

EDITORIAL COMMENTS

Towards a more judicial approach? EU antitrust fines under the scrutiny of fundamental rights

“Takings rights seriously?” Almost twenty years ago, adding a question-mark to the title of Ronald Dworkin’s famous book, a controversy about the fundamental rights jurisprudence of the European Court of Justice started in the pages of this journal.¹ Meanwhile, much has been done to make the question-mark look out of place. Together with the general principles of Union law, the Charter of Fundamental Rights and, after the EU’s impending accession, the European Convention of Human Rights (ECHR) provide a three-pronged foundation for fundamental rights protection in the EU. Moreover, the Court’s seriousness about safeguarding fundamental rights has been proven in many respects.² However, if recent critical analyses and commentaries are to be believed, there is one area of EU law that seems to resist the full force of fundamental rights: in the realm of competition law, the Commission seems to reign supreme as a Leviathan insufficiently tamed by the European Courts and the European legislature. In particular, the Commission’s fining decisions for violations of Articles 101 and 102 TFEU and their judicial review have attracted much criticism. This raises the question whether, after the “more economic approach” in EU competition law, a “more judicial approach” is called for.

Fairness and legal certainty as constitutional challenges

The criticism levelled against current fining practice is primarily concerned with procedural fairness. In 1996, an antitrust practitioner summarized an impression still shared by many companies and their legal advisers: “Undertakings often feel that they are treated unfairly and that their procedural rights are violated in the course of infringement proceedings.”³ Since then, several improvements have been made. As compared to Article 19

1. Coppel and O'Neill, “The European Court of Justice: Taking Rights Seriously?”, 29 CML Rev. (1992) 669, *contra* Weiler and Lockhart, “‘Taking Rights Seriously’ Seriously: The European Court and its fundamental rights jurisprudence”, Parts I and II, 32 CML Rev. (1995) 51 and 579.

2. Cf. e.g. Joined Cases C- 92 & 93/09, *Volker and Markus Schecke GbR and Hartmut Eifert v. Land Hessen*, judgment of 9 Nov. 2010, nyr.

3. Montag, “The Case for a Radical Reform of the Infringement Procedure under Regulation 17”, 17 ECL Rev. (1996) 428, at 429.

of old Regulation 17,⁴ the parties' rights in the procedure before the Commission, such as the right to a hearing and the right to access to the Commission's file, have been strengthened by Article 27 Regulation 1/2003⁵ together with the Implementing Regulation enacted by the Commission.⁶ These rules are complemented by provisional papers on Best Practices in proceedings concerning Articles 101 and 102 TFEU and on submission of economic evidence, published by DG Competition in 2010.⁷ Furthermore, following a Commission decision of 2001,⁸ hearing officers have received a revised mandate and have been placed outside DG Competition in order to ensure respect for the effective exercise of the right to be heard. However, these measures have not calmed concerns. Certain elements of "due process", in particular the right not to incriminate oneself and legal professional privilege, are still regarded by some as not sufficiently protected in the present legal framework.⁹ More worryingly, several complaints go much deeper than this. They see the roots of unfairness in the basic structure of EU antitrust enforcement, with a Commission that both investigates and decides in the driving seat, and a European judiciary that allegedly restricts itself to some sort of "light" review in the back-seat.¹⁰ By providing that "[i]n the

4. EEC Council Regulation No. 17: First Regulation implementing Articles 85 and 86 of the Treaty, O.J. (English spec. ed.), Chapter I, Series 1959–1962, 87.

5. Council Regulation (EC) No. 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, O.J. 2003, L 1/1.

6. Commission Regulation (EC) No. 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, O.J. 2004, L 123/18.

7. Available on ec.europa.eu/competition/antitrust/legislation/legislation.html.

8. Commission Decision of 23 May 2001 on the terms and reference of hearing officers in certain competition proceedings, O.J. 2001, L 162/21. Cf. also the Guidance on procedures of the Hearing Officers in proceedings relating to Articles 101 and 102 TFEU (ex Arts. 81 and 82 EC), available on ec.europa.eu/competition/antitrust/legislation/legislation.html.

9. Cf. Andreangeli, *EU Competition Enforcement and Human Rights* (Edward Elgar, 2008), pp. 92–151. As to legal professional privilege, cf. also Di Federico, case note on Case C-550/07 P, *Akzo Nobel Ltd and Akros Chemicals Ltd v. Commission*, 48 CML Rev. (2011), 581.

10. Critical assessments of the status quo abound; see e.g. Edward, "Quality Control of Competition Decisions", in Bultermann, Hancher, McDonnell and Sevenster (Eds.), *Views of European Law from the Mountain, Liber Amicorum Piet Jan Slot* (Kluwer, 2009), p. 143; Forrester, "A bush in need of pruning: The luxuriant growth of 'Light Judicial Review'", in Ehlermann and Marquis (Eds.), *European Competition Annual 2009: The Evaluation of Evidence and its Judicial Review in Competition Cases* (Hart Publishing, 2011), p. 407; Forrester, "A challenge for Europe's judges: The review of fines in competition cases", 36 EL Rev. (2011) 185; Schwarze, Bechtold and Bosch, "Deficiencies in European Community Competition Law: Critical analysis of the current practice and proposals for change" (2008), available on www.gleisslutz.com/de/publikationen/nachanwalt.html?nDisplayJur=49; Schweitzer, "The European competition law enforcement system and the evolution of judicial review", in Ehlermann and Marquis (Eds.), *ibid.*, p. 79; Sibony, *Le juge et le raisonnement économique en droit de la concurrence* (L.G.D.J., 2008); Sibony and Barbier de la Serre, "Charge de la preuve et théorie du contrôle en droit communautaire de la concurrence: Pour un

determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal ...”, Article 6(1) ECHR (and, correspondingly, Art. 47(2) of the EU Charter) serves as constitutional underpinning for these attacks on the status quo. As the fines imposed by the Commission have reached unprecedented heights, so has the degree of attention for the question whether the fining procedure followed by the Commission and the judicial review exercised by the EU Courts measure up to these requirements.

Closely intertwined with “due process” issues, though less prominently discussed, is a second strand of criticism that relates to the substance of fining decisions. Irrespective of how decisions are ultimately reached, fines should be sufficiently predictable as to their amount, their addressees and, of course, the infringements for which they are imposed. In the EU, legislative parameters for such a determination are notoriously scarce. Article 23(2) and (3) of Regulation 1/2003 merely provide that the Commission may impose fines on undertakings for intentional or negligent infringements of Articles 101 or 102 TFEU up to a maximum amount of 10% of the total annual turnover of each undertaking concerned, having regard both to the gravity and to the duration of the infringement. While these premises for the calculation of fines have been the same for almost fifty years, the Commission practice that evolved on their basis has continuously been revised and refined. In order to enhance transparency with regard to the amount of the fine, the Commission adopted and subsequently revised Guidelines for setting fines in antitrust cases¹¹ and a Leniency Notice that clarifies the conditions for immunity and reduction of fines granted to “whistleblowers”.¹² Moreover, with the general approval of the European Courts, the Commission was happy to fill the legislative vacuum left by Regulation 1/2003 with regard to the determination of the addressee of a fine by introducing rules on joint and several liability within groups of companies that, as a whole, form a single economic entity and thus qualify as an “undertaking” for the purposes of competition law.¹³

changement de perspective”, 43 RTDE (2007), 205; Slater, Thomas and Waelbroeck, “Competition law proceedings before the European Commission and the right to a fair trial: No need for reform?”, 5 *European Competition Journal* (2009), 97; Venit, “Human all too human: The gathering and assessment of evidence and the appropriate standard of proof and judicial review in Commission enforcement proceedings applying Article 81 and 82”, in Ehlermann and Marquis (Eds.), *ibid.*, p. 191.

11. Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, O.J. 2006, C 210/2; preceded by the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty, O.J. 1998, C 9/3.

12. Commission notice on immunity from fines and reduction of fines in cartel cases, O.J. 2006, C 298/17.

13. Cf. Case C-97/08 P, *Akzo Nobel N.V. and Others v. Commission*, [2009] ECR I-8237.

Last but not least, the Commission's "more economic approach" to the prohibitions in Articles 101 and 102 TFEU as such has raised the issue whether it is still predictable for market participants what conduct they may be punished for.¹⁴ Like procedural fairness, legal certainty as to these substantive dimensions of fining decisions is not just nice to have, but a constitutional requirement. Again, recourse under fundamental rights granted to those accused of a criminal offence such as the principle *nullum crimen, nulla poena sine lege* in Article 7(1) ECHR is meant to sharpen the edge of the legal argument against the present state of affairs.

The nature of antitrust fines: Criminal, but not hard-core criminal

Quite evidently, the impact of fundamental rights for antitrust fines would be seriously limited if such fines were to be considered non-criminal in nature, thus falling beyond the reach of the criminal-head guarantees in Articles 6 and 7 ECHR. Despite the determination in Article 23(5) Regulation 1/2003 that fines "shall not be of a criminal nature", it can be safely assumed that for the purposes of the ECHR, this is not the case. According to the so-called *Engel* criteria,¹⁵ which the European Court of Human Rights reaffirmed and clarified in *Jussila*,¹⁶ the internal classification of an offence is merely a starting-point. Other alternative factors to be considered are the nature of the offence and the degree of severity of the penalty that the person concerned risks incurring. While the European Court of Human Rights has not yet had the opportunity to apply these criteria to the imposition of fines by the Commission for infringements of Articles 101 or 102 TFEU, it has long been recognized by the Court of Justice that these procedures are "criminal" within the autonomous meaning of the ECHR.¹⁷

However, the general applicability of the criminal-head guarantees of the ECHR does not preclude a differential treatment of cases that fall within this category. For the purposes of Article 6 ECHR, the European Court of Human Rights drew a distinction between the "hard core of criminal law" and "cases not strictly belonging to the traditional categories of criminal law, for example ... competition law", to which "the criminal-head guarantees will not

14. Cf. Roth, "The 'More Economic Approach' and the Rule of Law", in Schmidtchen, Albert and Voigt (Eds.), *The More Economic Approach to European Competition Law* (Mohr Siebeck, 2007), p. 37.

15. Judgment of 8 June 1976, *Engel and Others v. The Netherlands*, A/22, para 82.

16. Judgment of 23 Nov. 2006, Application No. 73053/01, *Jussila v. Finland*, paras. 30–31.

17. Case C-199/92 P, *Hüls AG v. Commission*, [1999] ECR I-4287 para 150; Joined Cases C-189/02 P etc., *Dansk Rørindustri A/S and Others v. Commission*, [2005] ECR I-5425 para 202.

necessarily apply with their full stringency”.¹⁸ It is submitted that the recent increase in levels of fines imposed by the Commission does not call into question their classification as being outside the hard core of criminal law. Compared to traditional criminal sanctions, EU antitrust fines have a narrower focus since they are primarily designed to counteract economic incentives to engage in anti-competitive conduct by outweighing expected profits from such behaviour. If fines have reached unprecedented levels, this is not due to a change in direction, but merely to the experience that a lower level of fines was not sufficient to perform this task. Therefore, a shift from the “quasi-criminal” to the “hard-core criminal” category is not called for.

The real issues rather seem to follow from the ambiguity of the standards that apply to quasi-criminal sanctions: what does a less stringent application of the criminal-head guarantees to this category of cases actually mean, and how does this translate into the sphere of EU competition law? As the European Court of Human Rights has so far provided only limited guidance in this regard, the EU Courts find themselves in largely uncharted waters.

Procedural issues of fines: Quis judicabit?

At least one consequence of the distinction between cases within and outside the hard core of criminal law seems to be safely grounded in the case law of the European Court of Human Rights. Outside the hard core of criminal law, Article 6(1) ECHR does not require criminal sanctions to be imposed, in the first instance, by a judicial body. As the Court held in *Janosevic* with regard to the imposition of (potentially large) financial sanctions by tax authorities, a system that grants such a power to a non-judicial body is compatible with Article 6(1) ECHR as long as the persons affected can bring an appeal “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”.¹⁹

At first sight, the system of EU antitrust fines fits into this mould ideally. Once the Commission has made a fining decision, an action for annulment may be brought against it before the General Court. Setting the review of decisions fixing a fine apart from the review of other acts which merely fall

18. *Jussila v. Finland*, *supra* note 16, para 43.

19. Judgment of 21 May 2003, *Janosevic v. Sweden*, Application No. 34619/97, para 81. For a more comprehensive analysis of the requirements under Art. 6(1) ECHR, cf. A.G. Mengozzi, Opinion of 17 Feb. 2011 in Case C-521/09 P, *Elf Aquitaine SA v. Commission*, pending, paras. 30–37; Castillo de la Torre, “Evidence, Proof and Judicial Review in Cartel Cases”, in Ehlermann and Marquis, *op. cit. supra* note 10, p. 319, at pp. 396–405; Wils, “The Increased Level of EU Antitrust Fines, Judicial Review and the European Convention on Human Rights”, 33 *World Comp.* (2010), 6, at pp. 12–18. See also Case T-138/07, *Schindler Holding Ltd and Others v. Commission*, judgment of 13 July 2011, nyr, paras. 49–59.

under the legality review according to Article 263 TFEU, Article 261 TFEU and Article 31 Regulation 1/2003 stipulate that jurisdiction is unlimited with regard to the fine (though not with regard to the finding of an infringement),²⁰ including the possibility to cancel, reduce or increase its amount. In sum, not only the Commission's position as to questions of law, but also the Commission's findings of fact as well as the legal assessment of those facts are open to the General Court's scrutiny. In order to carry out a review of facts, the General Court can take evidence.²¹ It may hear testimony or, on its own initiative, commission an expert's report,²² and it may ask the parties and the Member States to present all documents and information deemed desirable.²³ With the General Court thus having jurisdiction to review the Commission's fining decisions in every respect and the means to exercise this jurisdiction, it does not matter that, in cases of further appeal, the Court of Justice merely examines questions of law, as neither the wording of Article 6(1) ECHR nor the case law of the European Court of Human Rights indicates that more than one instance of full review is required.²⁴

However, on closer inspection, it is an open question whether the way in which judicial review is exercised by the General Court really satisfies the requirements of Article 6(1) ECHR. Issues that need attention are linked to the intensity of the Court's examination of the Commission's findings of infringements of Articles 101 and 102 TFEU as well as to the Court's apparent deference to the Commission's calculation of fines.

Regarding the first issue, the widely discussed "margin of appreciation" doctrine is a cause of some concern.²⁵ Going back to early judgments of the Court of Justice (which did not, however, deal with fines),²⁶ this doctrine, which the General Court now also applies to cases involving fines, limits the review of complex economic or technical appraisals made by the Commission "to checking whether the relevant rules on procedure and on stating reasons have been complied with, whether the facts have been accurately stated and

20. As has rightly been pointed out by Wils, *op. cit. supra* note 19, at p. 24 note 89.

21. Arts. 32 and 53 of the Statute of the Court of Justice.

22. Art. 65 of the General Court's Rules of Procedure.

23. Arts. 24 and 53 of the Statute of the Court of Justice.

24. Cf. Wils, *op. cit. supra* note 19, at p. 18–19. A review by a higher tribunal is only required by Art. 2 of Protocol No. 7 to the ECHR.

25. This doctrine has been discussed in this journal by Bailey, "Scope of review under Article 81 EC", 41 CML Rev. (2004), 1327, and by Fritzsche, "Discretion, scope of judicial review and institutional balance in European law", 47 CML Rev. (2010), 361.

26. Joined Cases 56 & 58/64, *Consten and Grundig v. Commission* [1966] ECR 299, 347; Case 26/76, *Metro SB-Grossmärkte v. Commission*, [1977] ECR 1875, paras. 45 and 50; Case C-42/84, *Remia v. Commission*, [1985] ECR 2545 para 34; Joined Cases 142 & 156/84, *British American Tobacco Company v. Commission*, [1987] ECR 4487, para 62. This doctrine was apparently inspired by Art. 33(1) ECSC.

whether there has been any manifest error of assessment or a misuse of powers”.²⁷ Seen from the angle of Article 6(1) ECHR, the question is whether the concept of “full jurisdiction” allows for the concession of a margin of appreciation to the Commission as a non-judicial body. While it is true that regarding non-criminal disputes that fall under Article 6(1) ECHR, the European Court of Human Rights has accepted certain limitations to the intensity of judicial review in a number of decisions listed in its recent *Sigma Radio* judgment,²⁸ their value as precedents for the specific issue discussed here is dubious: As the Court observed in *Sigma Radio*, its acknowledgement that the requirement of “full jurisdiction” will be satisfied if the judicial body in question has exercised “sufficient jurisdiction” or provided “sufficient review” is meant to have “regard to the fact that it is often the case in relation to *administrative law appeals* in the Member States of the Council of Europe, that the scope of judicial review over the facts of a case is limited and that it is the nature of review proceedings that the reviewing authority reviews the previous proceedings, rather than taking factual decisions”.²⁹ As, for the purposes of the ECHR, the review of antitrust fines does not belong to the sphere of administrative law, there is a risk that the formula used by the EU Courts falls short of the ECHR requirements, at least if it is taken at face value. Judicial review “by an independent and impartial tribunal” (Art. 6(1) ECHR) is only meaningful if it purges all traces of partiality from the decision under review, including a prosecutorial bias of the body that made the decision. Notwithstanding the internal checks and balances introduced during the last ten years, the Commission as a whole publicly displays more than ever a healthy appetite for hunting and bringing down antitrust perpetrators. It is hard to believe that any matter relevant to the finding of an infringement is completely immune to the influence of such a prosecutorial disposition. If this is true, judicial self-restraint out of respect for the Commission’s superior expertise in complex economic or technical matters creates the danger that, by approving the Commission’s decision, the General Court is associating itself with a procedure that cannot be said to be wholly impartial. However, it seems that this danger can be avoided at comparably low cost: generally, the “margin of appreciation” doctrine has not prevented the General Court from looking into any economic or technical detail of a case that appeared remotely promising as a basis for a successful ground of appeal. Therefore, much would be won if the Court stopped paying lip-service to the old “complex appraisals” formula and searched for a more adequate description of what it actually does.

27. Case T-201/04, *Microsoft Corp. v. Commission*, [2007] ECR II-3601 para 87.

28. Judgment of 21 July 2011, *Sigma Radio Television Ltd. v. Cyprus*, Applications Nos. 32181/04 and 35122/05, paras. 156–157.

29. *Supra* note 28, para 153 (emphasis added).

The second issue concerns the review of the calculation of fines. Starting from a natural understanding of Article 261 TFEU together with Article 31 Regulation 1/2003, one may be forgiven for thinking that the General Court regularly substitutes its own assessment of the fine under review for the Commission's assessment, judging its appropriateness without being bound in any regard by the Guidelines or by the Leniency Notice published by the Commission. Somewhat surprisingly, this has rarely been done by the General Court.³⁰ Instead of developing its own parameters for setting fines by using its unlimited jurisdiction under Article 261 TFEU, the General Court has mostly stuck to a legality review, examining the accordance of the fine at issue with the Commission's methodology. This approach is based on the recognition of a margin of discretion enjoyed by the Commission, which, via the principle of equal treatment, is limited by the Guidelines.³¹ The issue whether such a constraint on the intensity of the review exercised by the Court complies with Article 6(1) ECHR has been raised in the appeal against the General Court's *KME* judgment.³² In her Opinion, Advocate General Sharpston rightly stressed that Article 6 ECHR does not require a deviation from the adversarial nature of the proceedings before the General Court.³³ As a consequence, the General Court cannot be blamed for not discussing the appropriateness of the amount of a fine if the arguments put forward by the parties do not require such an assessment.³⁴ On the other hand, it is submitted that if the General Court is called upon to re-assess the calculation of a fine in the light of the criteria set out in Article 23 Regulation 1/2003 on the basis of its unlimited jurisdiction according to Article 261 TFEU, any deference to the Commission would hardly be justified. Again, this does not necessarily imply substantial changes: there is of course no reason to tinker with a fine if the General Court formed its own conviction that the Commission used adequate criteria and the result in the case before it is appropriate. But then it would be helpful if the Court said so.

30. Exceptions are Case T-43/92, *Dunlop Slazenger v. Commission*, [1994] ECR II-441; Case T-191/98, *Atlantic Container Line v. Commission*, [2003] ECR II-3275; Case T-236/01, *Tokai Carbon v. Commission*, [2004] ECR II-1181.

31. See e.g. *Dansk Rørindustri*, cited *supra* note 17, para 211.

32. Case T-127/04, *KME Germany AG and Others v. Commission*, [2009] ECR II-1167.

33. Opinion of 10 Feb. 2011, Case C-272/09 P, *KME Germany and Others v. Commission*, pending, para 74.

34. This seems to be the case in *KME*; see A.G. Sharpston's Opinion, previous note, para 123: "even if other matters could have been raised – concerning, for example, the possible need to explain why the overall starting amount was EUR 58.1 million, rather than EUR 20 million or EUR 100 million – they were not, and the General Court addressed the matters which were raised in a manner which in no way suggests that it was not exercising its full jurisdiction as required by the ECHR."

*Substantive issues of fines: How much? Against whom?
For what behaviour?*

The level of legal certainty as to the calculation of fines, their potential addressees and the infringements for which they are imposed would appear deplorably low if guidance was merely sought in the wording of Article 23 Regulation 1/2003 and of Articles 101 and 102 TFEU. Hardly anyone could gather from these provisions alone the details of the Commission's Guidelines for the setting of fines, the rules on imputation of liability or, to mention just one example of the intricacies of finding an infringement of Articles 101 or 102 TFEU, the relevance of the "as efficient competitor" test for the question whether the pricing behaviour of a dominant undertaking constitutes an abuse. However, the principle of the legality of criminal offences and penalties (*nullum crimen, nulla poena sine lege*), as interpreted by the Court of Justice and by the European Court of Human Rights, merely requires that "the individual concerned is in a position, on the basis of the wording of the relevant provision *and with the help of the interpretative assistance given by the courts*, to know which acts or omissions will make him criminally liable".³⁵ In particular, the concept of "law" ("loi") referred to in Article 7(1) ECHR "encompasses both law of legislative origin and that deriving from case law".³⁶

In *Degussa*,³⁷ the General Court and the Court of Justice both came to the conclusion that Article 15(2) Regulation 17³⁸ is sufficiently clear and precise to satisfy these requirements. According to these judgments, the reference-points that make the calculation of fines foreseeable for the undertakings concerned include the 10% turnover threshold as maximum amount of the fine, the general principles of law, in particular the principles of equal treatment and of proportionality, the Guidelines published by the Commission and finally, the case law of the EU Courts on the basis of their unlimited jurisdiction. However, the judgments did not address the question whether these reference-points, if added together, could not interfere with one another, thus producing less instead of more legal certainty. At first sight, in the interest of clarity and foreseeability of fines, it seems perfectly sufficient simply to use the Commission's Guidelines as a primary means of orientation, supported by the principle of equal treatment in order to secure adherence to them. If a layer of unlimited review is added to this, with a Court following its

35. Case C-303/05, *Advocaten voor de Wereld VZW v. Leden van de Ministerraad*, [2007] ECR I-3633, para 50 (emphasis added).

36. *Dansk Rørindustri*, cited *supra* note 17, para 216.

37. Case T-297/02, *Evonik Degussa GmbH v. Commission*, [2006] ECR II-897, paras. 74–83 ; Case C-266/06 P, *Evonik Degussa GmbH v. Commission*, not published, paras. 50–54

38. Art. 23(2) and (3) Regulation 1/2003.

own agenda in re-setting the fines, this would hardly seem like a progress for legal certainty. Against this background, it has been questioned whether it would be compatible with the demands of legal certainty and the protection of legitimate expectations if the EU Courts, in the exercise of their unlimited jurisdiction, had much freedom to deviate from the Guidelines, instead of restricting themselves to judicial review of their legality.³⁹ But this would put legal certainty potentially at odds with the demands of “full jurisdiction” of an independent and impartial tribunal under Article 6(1) ECHR. Therefore it is suggested that a different solution is preferable, which gives precedence to the judiciary: the requirement of “full jurisdiction” will undoubtedly be satisfied, and legal certainty will equally be served if, on the basis of unlimited review, a consistent case law authoritatively adds clarity and precision to the legislative parameters for the setting of fines. From this perspective, it is not the intensity of unlimited review that poses a danger to legal certainty. On the contrary, it is the concession of a margin of discretion to the Commission that is a likely source of confusion, as it leads to gaps in the fabric of the case law. Finally, only this solution fully complies with the idea that, for the purposes of *nullum crimen, nulla poena sine lege*, “lex” comprises law of legislative origin and its interpretation by the courts, but not administrative guidelines and decisions.

As to the determination of the addressees of a fine, the same reasoning applies. If, on the basis of the concept of a single economic entity, several companies form one and the same undertaking for the purposes of competition law, they are regarded as jointly and severally liable for an infringement committed by that undertaking.⁴⁰ As a consequence of the argument that has just been made, it is submitted that the Commission should neither be granted any discretion regarding the choice of the addressees of the fine among the companies forming the economic entity nor regarding the determination of the individual sums to be paid by those companies in relation to each other. In *Siemens Österreich*, it seems that the General Court implicitly endorsed this position: Relying on the principle that penalties must be specific to the offender and to the offence concerned, the Court held that the amount each company is required to bear in relation to the other joint and several debtors must be discernible from the Commission’s decision, adding that “[i]n

39. Meji, “Scope of judicial review and sanctions in competition cases”, in Bultermann, Hancher, McDonnell and Sevenster, op. cit. *supra* note 10, p. 179, at p. 183.

40. See e.g. Joined Cases T-122-124/07, *Siemens Österreich and Others v. Commission*, judgment of 3 March 2011, nyr, para 150. A separate issue not discussed here concerns the compatibility of the presumption of liability of a parent company for a fully owned subsidiary with the presumption of innocence in Art. 6(2) ECHR; cf. A.G. Mengozzi, *supra* note 19, paras. 59–67. The issue has now been raised before the ECtHR by an unnamed Dutch company; see SJ Berwin, *Community Week* of 8 July 2011.

so far as possible, those amounts must reflect the weighting of the individual shares of the joint liability”.⁴¹ On this basis, the Court undertook a detailed review of the Commission’s decision and found fault both with the selection of the addressees of the fine and with the determination of the respective amounts for which they were held liable.⁴² No mention of a margin of discretion was made. If this is a sign of the Court’s willingness to put the setting of fines under closer scrutiny, it has to be welcome.

Last but not least, the requirement of legal certainty also affects the assessment of the offence for which a fine is imposed. Quite obviously, the more demanding the application of Articles 101 and 102 TFEU becomes in the light of the “more economic approach”, the more difficult it is for the undertakings concerned to predict whether their conduct violates these provisions. As far as fines are directed against behaviour that is still *per se* illegal, namely hard-core cartels, this is not an issue. On the other hand, whenever the finding of an infringement can only be derived from a sophisticated analysis of economic effects, the question arises whether such an infringement qualifies as “intentional or negligent”, as required by Article 23(2) Regulation 1/2003. If e.g. the finding of an abuse within the meaning of Article 102 TFEU relied on economic data the undertaking concerned could not be aware of at the time of its conduct, its culpability would be hard to maintain. However, if an effects-based analysis is just used as an elaborate decorum alongside a form-based assessment that establishes the infringement in a conventional way, as could be seen in the Commission’s *Intel* decision,⁴³ such an argument is not persuasive.

Fundamental rights and effective enforcement

There may be worries (or hopes) that more intensive judicial review, as advocated in this comment, means less effective enforcement because, for fear of defeats before the General Court, the Commission may lose its zeal. These concerns do not seem justified. Public antitrust enforcement is effective if offences are uncovered and fined with an amount that provides optimal deterrence. This task falls primarily to the Commission (and, in the second place, to national cartel authorities). Therefore, it is vital to have an institutional framework that keeps the Commission’s enforcement efforts at a high level. But it is hard to see why a certain degree of independence from judicial review should be an indispensable part of such a framework. As we have seen in other respects, most notably in merger control, a tightening of the

41. *Siemens Österreich*, cited *supra* note 40, paras. 153–4.

42. *Ibid.*, para 166.

43. Cf. Case COMP/C-3/37.990 – *Intel*, para 1760.

judicial screws did not jeopardize the Commission's work, but provided an incentive for the Commission to take measures so that it produced (even) better results. Moreover, looking at Member States like the U.K. and Germany,⁴⁴ there are several national cartel authorities that apparently work successfully without being granted a margin of discretion in their respective review procedures. All things considered, if entrusted to judges with a good understanding of competition law and its economic background, unrestricted judicial review will most likely not lead to less, but to better enforcement. As the suggestions made in this comment only require a modest shift in the balance between the Commission and the Courts, labelling this a "more judicial approach" would perhaps overstate the importance of such a realignment. Then again, some would say precisely this would make it match the "more economic approach".

44. Cf. Schweitzer, *op. cit. supra* note 10, pp. 110–128. For a broader survey, cf. Essens, Gerbrandy and Lavrijssen (Eds.), *National Courts and the Standard of Review in Competition Law and Economic Regulation* (Europa Law Publishing, 2009).