

INTENSITY OF JUDICIAL REVIEW OF FINES IN EU COMPETITION LAW

Judicial Deference in Competition Law

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Plan of the presentation

- Notion of **unlimited jurisdiction** (art. 261 TFEU) - **reforming powers** of the General Court
- **Scope of control** – in contrast with the control of legality (art. 263 TFEU)
- **Intensity of control** – how is it started and for what reason?
- **Quality of control** - what is checked and how?

Unlimited jurisdiction

- Art. 261 TFEU – regulations
- General Court replaces the Commission in its reasoning
- Possible activism:

Can it rely on new evidence?

Can it rely on facts post-dating the decision?

Can it or should it take into account infringements of procedure?

SCOPE of CONTROL

Unlimited jurisdiction is not so unlimited :

- No autonomous action under art. 261
- Always linked with legality control

T-252/03 *FNICGV*, para 22

But can it be used only if illegality occurs?

C-534/07 P *Prym*

- Is there a prohibition of *reformationis in peius*?
- Is there a full transfer of powers from the European Commission to the General Court? – the GC cannot replace its actions or omissions

SCOPE of CONTROL

- Unlimited jurisdiction only covers the setting of the fine? Does it cover elements of sanction like: gravity, duration, mitigating and aggravating circumstances?
- Only the sanction or the whole decision (f.i. assessment of infringement in question) ?

C-389/10 P *KME Germany* para 120

C-603/13 P *Galp Energia España* para 76

→ Unlimited jurisdiction is very limited to its scope – only the imposition of financial sanctions

INTENSITY of CONTROL

- How far can we go?
- **Only within the pleas or ex officio? – Chalkor, KME Germany**
- If General Court acts *ex officio* – what are the circumstances to consider it? It is a question of public policy? What is public policy measure here? (f.i. proportionality?)
- The very notion of unlimited jurisdiction is an exception to judicial deference – reference to public policy measures should be avoided?
- C-510/11 P Kone – the procedure is contradictory

INTENSITY of CONTROL

□ Possible measure of public order? – empty shell?

→ C-286/11 P Commission/Tomkins

GC can, even *ex officio*, benefit the mother company with a reduction of fine imposed of it, if its daughter company has profited of such a reduction

→ Obligation or discretion of the Court?

INTENSITY of CONTROL

- **What should initialise the control?**
 - **Error** that causes that the Court needs to annul [T-15/02 *BASF*] ?
 - **Any error** implying illegality [T-410/03 *Hoechst*] ?
 - **No need to identify an error** [C-238/99 P *Limburgse Vinyl Maatschappij*] ?

INTENSITY of CONTROL

Reforming powers?

- Decreasing

[what reason? Error? Equality? - C-523/15 P *Westfälische Drahtindustrie*,
Proportionality? → C-123/16 P *Orange Polska*, T-446/05 *Amann & Söhne*]

- Increasing? – principle ne ultra petita? [C-231/11 P *Siemens Österreich*]

C-534/07 P *Prym* – GC can vary the measure

C-295/12 P *Telefónica et Telefónica de España* – power to alter the amount of fine

C-125/07 P *Erste Group Bank*, C-3/06 P *Groupe Danone* – increase after hearing the parties, plea on modification (not increase)

T-69/04 *Schunk* - increase following suggestion of Commission

QUALITY of CONTROL

- How to readapt or recalculate a fine?
- Usually the GC does not question the method or level of fines – T-389/10 SLM
- C-447/11 P *Caffaro v Commission*:

it is not necessary to grant automatically a further reduction for each mitigating circumstance alleged by an applicant, even if it is well founded, provided that an **overall analysis taking account of all the relevant circumstances** leads to the finding that the amount of the fine imposed by the Commission is **proportionate**

QUALITY of CONTROL

- C-19/17 P Infineon Technologies/Commission (smart card chips) : para 207:

„the General Court did not review the **proportionality** of the amount of the fine imposed in relation to the number of contacts that it found against the appellant, and **did not set out the reasons why it did not conduct such a review, it made an error of law**”

QUALITY of CONTROL

- Need to **state grounds** [AG Whatelet in *Telefonica*]
- **Little guidance** in the legislation on the level of fine
- **No real analysis of purpose** of the fine
(deterrence, punishment, offence not profitable?) –
T-201/04 *Microsoft*, para 1363
- **Previsibility** of sanction? [Commission is free to
change... 100-103/80 *Pioneer*, C-189/02 P *Dansk
Rørindustri*]

Conclusions

- Unlimited jurisdiction – versus – full jurisdiction (ECHR) → no power to adjudicate fully on questions of facts and law
- The unlimited jurisdiction is not so unlimited as to its scope and intensity
- Is the General Court using all the doors open to it? – judicial deference is rather **present**

Thank you for your attention