

Géraldine Gaulard, *La pleine juridiction du juge de l'Union européenne en droit de la concurrence: Contrôle et compétence sur les amendes*. Brussels: Bruylant, 2020. 380 pages. ISBN: 9782802765684. EUR 95

As part of its mandate to enforce Articles 101 and 102 TFEU, the European Commission has been conferred far-reaching sanctioning powers. Making use of those powers, it has not hesitated to impose very high fines on competition law offenders in recent years. The CJEU – the General Court and, on appeal, the Court of Justice – plays an important role in reviewing those decisions. Article 263 TFEU allows undertakings to introduce an action for annulment against Commission infringement and fining decisions. Within the framework of that action, the Courts have to review the legality of Commission enforcement. As the ECJ itself confirmed in its *KME Germany* (C-272/09, paras. 105–106) and *Chalkor* (C-386/10 P, para 67) cases, legality review allows the EU Courts to determine whether the Commission has considered the relevant facts and has classified them properly under EU competition law. In addition, and above all, Courts can review whether the Commission applied the law in a correct manner. On top of the action for annulment, Article 261 TFEU *juncto* Article 31 of Regulation 1/2003 give the Courts unlimited jurisdiction to cancel, reduce or increase the fine or periodic penalty payment imposed.

In practice, however, the intensity with which the EU Courts review Commission decisions and modify fines has been considered insufficient in light of the fundamental right to a fair trial enshrined in Article 47 CFR and Article 6 ECHR. Most fundamentally, the latter requires that sanctions that are “criminal” in nature be imposed by an independent and impartial tribunal, rather than by an administrative body. However, in domains such as competition law, administrative bodies may impose sanctions, as long as they can be reviewed by a court having full jurisdiction to review points of facts and law (ECtHR, *Menarini Diagnostics*). The notion of full jurisdiction remains somewhat vague and does not as such require that judges be empowered to take a *de novo* decision. The question therefore is whether or not the EU’s legality review coupled with unlimited jurisdiction over the amount of the fine is sufficient to meet the ECtHR’s full jurisdiction standard. Gaulard’s important book, the published version of her doctoral thesis defended at the Université d’Aix-Marseille, succeeds in revisiting and illuminating the core issues at the heart of that question.

The book starts out by highlighting that the enforcement of Articles 101 and 102 TFEU has undergone a fundamental development: the imposition of increasingly high fines uncontestedly makes EU competition law infringement procedures ever more “criminal” in nature under Article 6 ECHR. As a result, the need to evaluate the ECHR-proof nature of the existing judicial review framework has become more acute as well. The question therefore emerges whether the EU Courts have interpreted and applied their judicial review mandate so as to take that development into account. In two parts, the author sets out to show that, despite the Court’s rhetoric in *KME Germany* and *Chalkor*, the legality review and unlimited jurisdiction review frameworks leave much to be desired in that respect. As a result, she calls for modifications to either the Courts’ review practices or the procedural design of infringement procedures to be considered.

It is important to note from the outset that, contrary to the English language which distinguishes between full jurisdiction and unlimited jurisdiction, the French language refers to *pleine juridiction* in both situations. To avoid conceptual confusion, the author distinguished between the *pleine juridiction* standard and the *pleine juridiction* rule (pp. 19–20). The first refers to ECtHR-required full jurisdiction, the second to unlimited jurisdiction as foreseen in Article 261 TFEU.

The first part (*Une conception faussée de la pleine juridiction en droit de l'Union européenne*) revisits the requirement of full jurisdiction mandated by the ECtHR in the context of EU competition law investigations. It contains two main sections. In the first, the author revisits Article 6 ECHR and the way it has influenced debates on the intensity of judicial review

of Commission decisions based on Articles 101 and 102 TFEU. A useful and well-structured overview of the ECtHR's Article 6 case law on quasi-criminal procedures and its *Engel* criteria is followed by the conclusion that EU competition law enforcement is criminal in ECHR terms, despite the Courts' unwillingness to explicitly acknowledge this. Despite its formal respect for the ECtHR's full jurisdiction requirements, the ECJ continues to grant significant leeway to the Commission. That is especially the case when it engages in complex economic assessments over which the Courts exert only limited review. The author offers a nuanced overview of the case law, showing the EU Courts are less prone to sticking to their "complex economic assessments" case law in the field of concentration control. However, with regard to Articles 101 and 102 TFEU, the Courts seemingly stick to a rather light touch judicial review of Commission decisions.

The second section zooms in on the theoretical and practical possibilities of the EU Courts in implementing a wider format of unlimited jurisdiction in accordance with Article 261 TFEU. The author there outlines and analyses the limited scope of such unlimited jurisdiction (only over the amount of the fines) and its inherent attachment to the legality review under Article 263 TFEU. In doing so, however, the author argues that the Courts fail to ensure a meaningful review of Commission decisions. That is especially problematic in the context of settlement, commitment and leniency proceedings, where the review of the Courts becomes even more protracted and potentially incompatible with the ECHR's full jurisdiction requirements. The author offers a rich and well-structured analysis of relevant case law and points at the gaps in the existing judicial review framework.

The second part (*Pour une application dynamique de la pleine juridiction en droit de la concurrence de l'Union*) takes a more forward-looking perspective and calls for a better use of the unlimited jurisdiction powers conferred upon the EU Courts. It is again divided into two sections. The first section revisits the specific relationship between the legality review under Article 263 and unlimited jurisdiction under Article 261 TFEU. Here, the author again touches upon themes addressed in a more abstract way in the final section of the previous part. This time, Gaulard highlights the limited use made of unlimited jurisdiction powers. Additionally, and very importantly, the analysis shows the Court generally agrees with the Commission's fine-setting methodology, rather than relying on a methodology of its own in setting, reviewing, and modifying the amount of the fine. The author offers building blocks with which a more autonomous methodology can be envisaged.

In the second section, the book finally goes to the heart of the debate as to whether modifications to the current framework are necessary. Gaulard first revisits the limits inherent in judicial review, yet argues that those limits in no way deny a more developed unlimited jurisdiction approach to be taken. Against that background, proposals to modify the Commission decision-making structures and to enhance judicial review are made. Somewhat disappointingly, the suggestions offered here are the ones already presented by others on many occasions (such as the creation of a specialized competition law tribunal or European competition agency). The author nevertheless succeeds in bringing together different proposals that had previously been made in isolation from one another.

Despite its qualities as a most useful reference work and very interesting reflection instrument, the book also suffers from two important shortcomings. First, the book's structure makes it somewhat difficult to retrace the overall argument which I have tried to summarize here. The author is clearly aware of the most important case law and had studied the matter both from a theoretical and a practical point of view. However, discussions as to theoretical possibilities and practical problems have been separated somewhat artificially, meaning that the book meanders back and forth between the same questions while also making excursions into side issues that are less relevant for the development of the main argument. As a result, the reader at times risks losing track of the overall and central argument. Second, the author's analysis of relevant case law is at times too succinct fully to grasp the points the Court has made. It would have been helpful had a more extensive description of the cases at hand and the outcomes of the judicial review had been added to the analysis.

Those shortcomings notwithstanding, practitioners and scholars alike will benefit from the rich and comprehensive overview of case law and detailed analysis offered. Above all, the book is a gentle reminder that the EU Courts' compliance with the ECtHR's full jurisdiction standard cannot be taken for granted in the context of competition law enforcement. That reminder is all the more important against the background of a very similar (and equally deficient) enforcement framework currently taking shape in the context of the proposed Digital Markets Act (DMA). The issues highlighted in this book show that questions regarding the intensity of judicial review and the importance of ensuring full jurisdiction against Commission decisions remain key points of attention in that new framework as well. Gaulard's book will most certainly help policymakers and practitioners in framing and addressing those questions more sharply in years to come.

Pieter Van Cleynenbreugel  
Liège