanations relating to the Charter of Fundamental Rights, [2007] OJ C303/17 at 34, this provision corresponds to Article 6(1) 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".

<sup>29</sup> See the table in the GCLC Report, as note 1 above, paragraph 1.

<sup>30</sup> See also *The Optimal Enforcement of EC Antitrust Law*, as note 8 above, at 10-12.

<sup>31</sup> On the requirements of deterrence and proportional justice in setting the amount of antitrust fines, see the literature referred to in note 4 above.

<sup>32</sup> See Robert H. Lande, 'The Price of Abuse: Intel and the European Commission Decision', *Global Competition Policy* (June 2009, Release 2), [www.globalcompetitionpolicy.org](http://www.globalcompetitionpolicy.org), at 6-7, who argues that "the fine was much too low [...]: the implicit message of a 1 percent fine is for Intel to simply assume that its costs went up by 1 percent and that dealing with the Commission is just another cost of doing business"; see also H. Pearson, 'Headline-Grabbing Intel Fine Hides Article 82 EC Enforcement Concerns', *Global Competition Policy* (June 2009, Release 2), [www.globalcompetitionpolicy.org](http://www.globalcompetitionpolicy.org).

years ago, the Commission fully shares the task of enforcing Articles 81 and 82 EC with the competition authorities of the EU Member States. Only around one in six cases are now dealt with by the European Commission,<sup>33</sup> typically the larger cases, in particular infringements with effects on competition in more than three Member States.<sup>34</sup>

Comparisons between the fines imposed in different cases can nevertheless be revealing if one can find cases that are sufficiently similar in nature and size, and not too far removed in time as to make inflation a relevant factor. One example which has been highlighted by some commentators is the comparison between the fines imposed in the Belgian and Dutch beer cartel cases.<sup>35</sup> For roughly comparable infringements in similar markets, a fine of a bit more than € 46 million was imposed on Interbrew in 2001, whereas a fine of € 219 million was imposed on Heineken in 2007.<sup>36</sup>

Another possible indicator of a strong increase in the level of fines would be an increase in the frequency with which fines hit the ceiling, laid down in Article 23(2) of Regulation 1/2003, of 10 % of the undertaking's total turnover in the business year preceding the Commission decision. This does however not appear to have happened: the cases in which fines have been capped at the 10 % ceiling have remained relatively rare.<sup>37</sup>

---

<sup>33</sup> See note 9 above.

<sup>34</sup> See Commission Notice on cooperation within the Network of Competition Authorities, [2004] OJ C101/03, paragraph 14, and the Commission's Report of 29 April 2009 on the functioning of Regulation 1/2003, COM(2009)206, and accompanying Commission Staff Working Paper SEC(2009)574.

<sup>35</sup> See R. McLeod and L. Crofts, 'MLex Comment: What will blunt the EC's antitrust fines spike?', [www.mlex.com](http://www.mlex.com), 23 July 2009.

<sup>36</sup> Commission Decision of 5 December 2001 in Case IV/37.614/F3 *PO/Interbrew and Alken-Maes*, [2003] OJ L200/1, and Commission Decision of 18 April 2007 in Case COMP/B/37.766 *Dutch beer market*, [2008] OJ C122/1.

<sup>37</sup> It would indeed be very problematic if the general level of fines were to be raised to the point where fines would regularly be capped at the 10 % ceiling, because then fines would no longer reflect the differences between infringements, and between the participation of different undertakings in the same infringement. Both optimal deterrence and proportional justice require differentiation, to reflect the duration of infringements, the respective roles played by different cartel members, and many other relevant factors; see the literature referred to in note 4 above. It would of course be possible to amend Regulation 1/2003 so as to raise the 10 % ceiling. In its comments of 30 September 1999 on the White Paper which preceded the European Commission's proposal for what became Regulation 1/2003, the OECD Competition Law and Policy Division said that "it is somewhat disappointing that the White paper does not propose any increase in fines for substantive offences. [...] It is quite possible that fines limited to 10 % of one year's turnover, are already inadequate to deter the more harmful types of horizontal agreements", but this suggestion was not taken up by the European Commission or the EU Council; see *The Optimal Enforcement of EC Antitrust Law*, as note 8 above, at 159. As to the optimal mix between fines and other penalties to deter antitrust infringements, see the literature referred to in note 5 above.

As far as I know, only one study, by John Connor and Douglas Miller, has examined systematically the evolution of the European Commission's antitrust fines, using a method which fully takes into account the effect of inflation and the need to assess the level of fines in proportion to the size of the infringement.<sup>38</sup> On the basis of a sample of 192 corporate participants of hard-core global cartels fined between 1990 and January 2009, this study found a trend increase of fines over the 1990-2008 period of 8 % per year, as well as, in addition to this trend, a 107 % increase due to the introduction of the Commission's 2006 Guidelines on fines.<sup>39</sup>

Of course, it cannot be concluded from the finding of a substantial increase in the level of fines that the new fining level is excessive. Indeed, the previous lower level may have been too low.<sup>40</sup> According to settled case-law of the EU Courts, "in assessing the gravity of an infringement for the purpose of fixing the amount of the fine, the Commission must take into consideration not only the particular circumstances of the case but also the context in which the infringement occurs and must ensure that its action has the necessary deterrent effect [...] It [is therefore] open to the Commission to have regard to the fact that [certain types of infringements], although they were established as unlawful at the outset of Community competition policy, are still relatively frequent on account of the profit that certain of the undertakings concerned are able to derive from them and, consequently, it [is] open to the Commission to consider that it is appropriate to raise the level of fines [within the limits indicated in Article 23(2) of Regulation 1/2003] so as to reinforce their deterrent effect".<sup>41</sup>

---

<sup>38</sup> J.M. Connor and D.J. Miller, 'Determinants of EC Antitrust Fines for Members of Global Cartels, paper presented at the 3<sup>rd</sup> LEAR Conference on The Economics of Competition Law (Rome, 25-26 June 2009), <http://www.learlab.com/learconference/>.

<sup>39</sup> See note 15 above.

<sup>40</sup> See J.M. Connor and D.J. Miller, as note 38 above; P. Lowe, as note 5 above, at 2-3; and E. Combe and C. Monnier, 'Fines Against Hard Core Cartels in Europe: The Myth of Over Enforcement', *Cahiers de Recherche PRISM-Sorbonne* (June 2009), available at <http://ssrn.com/abstract=1431644>.

<sup>41</sup> Judgments of the Court of Justice of 7 June 1983 in Joined Cases 100/80 to 103/80 *Musique Diffusion Française and Others v Commission* [1983] ECR 1825, paragraphs 106-109, and of 2 October 2003 in Case C-196/99 P *Aristrain v Commission* [2003] ECR I-11005, paragraph 81. It should be pointed out that, as a matter of logic, the fact that at a given point in time relatively many antitrust infringements are still discovered is primarily indicative of the deterrent effect of the level of fines imposed just before or around the time these infringements started. Cartels tend to get detected and punished many years after they come into being. The number of cartels detected at a given point in time is thus more likely to be indicative of the adequacy of the level of fines imposed ten or fifteen years earlier than of the level of fines imposed five years earlier.

## II. COMPATIBILITY WITH THE EUROPEAN CONVENTION ON HUMAN RIGHTS

### A. The criminal nature of the European Commission's antitrust fines

It is not possible to give a one word answer to the question whether the European Commission's antitrust fines are of a criminal law nature. The reason is that there is not a single notion of "criminal", but two.<sup>42</sup> On the one hand, there is the question whether the European Commission's antitrust fines are "criminal" within the meaning of EU law. On the other hand, there is the separate question whether they are "criminal" within the autonomous meaning of the European Convention on Human Rights. There is no necessity for the answer to the two questions to be the same.

Article 23(5) of Regulation 1/2003 provides that the European Commission's antitrust fining decisions "shall not be of a criminal law nature".<sup>43</sup> This answers the question whether the European Commission's antitrust fines are "criminal" within the meaning of EU law.<sup>44</sup>

As to the question whether the European Commission's antitrust fines are "criminal" within the meaning of the European Convention of Human Rights, the answer can be derived from the case-law of the European Court of Human Rights, and in particular the judgment of 23 November 2006 in *Jussila v Finland*.<sup>45</sup> In paragraphs 30 and 31 of this judgment, the European Court of Human Rights restated as follows its case-law as to what is "criminal" within the autonomous meaning of Article 6 ECHR:

*"The Court's established case-law sets out three criteria to be considered in the assessment of the applicability of the criminal aspect. These criteria [are] sometimes referred to as the "Engel criteria" [...]:*

---

<sup>42</sup> See also my paper 'Is Criminalization of EU Competition Law the Answer?' (2005) 28 *World Competition* 11, at 117-122, and *Efficiency and Justice in European Antitrust Enforcement*, as note 8 above, at 155-161.

<sup>43</sup> Article 5 of Regulation 1/2003 leaves it to each EU Member State to determine whether the fines imposed by its national competition authorities for infringements of Articles 81 and 82 EC are "criminal" within the meaning of their respective national laws.

<sup>44</sup> This qualification as non-criminal under domestic law also has a certain relevance under the European Convention on Human Rights: see below, (text accompanying) notes 45 and 55.

<sup>45</sup> Judgment of the European Court of Human Rights (Grand Chamber) of 23 November 2006 in Case of *Jussila v Finland*, Application no. 73053/01.

“... [I]t is first necessary to know whether the provision(s) defining the offence charged belong, according to the legal system of the respondent State, to criminal law, disciplinary law or both concurrently. This however provides no more than a starting point. The indications so afforded have only a formal and relative value and must be examined in the light of the common denominator of the respective legislation of the various Contracting States.

*The very nature of the offence is a factor of greater import. ...*

*However, supervision by the Court does not stop there. Such supervision would generally prove to be illusory if it did not also take into consideration the degree of severity of the penalty that the person concerned risks incurring. ...”*

*The second and third criteria are alternative and not necessarily cumulative. It is enough that the offence in question is by its nature to be regarded as criminal or that the offence renders the person liable to a penalty which by its nature and degree of severity belongs in the general criminal sphere [...]. The relative lack of seriousness of the penalty cannot divest an offence of its inherently criminal character [...]. This does not exclude a cumulative approach where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge [...].”*

That the application of these "Engel criteria" to the European Commission's antitrust fining procedures leads to the conclusion that these procedures are "criminal" within the autonomous meaning of Article 6 ECHR, is no longer news today.<sup>46</sup> Indeed, it has been recognised by the EU Courts for several years now.

Judge Vesterdorf, acting as Advocate General in the *Polypropylene cartel* cases at the Court of First Instance, already made the point in 1989.<sup>47</sup> At the Court of Justice, Advocate General Léger held in 1998 in the *Baustahlgewebe* case that "[i]t cannot be disputed – and the Commission does not dispute – that, in the light of the case-law of the European Court of Human Rights and the opinions of the European Commission of Human Rights, the present case involves a 'criminal charge'".<sup>48</sup>

The Court of Justice itself held in 1999 in *Hüls*, in relation to Article 6(2) ECHR, which guarantees the presumption of innocence for everyone charged with a "criminal" offence, that "[i]t must also be accepted that, given the nature of the

---

<sup>46</sup> See D. Waelbroeck and D. Fosselard, 'Should the Decision-Making Power in EC Antitrust Cases be left to an Independent Judge? – The Impact of the European Convention of Human Rights on EC Antitrust Procedures' (1995) 15 *Yearbook of European Law* 111, and my paper 'La compatibilité des procédures communautaires en matière de concurrence avec la Convention européenne des droits de l'homme' (1996) *Cahiers de droit européen* 329.

<sup>47</sup> Opinion of Mr Vesterdorf, acting as Advocate General, of 10 July 1991 in Joined Cases T-1/89 to T-4/89 and T-6/89 to T-15/89 *Rhône-Poulenc and Others v Commission* [1991] ECR II-869 at 885.

<sup>48</sup> Opinion of Advocate General Léger of 3 February 1998 in Case C-185/95 P *Baustahlgewebe v Commission* [1998] ECR I-8422, paragraph 31.

*infringements in question and the nature and degree of severity of the ensuing penalties, the principle of the presumption of innocence applies 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 (see, to that effect, in particular the judgments of the European Court of Human Rights of 21 February 1984, Öztürk, Series A No 73, and of 25 August 1987 Lutz, Series A No 123-A)".<sup>49</sup>*

The European Court of Human Rights has never itself had the occasion to apply its case-law as to what is "criminal" within the autonomous meaning of Article 6 ECHR in a case concerning the imposition of a fine by the European Commission for infringement of the EU antitrust prohibitions.<sup>50</sup> In *Société Stenuit v France* the European Commission of Human Rights (a body which until its abolition in 1998 dealt in first instance with applications under the European Convention on Human Rights) held that a fine imposed by a French administrative authority on a company for an infringement of French competition law constituted a criminal penalty within the meaning of Article 6 ECHR. The applicant subsequently withdrew its application, and the European Court of Human Rights struck the case out for that reason, without examining the question of the applicability of Article 6 ECHR.<sup>51</sup> Only in 2006, in its judgment in *Jussila v Finland*,<sup>52</sup> did the European Court of Human Rights clearly endorse the assessment of the European Commission of Human Rights in *Société Stenuit v France*, as discussed immediately below.

---

<sup>49</sup> Judgment of 8 July 1999 in Case C-199/92 P *Hüls v Commission* [1999] ECR 4287, paragraph 150. See also Judgment of 28 June 2005 in Joined Cases C-189/02 P etc *Dansk Rorindustri and Others v Commission* [2005] ECR I-5425, paragraph 202: "The Court of First Instance held, first of all and correctly, that the principle of non-retroactivity of criminal laws, enshrined in Article 7 of the ECHR as a fundamental right, constitutes a general principle of Community law which must be observed when fines are imposed for infringement of the competition rules and that that principle requires that the penalties imposed correspond with those fixed at the time when the infringement was committed."

<sup>50</sup> In the case of *Senator Lines GmbH v. the 15 Member States of the European Union* (Decision of the European Court of Human Rights (Grand Chamber) of 10 March 2004, Application no. 56672/00), the question was raised. The European Commission had imposed a fine of € 273 million on Senator Lines. The EU Courts rejected the request of the company to suspend the payment of the fine pending the appeal against the European Commission's decision. Senator Lines GmbH alleged a violation of Article 6 ECHR (right of access to court), in that it was required to pay the fine before a decision was taken in the substantive proceedings before the EU Courts. It claimed that this would have resulted in the insolvency and liquidation of the company before the substantive issues were determined. The application was declared inadmissible by the European Court of Human Rights after the EU Court of First Instance decided to set aside the fine imposed by the European Commission; see also (text accompanying) notes 23 to 25 above and 75 to 77 below.

<sup>51</sup> Judgment of 27 February 1992, *Société Stenuit v France*, Application No. 11598/85, Series A no. 232-A.

<sup>52</sup> Note 45 above.

## **B. The different applicability of the ECHR criminal-head guarantees to the hard core of criminal law and to cases not belonging to the hard core of criminal law**

In *Jussila v Finland*, which concerned the question whether Article 6 ECHR guaranteed the right to an oral hearing before the court hearing an appeal against the imposition of tax surcharges on the applicant by the Finnish tax administration, the European Court of Human Rights held the following:

*"the autonomous interpretation adopted by the Convention institutions of the notion of a "criminal charge" by applying the Engel criteria have underpinned a gradual broadening of the criminal head to cases not strictly belonging to the traditional categories of the criminal law, for example administrative penalties (...), prison disciplinary proceedings (...), customs law (...), competition law (Société Stenuit v. France, judgment of 27 February 1992, Series A no. 232-A) and penalties imposed by a court with jurisdiction in financial matters (...). 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, ...)".<sup>53</sup>*

The European Court of Human Rights thus confirmed a number of points, which could already be derived from its earlier judgments:<sup>54</sup>

- Within the broad range of procedures or penalties that are "criminal" within the meaning of Article 6 ECHR, a distinction must be 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".
- Competition law of the type considered in *Stenuit v France*, whereby fines are imposed on companies for violation of competition rules, which are not classified as "criminal" under domestic law,<sup>55</sup> belongs to the second category, outside the hard core of criminal law.

---

<sup>53</sup> *Jussila v Finland*, as note 45 above, paragraph 43; see also Judgment of the European Court of Human Rights of 4 March 2008 in Case of *Hüseyin Turan v Turkey*, Application no. 11529/02, paragraph 32.

<sup>54</sup> See 'The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis', as note 3 above, at 209, footnote 13; *Principles of European Antitrust Enforcement*, as note 3 above, paragraph 578, footnote 14; 'Is Criminalization of EU Competition Law the Answer?', as note 5 above, at 121-122; and *Efficiency and Justice in European Antitrust Enforcement*, as note 4 above, paragraphs 490-491.

<sup>55</sup> See Judgment of 25 February 1997 in the Case of *Findlay v the United Kingdom*, Reports 1997-I, paragraph 79.

- The criminal-law guarantees laid down in Article 6 ECHR do "not necessarily apply with their full stringency" to cases belonging to the second category, outside the hard core of criminal law.<sup>56</sup>
- An example of this differential treatment concerns the compatibility with Article 6 ECHR of the imposition of criminal fines, in the first instance, by an administrative or non-judicial body that combines investigative and decision-making powers. Whereas in cases belonging to the hard core of criminal law, Article 6 ECHR requires that penalties are imposed, in the first instance, by an independent tribunal, it is compatible with Article 6 ECHR for penalties belonging to the second category, outside the hard core of criminal law, to be imposed, in the first instance, by an administrative or non-judicial body that combines investigative and decision-making powers. This last point is further analysed immediately below.

**C. Outside the hard core of criminal law, criminal penalties can be imposed, in the first instance, by an administrative or non-judicial body combining investigative and decision-making powers**

In paragraph 81 of the judgment in *Janosevic v Sweden*,<sup>57</sup> referred to in *Jussila v Finland* as quoted above, the European Court of Human Rights held the following:

*"The tax authorities are administrative bodies which cannot be considered to satisfy the requirements of Article 6 § 1 of the Convention. The Court considers, however, that Contracting States must be free to empower tax authorities to impose sanctions like tax surcharges even if they come to large amounts. Such a system is not incompatible with Article 6 § 1 so long as the taxpayer can bring any such decision affecting him before a judicial body that has full jurisdiction, including the power to quash in all respects, on questions of fact and law, the challenged decision (see Bendenoun v. France, judgment of 24 February 1994, Series A no. 284, pp. 19-20, § 46, and Umlauf v. Austria, judgment of 23 October 1995, Series A no. 328-B, pp. 39-40, §§ 37-39)."*

From this paragraph in *Janosevic v Sweden*, read together with *Jussila v Finland* as quoted above, the following points are clear:

- Outside the hard core of criminal law, it is compatible with Article 6 ECHR for criminal sanctions to be imposed, in the first instance, by an administrative or non-judicial body, which combines investigative and

---

<sup>56</sup> See also the judgment of the EU Court of First Instance of 8 July 2008 in Case T-99/04 *AC-Treuhand v Commission*, [2008] ECR II-1501, paragraph 113.

<sup>57</sup> Judgment of 21 May 2003, *Janosevic v Sweden*, Application no. 34619/97.



decision-making functions, without any internal organisational separation between these functions. Only if there is no possibility of appeal to a judicial body with full jurisdiction, or if the first-instance decision-making body is itself a judicial body under domestic law (as was for instance the case for the French Banking Commission considered in *Dubus v France*<sup>58</sup>), does Article 6 ECHR require internal separation within the first-instance decision-making body between investigative and adjudicative functions.

- This holds "even if [these sanctions] come to large amounts", or – to use the language of paragraphs 46 and 47 of *Bendenoun v France* – "even if the [penalties] are large ones", or "very substantial". It is thus clearly erroneous to claim that Article 6 ECHR only allows the imposition, in the first instance, of criminal penalties by an administrative or non-judicial body for "minor offences".<sup>59</sup>
- However, if, outside the hard core of criminal law, criminal penalties are imposed, in the first instance, by an administrative or non-judicial body, Article 6 ECHR requires a possibility of appeal "before a judicial body that has full jurisdiction, including the power to quash in all respects, on questions of fact and of law, the challenged decision".

#### **D. Conclusions as to the European Commission's antitrust fining powers**

The conclusions from the above analysis of the case-law of the European Court of Human Rights as to the European Commission's antitrust fining powers can be summarised as follows:

- Whereas the European Commission's antitrust fining powers are not "criminal" within the meaning of EU law, they are "criminal" within the wider autonomous meaning of Article 6 ECHR.
- Inside the wider autonomous ECHR category of "criminal", the requirements of Article 6 ECHR are different for, on the one hand, the "hard core of criminal law", and, on the other hand, outside the hard core of criminal law.
- The European Commission's antitrust fining powers, which are not classified as "criminal" under EU law, and which only concern the

---

<sup>58</sup> Judgment of the European Court of Human Rights of 11 June 2009, *Dubus v France*, Application no. 5242/04, paragraph 26; see similarly the judgment of the French Cour de Cassation of 5 October 1999, *TGV Nord et Pont de Normandie*, with case-note by D. Waelbroeck and M. Griffiths in (2000) 37 *Common Market Law Review* 1465.

<sup>59</sup> See GCLC Working Paper, as note 1 above, at 26, and GCLC Report, as note 1 above, paragraph 38.

imposition of fines on undertakings, are outside the "hard core of criminal law".

- Outside the hard core of criminal law, Article 6 ECHR allows for criminal penalties to be imposed, in the first instance, by an administrative or non-judicial body, that combines investigative and decision-making powers, provided that there is a possibility of appeal "before a judicial body that has full jurisdiction, including the power to quash in all respects, on questions of fact and of law, the challenged decision".
- Article 6 ECHR thus allows the imposition of antitrust fines by the European Commission, and does not require any separation inside the Commission between investigative and decision-making functions, provided that the EU Courts, before which the addressees of Commission fining decisions can appeal, have "full jurisdiction, including the power to quash in all respects, on questions of fact and of law, the challenged decision" (as understood by the European Court of Human Right in paragraph 81 of *Janosevic v Sweden* quoted above).

It should be noted that the recent increase in the level of antitrust fines imposed by the European Commission has no relevance whatsoever in this respect. Even if these fines were to be increased further in the future, they would still not be "criminal" within the meaning of EU law. And even when they were at their lowest in the past, they were already "criminal" within the meaning of the European Convention on Human Rights.<sup>60</sup> Indeed, the European Court of Human Rights has consistently held that, in determining whether a procedure is "criminal" within the meaning of Article 6 ECHR, the assessment of the severity of the penalty, under the third of the "*Engel* criteria",<sup>61</sup> is to be made by reference to the maximum potential penalty for which the relevant law provides.<sup>62</sup> The maximum fine which can be imposed by the European Commission has always been and still is 10 % of the undertaking's total turnover in the preceding business year.<sup>63</sup> And the clear indications by Judge Vesterdorf in 1989, by Advocate General Léger in 1998 and by the Court of Justice itself in 1999 that the European Commission's antitrust fining procedures are "criminal" within the

---

<sup>60</sup> In this sense, it is correct to say that "[t]he Commission's fines are no more criminal now than in 1969 when it imposed its first fine of ECU 500,000 in *Quinine*" ('Cartels, Fines, and Due Process', as note 5 above, at 5). In fact, if one takes into account the effect of inflation (see text accompanying note 30 above), the *Quinine* fine in 1969, and the other very early fines, were significantly higher than the fines imposed in the mid-1970s; see *The Optimal Enforcement of EC Antitrust Law*, as note 8 above, at 11.

<sup>61</sup> See text accompanying notes 45 and 53 above.

<sup>62</sup> See, most recently, Judgment of the European Court of Human Rights (Grand Chamber) of 10 February 2009 in Case of *Sergey Zolotukhin v Russia*, Application no. 14939/03, paragraph 56.

<sup>63</sup> See (text accompanying) note 14 above, and note 37 above.

meaning of the European Convention on Human Rights,<sup>64</sup> predate any recent increase in the level of fines actually imposed. As to the European Commission's antitrust fines being outside the "hard core of criminal law", and Article 6 ECHR thus allowing their imposition, in the first instance, by an administrative or non-judicial body, it is clear from *Janosevic v Sweden*, referred to by the European Court of Human Rights in *Jussila v Finland*, and from *Bendenoun v France*, referred to in *Janovesic v Sweden*, that, outside the hard core of criminal law, criminal penalties can be imposed by an administrative or non-judicial body, "even if they come to large amounts", or "even if they are large ones" or "very substantial".<sup>65</sup>

### **III. JUDICIAL REVIEW BY THE EU COURTS OF THE EUROPEAN COMMISSION'S ANTITRUST FINING DECISIONS**

The only question which remains to be analysed is whether the EU Courts, before which addressees of European Commission antitrust fining decisions can bring an application for judicial review, have "full jurisdiction, including the power to quash in all respects, on questions of fact and of law, the challenged decision", as understood by the European Court of Human Right in *Janosevic v Sweden*.<sup>66</sup>

#### **A. Article 6 ECHR does not require two levels of judicial review, judicial review beyond the pleas raised by the parties, *de novo* trials or automatic suspensive effect**

In relation to the question whether the judicial review by the EU Courts satisfies the criteria of Article 6 ECHR, as interpreted by the European Court of Human Rights, four points should be clarified at the outset:

- The case-law of the European Court of Human Rights does not require several layers of full judicial review. It only requires that the addressee of an administrative decision imposing a criminal penalty on him can bring this decision before "a judicial body" that has full jurisdiction, including the power to quash in all respects, on questions of fact and law, the challenged decision.<sup>67</sup> The fact that, in the EU system, only the EU Court

---

<sup>64</sup> See (text accompanying) notes 47 to 49 above.

<sup>65</sup> See text accompanying note 59 above.

<sup>66</sup> See (text accompanying) note 57 above.

<sup>67</sup> Paragraph 81 of *Janosevic v Sweden*, quoted in the text accompanying note 57 above.

of First Instance has jurisdiction over both questions of fact and law, whereas any further appeal to the EU Court of Justice is limited to points of law only, is thus not problematic.

- Nothing in the case-law of the European Court of Human Rights suggests that judicial review should go beyond the pleas raised by the parties. According again to paragraph 81 of *Janosevic v Sweden*, what is required is that the affected party "can bring [the] decision affecting him before a judicial body that has full jurisdiction, including the power to quash in all respects, on questions of fact and of law, the challenged decision". This certainly requires the reviewing court to examine all pleas, factual and legal, which are raised before it by the affected party, but nothing suggests that it requires the reviewing court to raise any pleas on its own motion.<sup>68</sup>
- The case-law of the European Court of Human Rights does not require either that the judicial body conducts a *de novo* trial, starting from a blank slate, instead of reviewing the contested decision (fully, examining all pleas, factual and legal, raised by the applicant), and quashing the decision whenever it disagrees with the contested decision's findings.<sup>69</sup>

---

<sup>68</sup> Contra J. Schwarze, R. Bechtold and W. Bosch, *Deficiencies in European Community Competition Law – Critical analysis of the current practice and proposals for change* (Gleiss Lutz, September 2008), who claim, at pages 6 and 58-59, without reference to any judgment of the European Court of Human Rights, that the fact that judicial control by the EU Courts is limited to the pleas by the parties would make this control too limited in view in the European Convention on Human Rights.

For the right of access to the court to be effective, the European Convention on Human Rights would no doubt require that provision should be made for legal aid where the absence of such aid would make it impossible to ensure effective access (see Judgments of the European Court of Human Rights of 9 October 1979 in Case of *Airey v Ireland*, Series A no. 32, and of 15 February 2005 in Case of *Steel and Morris v United Kingdom*, Application no. 68416/01), but the addressees of European Commission antitrust fines tend to be well-resourced companies with access to the best legal assistance available on the market, so this is not really an issue. Anyway, legal aid is available before the EU Courts; see Articles 94 to 97 of the Rules of Procedure of the EU Court of First Instance, and Article 67 of the Rules of Procedure of the EU Court of Justice.

Finally, it should be noted for the sake of completeness that the EU Courts may in fact raise certain types of pleas on their own motion; see K. Lenaerts, D. Arts, I. Maselis and R. Bray, *Procedural Law of the European Union* (2<sup>nd</sup> edition, Sweet & Maxwell 2006), at 288-289, paragraph 7-122, and Judgment of the Court of Justice of 10 December 1957 in Case 8/56 *ALMA v High Authority* [1957 and 1958] ECR 95, at 100: "even in the absence of a formal submission, the Court is authorized to reduce the amount of an excessive fine since such a result would not have an effect *ultra petitem*, but would on the contrary amount to a partial acceptance of the application".

<sup>69</sup> The Judgment of the European Court of Human Rights (Second Section) of 27 January 2004, *Kyprianou v Cyprus*, Application no. 73797/01, quoted in the GCLC Working Paper, as note 1 above, at 42, is irrelevant in this context. This case did not concern the requirements for the judicial review by a court of a decision taken by an administrative or non-judicial body in an area outside the hard core of criminal law. The case rather concerned the hard core of criminal law (imprisonment of a natural person for contempt of court), and the question under what conditions, in such a case, the violation of Article 6 ECHR resulting from the lack of impartiality of the court taking the decision in first instance could be remedied on appeal. It should also be noted that the Judgment of 27 January 2004 of the Second Section in *Kyprianou v Cyprus* was replaced by the Judgment of 15 December 2005 of the Grand Chamber of the European Court of Human Rights, which reached the same final conclusion, but with a reasoning that does not use the expression "*de novo*".

Nor does the case-law of the European Court of Human Rights require that the reviewing court is vested with the power to take any decision which the first-instance-decision-making administrative or non-judicial body could have taken. In the United Kingdom, the Competition Appeal Tribunal ("CAT"), which reviews the decisions of the Office of Fair Trading ("OFT") imposing fines for infringements of Articles 81 and 82 EC and of the corresponding U.K. antitrust prohibitions, has been vested with the power to take any decision which the OFT could have taken.<sup>70</sup> Such a power may very well be desirable for efficiency reasons. If for instance the CAT finds that the OFT has insufficiently reasoned its decision, or has committed some procedural error in the process of adopting its decision, it can itself investigate the matter; and, if it finds that the infringement of the antitrust prohibitions did indeed take place, and a fine is indeed warranted, it can itself make the finding of the infringement and impose the fine. But nothing in the case-law of the European Court of Human Rights requires such a power for the reviewing court. According to paragraph 81 of *Janosevic v Sweden*,<sup>71</sup> it suffices that the reviewing court can "quash [...] the contested decision" (in all respects, on questions of fact and law). The current system of judicial review by the EU Courts, whereby, when the EU Courts find a procedural defect or inadequate reasoning in a Commission decision, the decision is annulled,<sup>72</sup> and it is subsequently open to the Commission, at least in cases where the defect is merely procedural,<sup>73</sup> to adopt a new decision (now following the correct procedures), which can then again be submitted to the EU Courts for judicial review, is no doubt unfortunate

---

<sup>70</sup> See further D. Bailey, 'The early case-law of the Competition Appeal Tribunal', in B. Rodger and A. McCulloch, *Ten Years of UK Competition Law Reform* (Dundee University Press 2010), and H. Schweitzer, 'The European competition law enforcement system and the evolution of judicial review', paper presented at the 14<sup>th</sup> Annual EU Competition Law and Policy Workshop (Florence, 19-20 June 2009),

<http://www.eui.eu/DepartmentsAndCentres/RobertSchumanCentre/Research/CompetitionPolicyMarketRegulation/CompetitionWorkshop/Index.aspx>, forthcoming in C.D. Ehlermann and M. Marquis (eds), *European Competition Law Annual 2009: Evaluation of Evidence and its Judicial Review in Competition Cases* (Hart 2010).

<sup>71</sup> See text accompanying note 57 above.

<sup>72</sup> It should be noted that a breach of procedure by the Commission will only lead to the annulment of the Commission's decision by the EU Courts if the breach adversely affected the interests of the applicant, which is not the case when it is clear that the Commission's decision could not have been any different if the procedural breach had not happened; see for instance, which regard to access to the file, paragraph 71 of the Judgment of the EU Court of Justice of 7 January 2004 in Joined Cases C-204/00 P etc. *Aalborg Portland and Others v Commission* [2004] ECR I-123. This case-law of the EU Court is also fully in line with the case-law of the European Court of Human Rights; see for instance Judgment of 9 July 2007 Case of *Verdu Verdu v Spain*, Application no. 43432/02.

<sup>73</sup> See further my paper 'The Principle of *Ne Bis in Idem* in EC Antitrust Enforcement: A Legal and Economic Analysis' (2003) 26 *World Competition* 131, and chapter 3 of *Principles of European Antitrust Enforcement*, as note 8 above.

from the perspective of efficient antitrust enforcement,<sup>74</sup> but not problematic under the European Convention on Human Rights.

- Finally, the case-law of the European Court of Human Rights does not require that an application for judicial review has automatic suspensive effect.<sup>75</sup> What is required, according to paragraph 81 of *Janosevic v Sweden*, is that the reviewing court has the power "to quash in all respects [...] the contested decision". This no doubt implies that a successful appeal must be able to undo the effects of the quashed decision. The EU system satisfies this test. Indeed, a judgment of the EU Courts annulling a Commission decision, or resetting the fine at a lower level, has retroactive effect, and the Commission is obliged to reimburse the fine already paid with interest.<sup>76</sup> In those (very rare) cases where the company's financial situation is so bad that it cannot pay the fine, or provide a bank guarantee,

---

<sup>74</sup> The *PVC Cartel* case illustrates well the efficiency problem: The European Commission adopted in December 1988, following an investigation started in 1983, a decision finding that since 1980 fourteen producers of PVC had operated a price fixing cartel in violation of Article 81 EC, and imposing fines on them. Most of the PVC producers brought actions for annulment of the decision. After a first judgment by the Court of First Instance declaring the Commission's decision non-existent, and an appeal against that judgment by the Commission, the Court of Justice in 1994 annulled the Commission's decision, because the Commission had failed to authenticate its decision in the way provided for in its own Rules of Procedure (Judgment of 15 June 1994 in Case C-137/94 P *Commission v BASF and Others* [1994] ECR I-2629). Following this judgment, the European Commission readopted its decision, now duly authenticated, reimposing the same fines. The PVC producers again brought an application for annulment to the Court of First Instance, and a further appeal to the Court of Justice (Judgment of 15 October 2002 in Joined Cases C-238/99 P etc. *Limburgse Vinyl Maatschappij (LVM) and Others v Commission* [2002] ECR I-8616), which finally confirmed the Commission's decision, almost fourteen years after the initial Commission decision. See further 'The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis', as note 3 above, at 222, and my paper 'The Use of Settlements in Public Antitrust Enforcement: Objectives and Principles' (2008) 31 *World Competition* 335 at 343. It would be possible under Article 83(2)(d) EC for the EU legislator, through an amendment of Regulation No 1/2003, to give the EU Court of First Instance, when reviewing European Commission decisions applying Articles 81 and 82 EC, similar powers as those held in the U.K. by the CAT when reviewing decisions of the OFT.

<sup>75</sup> Contra GCLC Working Paper, as note 1 above, at 42 and 44, which relies on this point as well as on *Kyprianou v Cyprus*; see note 69 above. However, the problem in that case was not merely the absence of suspensive effect, but the fact that Mr Kyprianou had been condemned to imprisonment, and had to serve his prison sentence immediately, so that, by the time of the appeal, this effect of the first decision could no longer be undone. In any event, as explained in note 69 above, the *Kyprianou v Cyprus* case concerns the hard core of criminal law, and is therefore not relevant for assessing the compatibility of the EU's antitrust fining procedures with Article 6 ECHR.

<sup>76</sup> Judgment of the Court of First Instance of 10 October 2001 in Case T-171/99 *Corus UK v Commission* [2001] ECR II-2967. The fact that, if the company chooses to provide a bank guarantee instead of immediately paying the fine, it will not receive reimbursement of the bank guarantee charges, is not problematic, because the company always has the option of paying the fine, and thus being guaranteed interest upon reimbursement in case of annulment or reduction of the fine; see Judgment of the Court of First Instance of 21 April 2005 in Case T-28/03, *Holcim (Deutschland) v Commission*, [2005] ECR II-1357, confirmed upon appeal by Judgment of the Court of Justice of 19 April 2007 in Case C-282/05 P, *Holcim (Deutschland) v Commission*, [2007] ECR I-2941.

without going bankrupt, and where the company's appeal against the Commission decision is not manifestly unfounded, the company can obtain interim relief from the EU Courts.<sup>77</sup>

## **B. The meaning of "full" jurisdiction: scope and intensity of judicial review**

Some further clarification as to what exactly it means for the reviewing court to have "full jurisdiction, including the power to quash in all respects, on questions of fact and of law, the challenged decision" can be found in paragraph 82 of the same judgment *Janosevic v Sweden*, where the European Court of Human Rights applied the test to the case at hand. The Court concluded that there was no violation of Article 6 ECHR because the Swedish administrative courts reviewing the findings of the Swedish Tax Authority "have jurisdiction to examine all aspects of the matters before them. Their examination is not restricted to points of law but may also extend to factual issues, including the assessment of evidence. If they disagree with findings of the Tax Authority, they have the power to quash the decisions appealed against".<sup>78</sup>

As to the **scope** of judicial review, it thus appears clearly that there can be no restrictions as to the types of issue relating to the contested decision which the reviewing court can examine, if raised by the applicant: points of law, fact or assessment of facts.

It is less clear what is required as to the **intensity** of judicial review. As quoted just above,<sup>79</sup> the European Court of Human Rights noted in paragraph 82 of *Janosevic v Sweden* that the Swedish administrative courts had the power to quash the decisions appealed against "if they disagree" with the findings of the Swedish Tax Authority. It could be argued on the basis of this wording that the "full jurisdiction" of the reviewing court must be "full" not only as to the scope of judicial review (covering all issues: law, fact and assessment of facts) but also as to the intensity of judicial review, thus excluding standards of review under which only manifest errors are corrected.<sup>80</sup>

---

<sup>77</sup> See above, (text accompanying) note 23, and Order of the President of the EU Court of First Instance of 28 March 2007 in Case 384/06 R *IBP v Commission*, [2007] ECR II-30, paragraph 94.

<sup>78</sup> *Janosevic v Sweden*, as note 57 above, paragraph 82.

<sup>79</sup> Text accompanying note 78.

<sup>80</sup> Apart from the fact that it draws rather much from the single word "disagree", a problem with this argument is that, as a matter of logic, the Court's observation that the Swedish administrative courts could quash the decision appealed against whenever they "disagreed" with its findings, and the Court's subsequent conclusion that there was no violation of Article 6 ECHR only prove that such intensity of review is a sufficient condition for compatibility with Article 6 ECHR, not that it is a necessary condition.

However, in its case-law concerning disputes over "civil rights and obligations" (which, together with "criminal charges", are covered by Article 6(1) ECHR, and for which the European Court of Human Rights has also recognised that it is compatible with Article 6(1) ECHR to have a first-instance determination by an administrative body, provided that there is a possibility of appeal to an independent court with "full jurisdiction"), the European Court of Human Rights appears to have accepted that judicial review can be limited to a control of manifest errors where "the issues to be determined [require] a measure of professional knowledge or experience and the exercise of administrative discretion pursuant to wider policy aims".<sup>81</sup>

### C. Judicial review by the EU Courts in the area of cartels

In the area of cartels, which covers most of the European Commission's antitrust fining decisions, there can be little doubt that the judicial review by the EU Courts fulfills the requirements of Article 6 ECHR as interpreted by the European Court of Human Rights. As the Court of First Instance has pointed out in paragraph 719 of its *Cement cartel* judgment:

*"The arguments [...] based on the alleged limits to the Community judiciary's review of legality must [...] be rejected. When the Court of First Instance reviews the legality of a decision finding an infringement of Article [81(1)] and/or Article [82] of the Treaty, the applicants may call upon it to undertake an exhaustive review of both the Commission's substantive findings of fact and its legal appraisal of those facts. Furthermore, so far as concerns the fines, it has unlimited jurisdiction under Article 172 of the EC Treaty (now Article 229 EC) and Article 17 of Regulation No 17 [now Article 31 of Regulation No 1/2003]"*.<sup>82</sup>

As far as cartel cases are concerned, it appears indeed that the Court of First Instance invariably examines, as regards the substantive finding of the infringement of Article 81 EC, all pleas raised before it, on all matters of law, fact, and assessment of facts, and that it examines all these matters exhaustively.<sup>83</sup>

---

<sup>81</sup> Judgment of 14 November 2006 in Case of *Tsfayo v United Kingdom*, Application no. 60860/00, paragraph 46, referring to Judgment of 22 November 1995 in Case of *Bryan v United Kingdom*, Series A no. 335-A.

<sup>82</sup> Judgment of 15 March 2000 in Joined Cases T-25/95 etc. *Cimenteries CBR and Others v Commission*, [2000] ECR II-508, paragraph 719.

<sup>83</sup> This seems to be uncontested. Whereas the GCLC Working Paper and GCLC Report, as note 1 above, point to a number of other antitrust cases, in particular cases concerning Article 82 EC, where the EU Courts allegedly failed to exercise sufficient review, no cartel cases are mentioned.



As to the fines imposed, the Court of First Instance has jurisdiction in two respects:<sup>84</sup>

- Under Article 230 EC, it reviews the legality of the decision. This includes a full examination (similar to the examination of the substantive finding of the infringement of Article 81) of the findings in the contested decision as to the imputability of the infringement to the companies on whom the fines are imposed, and as to whether the infringement has been committed intentionally or negligently, as well as of the question whether the amount of the fine does not exceed the maximum of 10 % of the undertaking's total turnover in the preceding business year. The review under Article 230 EC also covers the question whether the Commission has adequately reasoned its decision, and whether the Commission, in fixing the amount of the fine, has complied with general principles of law, in particular the principles of proportionality and equal treatment, as well as, via the general principles of law, whether the Commission has respected its own Guidelines on the methodology for setting the amount of fines, and its own Leniency Notice.<sup>85</sup>

If the Court of First Instance had only the power to conduct this legality review under Article 230 EC, this could probably not be regarded as satisfying the *Janosevic v Sweden* test of "full jurisdiction", because it still leaves the European Commission substantial discretion as to the amounts of the fines imposed. The EU Courts have indeed repeatedly held, in the context of the examination of pleas of illegality under Article 230 EC, that "the Commission has a margin of discretion when fixing fines",<sup>86</sup> including "a particularly wide discretion as regards the choice of factors to be taken into account for the purposes of determining the amount of the fines",<sup>87</sup> and a discretion to raise the general level of fines

---

<sup>84</sup> See Judgment of the Court of Justice of 16 November 2000 in Case C-297/98 P *SCA Holding v Commission* [2000] ECR I-1010, paragraphs 53 to 54.

<sup>85</sup> See above, (text accompanying) notes 15 and 16. According to the case-law of the Court of Justice, "in adopting [guidelines] and announcing by publishing them that they will henceforth apply to the cases to which they relate, [the Commission] imposes a limit on the exercise of its discretion and cannot depart from those rules under the pain of being found, where appropriate, to be in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations" (Judgment of 28 June 2005 in Joined Cases C-189/02 P etc. *Dansk Rorindustri and Others v Commission* [2005] ECR I-5425, paragraph 211). While 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 Commission] may not depart in an individual case without giving reasons that are compatible with the principle of equal treatment" (Judgment of 18 May 2006 in Case C-397/03 P *Archer Daniels Midland v Commission* [2006] ECR I-4429, paragraph 91).

<sup>86</sup> Judgment of the Court of First Instance of 9 July 2003 in Case T-230/00 *Daesang and Sewon Europe v Commission* [2003] ECR II-2733, paragraph 38, referring to several earlier judgments.

<sup>87</sup> Judgment of the Court of Justice of 29 June 2006 in Case C-289/04 P *Showa Denko v Commission* [2006] ECR I-5859, paragraph 36, and Judgment of the Court of Justice of 8 February 2007 in Case C-3/06 P *Danone v Commission* [2007] ECR I-1331, paragraph 37.

so as to reinforce their deterrent effect.<sup>88</sup> This apparent hole in the "full jurisdiction" is however filled by the Court of First Instance's jurisdiction under Article 229 EC.

- Under Article 229 EC and Article 31 of Regulation 1/2003, the Court of First Instance has indeed "unlimited jurisdiction" with regard to the fines,<sup>89</sup> allowing it to "assess [...] the appropriateness of the amount of the fine".<sup>90</sup> On this basis, the Court of First Instance has "unlimited jurisdiction not only to appraise the facts but also to cancel or amend the fine as it sees fit".<sup>91</sup> It 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 cancel, reduce or even increase the fine imposed by the Commission when the issue of the amount of that fine is submitted for its assessment".<sup>92</sup> When resetting the amount of the fine in the exercise of this unlimited jurisdiction, the Court of First Instance is in no way bound by the Commission's guidelines.<sup>93</sup>

In my mind there can be no doubt that this "unlimited jurisdiction" satisfies the "full jurisdiction" test of *Janosevic v Sweden*.

---

<sup>88</sup> See (text accompanying) note 41 above.

<sup>89</sup> At first sight, it might appear that Article 31 of Regulation 1/2003, which does not contain an express reference to Article 229 EC, goes further in that it refers to unlimited jurisdiction to review "decisions whereby the Commission has fixed a fine", whereas Article 229 EC talks about unlimited jurisdiction "with regard to the penalties". The wider language in Article 31 of Regulation 1/2003 could be understood as covering not only the fine itself, but also the substantive finding of an infringement of Articles 81 or 82 EC contained in the same Commission decision. Apart from the fact that the finding of an infringement is probably to be considered legally as a distinct "decision" from the imposition of the fine, given the separate legal bases in Articles 7 and 23(2) of Regulation 1/2003, such a wider interpretation is contradicted by the preparatory works of Regulation 1/2003. Indeed, the text of Article 31 remained unaltered as from the Commission's initial proposal, and the explanatory memorandum of this proposal (Commission Proposal for a Regulation implementing Articles 81 and 82 of the Treaty, COM(2000)582 of 27 September 2000, at 29) explained that this Article "is identical to Article 17 of the existing Regulation No 17". Article 17 of Council Regulation No 17, [1962] OJ L13/204 (Special English Edition 1959-62, p. 87), expressly referred to "unlimited jurisdiction within the meaning of Article 172 of the Treaty [now Article 229 EC]".

<sup>90</sup> Judgment of the Court of Justice in *SCA Holding v Commission*, as note 84 above, paragraph 55.

<sup>91</sup> Judgment of the Court of First Instance of 11 March 1999 in Case T-156/94 *Aristrain v Commission* [1999] ECR II-645, paragraph 116, quoting the Report of the French Delegation on the ECSC Treaty on the notion of "full jurisdiction" as first introduced in that Treaty and later in Article 172 of the EEC Treaty (now Article 229 EC).

<sup>92</sup> Opinion of Advocate General Mengozzi of 6 November 2008 in Case C-511/06 P, *Archer Daniels Midland v Commission*, not yet reported in ECR, paragraph 175.

<sup>93</sup> Opinion of Advocate General Mengozzi, as note 92 above, paragraph 175, Opinion of Advocate General Jacobs of 15 December 2005 in Case C-167/04 P *JCB Service v Commission* [2006] ECR I-8935, paragraph 141, and Judgment of the Court of First Instance of 12 December 2007 in Joined Cases T-101/05 and T-111/05, *BASF and UCB v Commission* [2007] ECR II-4949, paragraph 213.

#### D. Unlimited jurisdiction with regard to fines in practice

As has been pointed out by Mr Vesterdorf, former President of the EU Court of First Instance, only in a few cases has the Court of First Instance, in the exercise of its unlimited jurisdiction, reset the amount of the fine on the basis of an own appraisal departing from the methodology used in the contested decision.<sup>94</sup>

In its review of the Commission's decision in the *Cartonboard cartel* case, the Court of First Instance found that the effects of the collusion on prices, which the Commission had taken into account when determining the level of the fines, were proved only in part, but the Court considered, in the exercise of its unlimited jurisdiction, that this did not justify any reduction in the level of the fines.<sup>95</sup> In *Dunlop Slazenger*, the Court of First Instance partially annulled the Commission's decision, because of a lack of evidence for part of the time period for which the Commission had found an infringement, but, in light of the seriousness of the infringement as found proven, the Court considered that a reduction of the fine proportionate to the reduction in the duration of the infringement was not appropriate.<sup>96</sup> In the *Trans-Atlantic Conference Agreement* case, the Court of First Instance only partially annulled the finding of an infringement of Article 82 EC, but entirely cancelled the fine, mainly because the same conduct was covered by Article 81 EC and had been notified to the Commission by the undertakings, under an at that time existing block exemption regulation, with ensuing immunity against fines as far as Article 81 EC was concerned, and because the conduct of the Commission during the administrative procedure had made the undertakings reasonably believe that they would not be sanctioned under Article 82 EC.<sup>97</sup> In the *Graphite electrodes cartel* case, the undertaking Nippon received a 10 % fine reduction under the Commission's leniency notice applicable at that time, because it had not contested the facts after receiving the statement of objections. Because Nippon subsequently challenged some of these facts before the Court of First Instance, the Court, in the exercise of its unlimited jurisdiction, lowered the fine reduction from 10 to 8 %.<sup>98</sup> Finally, in the *Choline chloride cartel* case, the Commission imposed fines for a single and continuous cartel infringement, including global and European arrangements.

---

<sup>94</sup> B. Vesterdorf, 'The Court of Justice and Unlimited Jurisdiction: What Does it Mean In Practice?', *Global Competition Policy* (June 2009, Release 2), [www.globalcompetitionpolicy.org](http://www.globalcompetitionpolicy.org), at 5.

<sup>95</sup> Judgment of 14 May 1998 in Case T-338/94 *Finnboard v Commission* [1998] ECR II-1617, paragraph 342.

<sup>96</sup> Judgment of 7 July 1994 in Case T-43/92 *Dunlop Slazenger v Commission* [1994] ECR II-441, paragraphs 178 and 179.

<sup>97</sup> Judgment of 30 September 2003 in Joined Cases T-191/98 etc. *Atlantic Container Line and Others v Commission* [2003] ECR II-3275, paragraphs 1603 to 1634.

<sup>98</sup> Judgment of 29 April 2004 in Joined Cases T-236/01 etc. *Tokai Carbon and Others v Commission* [2004] ECR II-1181, paragraphs 98 to 112 and 457.

Following a plea to this effect raised by the applicants, the Court of First Instance annulled the imposition of the fines as far as it concerned the global arrangements, because it found that the global and the European arrangements constituted separate infringements, and that the global infringement was time-barred. However, when resetting BASF's fine, the Court of First Instance, taking into account the gravity and duration of the remaining infringement, as well as the fact that BASF did not deserve a fine reduction for having cooperated in supplying evidence of the international arrangements, as these were time-barred, set a slightly higher fine for the European cartel than the one the Commission had initially imposed for the combined international and European arrangements.<sup>99</sup>

In the many other cases in which the Court of First Instance has found that for instance the duration of the infringement was shorter than found by the Commission, or that the Commission in setting the amount of the fine had failed to apply correctly its own guidelines, the Court of First Instance has reset the fine, in the exercise of its unlimited jurisdiction, in accordance with the methodology which the Commission had used for setting the initial fine, thus for instance reducing the fine proportionally to the reduced duration, or applying correctly the Commission's guidelines.

I do not think that the Court of First Instance can be criticised for not using more often its unlimited jurisdiction to depart from the methodology used by the Commission in setting the initial fine, where either the parties before the Court have not requested such departure, or the Court, when making its own assessment as to the appropriate fine, ends up agreeing with the Commission's methodology. If however the Court of First Instance were ever to refuse to assess the appropriateness of the fine, exercising its full jurisdiction, when requested to do so by the parties,<sup>100</sup> or if the Court of First Instance were to consider, when exercising its full jurisdiction, that it is not empowered to depart from the methodology used by the Commission,<sup>101</sup> this would be mistaken, and would indeed provide a ground for appeal to the Court of Justice against such a judgment of the Court of First Instance.

---

<sup>99</sup> Judgment of 12 December 2007 in Joined Cases T-101/05 and T-111/05 *BASF and UCB v Commission* [2007] ECR II-4949, paragraphs 209 to 213.

<sup>100</sup> In the *Luxembourg Brewers* case, the Commission had lowered the fines by 20 % because of legal doubts which could have been created by Luxembourg case-law (Commission decision of 5 December 2001, [2002] OJ L253/21, paragraph 100). Upon appeal by the companies concerned, who requested a further reduction, the Court of First Instance held that the alleged problem of legal uncertainty "cannot be taken into account as a mitigating circumstance warranting a reduction in the fine" (Judgment of 27 July 2005 in Joined Cases T-49/02 to T-51/02, *Brasserie nationale and Others v Commission* [2005] ECR II-3033, paragraph 192). However, as no party had requested an increase in the fine, the Court did not take away the 20 % reduction which the Commission had given.

<sup>101</sup> See above, (text accompanying) note 93.

## E. Complex economic and technical assessments

The conclusion from the above is that, certainly in the area of cartels, the EU Courts indeed have "full jurisdiction, including the power to quash in all respects, on questions of fact and of law, the challenged decision", as required by the case-law of the European Court of Human Rights.

What remains to be examined is whether the EU Courts also exercise the required "full jurisdiction" when reviewing European Commission decisions imposing fines for infringements of Articles 81 or 82 EC other than cartels.

This has been questioned,<sup>102</sup> in particular as to the review of decisions imposing fines for violations of Article 82 EC, because of the case-law of the EU Courts on complex economic and technical assessments, as restated by the Court of First Instance in the *Microsoft* case.<sup>103</sup>

The question does not relate to the unlimited jurisdiction with respect to the fines under Article 229 EC, but to the control exercised by the Court of First Instance under Article 230 EC over the substantive finding of the antitrust infringement.

In paragraphs 87 to 89 of its *Microsoft* judgment, the Court of First Instance held that:

"87. [...] it follows from consistent case-law that, although as a general rule the Community Courts undertake a comprehensive review of the question as to whether or not the conditions for the application of the competition rules are met, their review of complex economic appraisals made by the Commission is necessarily limited to checking whether the relevant rules on procedure and on stating reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers (Case T-65/96 *Kish Glass v Commission* [2000] ECR II-1885, paragraph 64, upheld on appeal by order of the Court of Justice in Case C-241/00 P *Kish Glass v Commission* [2001] ECR I-7759; see also, to that effect, with respect to Article 81 EC, Case 42/84 *Remia and Others v Commission* [1985] ECR 2545, paragraph 34, and Joined Cases 142/84 and 156/84 *BAT and Reynolds v Commission* [1987] ECR 4487, paragraph 62).

88. Likewise, in so far as the Commission's decision is the result of complex technical appraisals, those appraisals are in principle subject to only limited review by the Court, which means that the Community Courts cannot substitute their own assessment of matters of fact for the Commission's (see, as regards a decision adopted following complex appraisals in the medico-pharmacological sphere, order of the President of the Court of Justice in Case C-459/00 P(R)

---

<sup>102</sup> See GCLC Working Paper, as note 1 above, at 43, and GCLC Report, as note 1 above, at 17 to 20.

<sup>103</sup> Judgment of 17 September 2007 in Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601.

*Commission v Tranker* [2001] ECR I-2823, paragraphs 82 and 83; see also, to that effect, *Case C-120/97 Upjohn* [1999] ECR I-223, paragraph 34 and the case-law cited; *Case T-179/00 A. Menarini v Commission* [2002] ECR II-2879, paragraphs 44 and 45; and *Case T-13/99 Pfizer Animal Health v Council* [2002] ECR II-3305, paragraph 323).

89. However, while the Community Courts recognise that the Commission has a margin of appreciation in economic or technical matters, that does not mean that they must decline to review the Commission's interpretation of economic or technical data. The Community Courts must not only establish whether the evidence put forward is factually accurate, reliable and consistent but must also determine whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it (see, to that effect, concerning merger control, *Case C-12/03 P Commission v Tetra Laval* [2005] ECR I-987, paragraph 39)".

If one focused exclusively on paragraphs 87 and 88 of the *Microsoft* judgment, leaving aside paragraph 89, as well as the remainder of the judgment, and if one assumed that Article 6 ECHR requires a full intensity of review on all issues, excluding standards of review under which only manifest errors are corrected, one might argue that the conception of judicial review reflected in the *Microsoft* judgment appears not in line with the requirements of Article 6 ECHR, because of the limited review of complex economic or technical assessments.<sup>104</sup> I do not think, however, that there is a problem of incompatibility with Article 6 ECHR.

As indicated above, it is far from clear that the case-law of the European Court of Human Rights requires a full intensity of judicial review with regard to complex economic or technical assessments.<sup>105</sup>

In any event, paragraphs 87 and 88 of the *Microsoft* judgment, read in isolation, give a misleading picture of the real intensity of the judicial review performed by the EU Court of First Instance. In the immediately following paragraph 89 of the judgment, the Court of First Instance indeed largely takes back what it appears to give in the two preceding paragraphs: the supposedly limited review turns out to mean that the Court must establish (i) whether the evidence put forward is factually accurate, reliable and consistent, (ii) whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and (iii) whether it is capable of substantiating the conclusions drawn from it. The review thus appears in fact quite exhaustive.

This impression that the EU Court of First Instance, notwithstanding the general language on "limited" review and "manifest error", in reality exercises a quite exhaustive review is confirmed when reading the passages of the *Microsoft*

---

<sup>104</sup> See GCLC Working Paper, as note 1 above, at 43, and GCLC Report, as note 1 above, at 17 to 20.

<sup>105</sup> Text accompanying notes 78 to 81.

judgment where the supposedly limited review is put into application. For instance, as to the finding in the Commission's decision that Microsoft's refusal to supply interoperability information limited technical development to the prejudice of consumers, the Court opens its discussion in paragraph 649 of the judgment, and closes it in paragraph 665, by saying that it finds that the Commission's findings "are not manifestly incorrect". However, in the fifteen paragraphs in between, the Court in fact conducts an exhaustive review, finding that "the Commission was correct to observe" (paragraph 650), "the Commission was correct to consider" (paragraph 653), etc.<sup>106</sup>

## IV. SUMMARY AND CONCLUSIONS

The conclusions of the preceding analysis can be summarised as follows:

- The increase in the level of antitrust fines imposed by the European Commission in recent years is irrelevant for the assessment of the compatibility with the European Convention on Human Rights of the current institutional and procedural framework in which fines are imposed by the European Commission, with subsequent judicial review by the EU Courts. What counts for the qualification as "criminal" under Article 6 ECHR is the maximum potential penalty for which the relevant law provides, and this maximum (10 % of the undertaking's total turnover in the preceding business year) has remained unaltered since 1962.
- While not "criminal" within the meaning of EU law, the European Commission's antitrust fines are "criminal" within the wider autonomous meaning of Article 6 ECHR. However, inside the wider autonomous ECHR category of "criminal", the case-law of the European Court of Human Rights distinguishes 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". The European Commission's antitrust fining powers belong to the latter category.
- Outside of the hard core of criminal law, it is compatible with Article 6 ECHR for criminal sanctions to be imposed, in the first instance, by an administrative or non-judicial body, such as the European Commission, which combines investigative and decision-making functions, provided that there is a possibility of appeal "before a judicial body that has full jurisdiction, including the power to quash in all respects, on questions of fact and of law, the challenged decision".
- The EU Court of First Instance, before which addressees of European Commission antitrust fining decisions can bring an application for

---

<sup>106</sup> Judgment in Case T-201/04, as note 103 above.

judicial review, has the required full jurisdiction. The Court of First Instance cannot be criticised for not using more often its unlimited jurisdiction on fines to depart from the methodology used by the Commission in setting the initial fine, where either the parties before the Court have not requested such departure, or the Court, when making its own assessment as to the appropriate fine, ends up agreeing with the Commission's methodology.