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Unlimited jurisdiction: the end of a misnomer?

Eric Barbier de la Serre (Jones Day) · Monday, September 12th, 2011

The past decade has seen a flurry of articles published trying to make sense of the degree of control that the EU Courts exercise on complex economic reasoning. By contrast, much less has been written about the Courts' unlimited jurisdiction on fines, which allows them to increase or decrease the financial sanctions imposed by the Commission (See Article 261 TFEU and Article 31 of Regulation No 1/2003). This is probably due to the fact that for the past 50 years, such unlimited jurisdiction has been living a quiet life indeed. Over this period – and especially during the last three decades – the EU Courts have wielded this powerful tool with great caution, or at least with significant deference to the Commission. In the overwhelming majority of cases, the EU Courts have used their unlimited jurisdiction merely (i) to correct the illegality of a fine or (ii) in the case of the General Court, to confirm that the amount of the fine was appropriate, thereby strengthening its judgment in view of a potential appeal (see *e.g.*, Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon* v *Commission* [2005] ECR II-10*, paragraph 197). It is only exceptionally that in the absence of any illegality, the EU Courts have used their jurisdiction to the applicant's benefit. In practice, the EU Courts' unlimited jurisdiction had become an actual misnomer, or at least a sleeping beauty.

Admittedly, since *Musique Diffusion* it has been clear and uncontested that the Commission's power to impose fines is one of the means it has been given in order to pursue a general policy and to guide the conduct of undertakings (Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 105). Does this justify so much self-restraint from the EU Courts? In light of their pivotal role in the protection of fundamental rights in the EU, wouldn't it be entirely justified for them to be more proactive in controlling sanctions, even if it means that by doing so, they might be interfering – albeit only slightly – with the definition of EU competition policy? In our view, certainly yes.

The recent *Arkema* judgment delivered by the General Court in last June gives reasons to hope (Case T-217/06 *Arkema France and Others* v *Commission*, not yet reported).

In this case, the General Court reduced the fine imposed on Arkema and its subsidiaries for their participation in a cartel in the methacrylates sector, from €219.1 million to €113.3 million. More importantly, the General Court decided to decrease the fine in the absence of any illegality committed by the Commission, *i.e.*, for the sole reason that, in its view, a decrease was appropriate (See paragraphs 238 *et seq.*).

Two elements of the judgment are remarkable.

First, Arkema had raised the winning plea (concerning the turnover that the Commission should have taken into account to increase the fine for deterrence purposes) only at the hearing, which at the very least made its admissibility debatable.

Second, the Court found that the fine was in any case legal, as during the administrative procedure

Arkema had not challenged the (wrong) facts which the Commission had relied on in its Statement of Objections, when it assessed the need to increase the fine for deterrence purposes. *En passant* one may seriously doubt that the fine was legal for that sole reason. As the Court of Justice held in *Knauf*, "*there is no requirement under the law of the European Union that the addressee of the statement of objections must challenge its various matters of fact or law during the administrative procedure, if it is not to be barred from doing so later at the stage of judicial proceedings*"; "*Although an undertaking's express or implicit acknowledgement of matters of fact or of law during the administrative procedure before the Commission may constitute additional evidence when determining whether an action is well founded, it cannot restrict the actual exercise of a natural or legal person's right to bring proceedings before the General Court under the fourth paragraph of Article 263 TFEU*" (Case C-407/08 P *Knauf Gips* v *Commission*, not yet reported, paragraphs 89-91).

But what matters is that, in any case, the Court did not find it necessary to rule on the admissibility of Arkema's plea, nor to draw any consequences from the legality of the fine: it just decided to do what it could have done in numerous previous cases, *i.e.*, to exercise its unlimited jurisdiction to impose a fine on Arkema which, in its own subjective view – and irrespective of any illegality committed by the Commission –, was more appropriate than the one imposed by this institution.

And the Court may have done just the same thing in a judgment delivered one week later, where it held – without making any formal finding of illegality – that the reduction of the fine granted to Bavaria because of the length of the proceedings was insufficient (Case T-235/07 *Bavaria* v *Commission*, not reported yet, paragraphs 337-344).

This is certainly not a sea change yet, but could be interpreted as a sign of the Court's awareness that, once the EU has adhered to the European Convention on Human Rights (the negotiations have already started), the scope of its control on the Commission's decisions will sooner or later come under direct challenge in Strasbourg. The recent series of judgments modifying – or annulling – illegal fines in competition cases may be a further sign that the wind of change is blowing in Luxembourg (See the judgments in *Elevators*, *Synthetic Rubber*, *Gas Insulated Switchgear*, *Dutch Beer*, and *Hydrogen peroxide and sodium perborate*).

For the aficionados of EU judicial control, the 2000ies were the decade when limited judicial review came under the spotlight. Will the 2010ies be the decade of unlimited jurisdiction?

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