The Compatibility of the Standard of Judicial Review in EU Competition Law with Article 6(1) of the European Convention on Human Rights

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To my parents

ABSTRACT

This thesis brings two different, but interrelated worlds together. It assesses whether the standard of review applied in competition law cases by the Court of Justice of the European Union (CJEU) is sufficient to comply with the right to a fair trial of Article 6(1) of the European Convention on Human Rights (ECHR).

Within the framework of EU competition law, the EU judicature is called to review antitrust and merger decisions adopted by the European Commission. Since those decisions adversely affect the business and property rights of economic entities, it is essential that an effective judicial control is subsequently carried out by an independent and impartial tribunal. On this account, Article 6(1) of the ECHR imposes certain minimum requirements that the EU courts must fulfil despite the fact that the Convention does not form part of EU law.

My first goal is to decipher the foregoing requirements by perusing the relevant case law of the European Court of Human Rights (ECtHR), to wit the institution entrusted to interpret and apply the Convention authoritatively. My second goal is to define the standard of judicial review applied in EU competition law by scrutinizing the relevant case law of the CJEU. My third and most important goal is to determine in a substantiated manner whether the conditions set by the ECtHR are satisfied by the CJEU.

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AAC	Average Avoidable Cost
AEC	As-Efficient-Competitor
CDDH	Steering Committee for Human Rights
CJEU	Court of Justice of the European Union
CML Rev	Common Market Law Review
CoJ	Court of Justice
CPI	Competition Policy International
DCF	Discounted Cash Flows
ECHR	European Convention on Human Rights
ECLR	European Competition Law Review
ECR	European Court of Human Rights
ECSC	European Coal and Steel Community
ECtHR	European Court of Human Rights
EEA	European Economic Area
EEC	European Economic Community
EFTA	European Free Trade Association
EHRR	European Human Rights Reports
EL Rev	European Law Review
EU	European Union
EuConst	European Constitutional Law Review
FORDHAM INT'L L.J	Fordham International Law Journal
GC	General Court
Ibid	Ibidem

JECLAP	Journal of European Competition Law & Practice
OJ	Official Journal of the European Union
OUP	Oxford University Press
SO	Statement of Objections
SSNIP	Small but Significant Non-transitory Increase in Price
SSRN	Social Sciences Research Network
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
US	United States

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Introduction

The 'standard' of judicial review refers to the 'scope', the 'intensity' and the 'reforming capacity' of the control exercised by a court on the acts of a lower body. 'Scope' is determined by the reviewable components of the measure in question such as the legal basis, the facts, the technical appraisals, the legal conclusions. A judge may have competence to deal with all or only some of those segments. 'Intensity' should be understood as the depth of the examination carried out with respect to the reviewable components of the impugned measure. The court may examine exclusively their procedural legality or both their procedural and substantive legality or more drastically their legality together with their expediency. 'Reforming capacity' comprises the effect that can be exerted on the act. A tribunal may be unable to reform it, or possess the power solely to annul it, or choose between annulling it and modifying it.

Within the legal framework of the European Union (EU), the European Commission (Commission) is the institution entrusted with applying competition law and thereby regulating the conduct of economic entities on the internal market. It can find and penalize infringements of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU)[1] as well as control mergers and acquisitions. Natural and legal persons adversely affected by such administrative decisions are entitled to contest them before the Court of Justice of the European

[1] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2012] OJ C326/1.

Union (CJEU) and in particular to the General Court at first instance and to the Court of Justice at second instance.

Article 6(1) of the European Convention on Human Rights (ECHR)[2] protects the right to a fair trial by stipulating that:

> 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 within a reasonable time by an independent and impartial tribunal established by law.

All the rights enshrined in the Convention are interpreted by the European Court of Human Rights (ECtHR) which is based in Strasbourg and adjudicates on inter-state cases and individual applications invoking violations committed by one of the Contracting Parties to the ECHR.

Connecting all the above, my thesis assesses whether the standard of review applied by the CJEU to the competition decisions of the Commission complies with Article 6(1) ECHR as that has been construed by the jurisprudence of the ECtHR. The issue is of preponderant weight for any legal system imbued the rule of law because the right to a fair trial functions as a shield for every other fundamental right. Persons adversely affected by an administrative measure can protect their business or their property solely by relying on judicial bodies capable and willing to consider effectively all objections against that measure. Otherwise, they would be left exposed to arbitrariness and abuses on the part the executive. Administrative agencies may need a certain leeway to implement their policies, but courts have a pressing duty to

[2] The Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950), better known as the European Convention on Human Rights, is an international treaty signed by the forty-seven countries of the Council of Europe. The Council of Europe is an international organization whose aim is to protect human rights and fundamental freedoms across Europe.

prevent state action from infringing the fundamental rights of companies and individuals.

Inductive reasoning is the method predominantly used in the chapters to follow. The latter study specific judgments in order to infer with the greatest possible certainty the general standard of review required by the ECtHR and applied by the CJEU. I have tried to select the most elucidating examples from the voluminous case law. On the one hand, the large number of rulings in certain sections is necessary for adequately underpinning the derived conclusions. On the other hand, some important cases have been left out to avoid excessive repetition. This thesis does not include state-aid cases and its scope is limited to the action provided in Article 263 TFEU, in essence the only legal remedy that can be employed for annulment purposes in EU competition law.

At the outset, Chapter 1 explores the present and the future of the relationship between the EU and the ECHR. It aims at demonstrating that the Convention is not irrelevant to the EU and that the CJEU is compelled to observe Article 6(1) ECHR.

Chapter 2 displays how administrative decisions are adopted in EU competition law and the reasons why Article 6(1) ECHR is applicable to them. It clarifies that the decision-making authority of the Commission does not automatically violate the right to a fair trial.

Chapter 3 lies at the core of my study. It peruses the jurisprudence of the ECtHR in order to find out the exact requirements imposed by Article 6(1) ECHR on

the standard of judicial review in EU competition law. Emphasis is placed on the landmark judgment in *Menarini*.[3]

Chapter 4 takes us to the EU level and introduces us to the judicial procedure. It mentions the roles of the General Court and the Court of Justice and scrutinizes the adequacy of the presumed 'comprehensive' review carried out under Article 263 TFEU to questions of fact and law in EU competition law.

Staying at the EU level, Chapter 5 focuses on the 'limited' judicial control of complex economic assessments. It delineates the extent of the limitation and justifies its controversial existence. Moreover, it looks closely at how the EU judicature performs its duty in every subsection of EU competition law necessitating economic analysis.

Chapter 6 complements the work of the two previous chapters. It revolves around the review of fines in EU competition law, in respect of which the EU judges have been granted 'unlimited jurisdiction'. The content of this great power and the way it is exercised by the CJEU are analysed. Pertinent statistical data are also produced.

Finally, Chapter 7 puts everything together by determining the compatibility of the overall standard of judicial review in EU competition law with the conditions flowing from the jurisprudence of the ECtHR on Article 6(1) ECHR. In addition, it discusses proposals for reform regarding the competition law enforcement system of the EU.

[3] *A.Menarini Diagnostics S.R.L. v Italy* App no 43509/08 (ECtHR, 27 September 2011).

1. The Significance of Article 6(1) ECHR for the Standard of Judicial Review in EU Competition Law

The EU and the ECHR constitute two distinct international legal systems. They are governed by their own rules and no hierarchical ties exist between them. One could therefore get the impression that the axis of this thesis is purely theoretical, something akin to an exercise of comparative law. The present chapter explains why it matters in practice that the standard of judicial review in EU competition law complies with Article 6(1) ECHR. There is one material reason deriving from the EU's standpoint towards the ECHR, a second one arising from the current ECHR's perspective of the EU and a third one relating to the future potential relationship between the two legal regimes.

1.1. The Reception of the ECHR by the EU

In the EU legal order, human rights and fundamental freedoms are referred to as 'fundamental rights'.[4] The Union has developed a framework acknowledging and shielding fundamental rights, including of course the right to a fair trial. That

[4] See Dorota Leczykiewicz, "'Effective Judicial Protection' of Human Rights after Lisbon: Should National Courts Be Empowered to Review EU Secondary Law?" (2010) 35 EL Rev 326, 328-329.

framework is heavily influenced by the ECHR and the jurisprudence of the ECtHR, notwithstanding that the Convention is not formally incorporated into EU law.[5]

1.1.1. Fundamental rights in the EU and the influence of the ECHR

From as early as 1969, the CJEU has declared that fundamental rights form an integral part of the general principles of Union law.[6] The latter are written and unwritten sources of primary law supplementing the Lisbon Treaties.[7] The institutions of the Union and of the Member States, when acting within the scope of EU law, must abide by those principles.[8] Moreover, the Charter of Fundamental Rights of the European Union offers explicit protection to fundamental rights.[9] Article 6(1) of the Treaty on the European Union (TEU) attributes to the Charter the same legal value as the Treaties. Article 51(1) of the Charter specifies that the provisions thereof are obligatory for the Union organs and for the Member States only when they are implementing EU law.[10]

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[5] Case C-501/11 P *Schindler Holding Ltd and Others v Commission* EU:C:2013:522, para 32; Case C-510/11 P *Kone Oyj and Others v Commission* EU:C:2013:696, para 21; Case C-295/12 P *Telefónica SA and Telefónica de España SAU* v Commission EU:C:2014:2062, para 41.

[6] See Case 29/69 *Stauder v City of Ulm* [1969] ECR 419, para 7; Case 11/70 *Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle Getreide* [1970] ECR 1125, para 4; Case C-36/02 *Omega Spiehallen- und Automatenaufstellungs-GmbH v Oberburgermeinsterin der Bundesstadt Bonn* [2004] ECR I-9609, para 33.

[7] Alan Dashwood, Michael Dougan, Barry Rodger, Eleanor Spaventa and Derrick Wyatt, *Wyatt and Dashwood's European Union Law* (6th edn, Hart Publishing 2011) 36 and 321. See also Takis Tridimas, *The General Principles of EU Law* (2nd edn, OUP 2006) 31; Elena Gualco, 'General principles of EU law as a passe-partout key within the constitutional edifice of the European Union: are the benefits worth the side effects?' (2016) Institute of European Law Working Paper 5/2016, 2 <epapers.bham.ac.uk/2188/1/IELWorkingPaper2016No5.pdf> accessed 02 October 2018.

[8] Case C-555/07 *Seda Kücükdeveci v Swedex GmbH & Co. KG*. [2010] ECR I-365, para 23; Case C-419/14 *WebMindLicenses kft v Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vám Főigazgatóság* EU:C:2015:832, para 84; Joined Cases C-532 and 538/15 *Eurosaneamientos SL and Others v ArcelorMittal Zaragoza SA and Francesc de Bolós Pi v Urbaser SA* EU:C:2016:932, para 52.

[9] Charter of Fundamental Rights of the European Union [2012] OJ C326/391.

[10] Article 51(1) of the Charter has been given a broad interpretation, see Explanations Relating to the Charter of Fundamental Rights [2007] OJ C303/2, Explanation on Article 51; Case C-

It turns out that respect for fundamental rights, in the shape of general principles of EU law or Charter provisions, is an inviolable condition for the lawfulness of every EU act.[11]

The ECHR is perceived as a beacon for the safeguard of fundamental rights within the EU. The CJEU initiated this pattern by stating in *Nold* that international treaties for human rights signed by the EU countries 'can supply guidelines which should be followed within the framework of the EU'.[12] It mentioned the ECHR explicitly in *Rutili*[13] and it accepted in *Johnston* that 'the principles on which that Convention is based must be taken into consideration in Community law'.[14]

The foregoing judgments are now fully reflected in the constitutional texts of the EU. Article 6(3) TEU stipulates that fundamental rights, as guaranteed by the ECHR, shall constitute general principles of the Union's law. Article 52(3) of the Charter identifies that the meaning and scope of Charter rights corresponding to rights

617/10 *Åklagaren v Hans Åkerberg Fransson* EU:C:2013:105, paras 17-22; Case C-483/12 *Pelckmans Turnhout NV v Walter Van Gastel Balen NV and Others* EU:C:2014:304, paras 17-22. See also Marek Safjan 'Fields of application of the Charter of Fundamental Rights and constitutional dialogues in the European Union' (2014) Centre for Judicial Cooperation Distinguished Lecture 2014/02 4-5 <http://cadmus.eui.eu/bitstream/handle/1814/32372/CJC_DL_2014_02.pdf?sequence=3> accessed 02 October 2018.

[11] Case C-260/89 *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and others* [1991] ECR I-2925 (known as *ERT*), para 41; Joined Cases C-402 and 415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351, para 284; Case T-410/09 *Almamet GmbH Handel mit Spänen und Pulvern aus Metall v Commission* EU:T:2012:676, para 39.

[12] Case C-4/73 *J.Nold, Kohlen- und Baustoffgroßhandlung v Commission* [1974] ECR 491, para 13.

[13] Case C-36/75 *Roland Rutili v Minister for the Interior* [1975] ECR 1219, para 32.

[14] Case C-222/*84 Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, para 18. See also Case C-46/87 *Hoechst v Commission* [1989] ECR 2859, para 13; Case C-299/95 *Friedrich Kremzow v Republik Österreich* [1997] ECR I-2629, para 14.

secured by the ECHR 'shall be the same as those laid down by the said Convention'.[15]

On the one hand, the CJEU remains 'the final and authoritative arbiter' of the impact of the ECHR within the EU as it has been correctly pointed out by Gráinne de Búrca.[16] On the other hand, the ECtHR has exclusive interpretive authority within the legal framework of the Convention,[17] deeming the latter 'a living instrument' that must be construed in the light of present-day conditions.[18] Unavoidably, the dynamic Strasbourg jurisprudence has pivotal significance for the application of the Convention in the EU.[19] The EU judicature has recognized this since *Roquette Frères*,[20] where it looked to the ECtHR for guidance so as to define the range of a general principle of Union law stemming from Article 8 ECHR.[21] In addition, the Explanations Relating to the Charter, which have to be given 'due regard' for its interpretation,[22] provide that the content of Charter rights corresponding to the

[15] See also Case C-400/10 PPU *J.McB v L.E.* [2010] ECR I-8965, para 53; Case C-218/15 *Gianpaolo Paoletti and Others v Procura della Repubblica* EU:C:2016:748, para 21.

[16] Gráinne de Búrca, 'The Evolution of EU Human Rights Law' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (OUP 2011) 490.

[17] See Article 32 ECHR.

[18] *Tyrer v the United Kingdom* (1978) Series A no 26, para 31; *Selmouni v France* ECHR 1999-V 149, para 101. See also *Christine Goodwin v the United Kingdom* ECHR 2002-VI 1, para 74.

[19] See Joined Cases C-411 and 493/10 *N. S. v Secretary of State for the Home Department and M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [2011] ECR I-13905, Opinion of AG Trstenjak, para 145.

[20] Case C-94/00 *Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression de frauds* [2002] ECR I-9011, para 29. See also Case C-465/07 *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie* [2009] ECR I-921, para 28; Case C-583/13 P *Deutsche Bahn AG and Others v Commission* EU:C:2015:404, paras 19-20.

[21] That general principle was 'the protection against arbitrary or disproportionate intervention by public authorities in the sphere of private activities' which was also mentioned in *Almamet*, note 11, paras 22-23.

[22] See Charter, note 9, preamble and Article 52(7); Case C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland* [2010] ECR I-13849, paras 35 and 45; *WebMindLicenses*, note 8, para 70; Case T-54/14 *Goldfish BV and Others v Commission* EU:T:2016:455, paras 49-51.

Convention are determined not only by the text of the latter instrument, but also by the case law of the ECtHR and by the CJEU.[23]

1.1.2. The impact of Article 6(1) ECHR on EU competition law

The Convention's right to a fair trial, as construed by the ECtHR, penetrates the EU legal order in two overlapping ways.

At the outset, it has given rise to the general principle of EU law known as 'effective judicial protection'.[24] Next, it operates as a minimum benchmark for the meaning and scope of the corresponding right of the Charter, the one in its Article 47(2).[25] Although the intensity of the afforded protection is the same as in Article 6(1) ECHR, its scope is wider.[26] The wording of Article 47(2) of the Charter encompasses all disputes, not merely the ones pertaining to civil rights and obligations or criminal charges.[27]

The General Court must respect both the general principle of effective judicial protection and Article 47(2) of the Charter, whose content is defined by Article 6(1) ECHR and the evolving Strasbourg jurisprudence, when it reviews Union acts in the

[23] Charter explanations, note 10, Explanation on Article 52.

[24] Case C-432/05 *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern* [2007] ECR I-2271, para 37; Case C-272/09 P *KME Germany AG, KME France SAS and KME Italy SpA v Commission* [2011] ECR I-12789, para 92; Case C-40/12 P *Gascogne Sack Deutschland GmbH v Commission* EU:C:2013:768, para 28.

[25] Case C-386/10 P *Chalkor AE Epexergasias Metallon v Commission* [2011] ECR I-13085, para 51; Case C-199/11 *Europese Gemeenschap v Otis NV and Others* EU:C:2012:684, para 47; *Kone*, note 5, para 20; *Telefónica*, note 5, para 57. See also Charter explanations, note 10, Explanation on Article 47.

[26] Kieron Beal and Tom Hickman, 'Beano No More: The EU Charter of Rights After Lisbon' (2011) 16 Judicial Review 113, 140. See also Article 52(3) of the Charter which allows it to offer more extensive protection than the Convention to fundamental rights.

[27] Article 47(2) of the Charter reads as follows: 'Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. […]'.

field of competition.[28] In the opposite scenario, the Court of Justice would have to uphold an appeal by an affected natural or legal person alleging an infringement of her fundamental rights on the part of the General Court.[29] Depending on the seriousness of the infringement, the Union could also incur non-contractual liability pursuant to Article 340(2) TFEU for any damage caused.[30]

This indirect binding force exerted by the rights of the Convention to the legal system of the EU is the first factor rendering the compatibility of the standard of judicial review in EU competition law with Article 6(1) ECHR practically important.

1.2. The Standpoint of the ECtHR towards the EU

Starting from *Matthews*, the long-standing position of the ECtHR has been that Union acts cannot be admissibly challenged before it since the EU is not a Contracting Party to the Convention.[31] However, the EU Member States all are. Individual and inter-state applications alleging a breach of a Convention right by one those countries will be deemed admissible as long as every available domestic remedy has been

[28] See Case C-385/07 P *Der Grüne Punkt - Duales System Deutschland GmbH v Commission* [2009] ECR I-6155, paras 177-178; Case T-214/06 *Imperial Chemical Industries Ltd v Commission* EU:T:2012:275, paras 282-283.

[29] See Case C-67/13 P *Groupement des cartes bancaires (CB) v Commission* EU:C:2014:2204 (hereinafter *CB*).

[30] See Case T-212/03 *MyTravel Group plc v Commission* [2008] ECR II-1967, paras 35-50; Case T-351/03 *Schneider Electric SA v Commission* [2007] ECR II-2237, paras 113-125; Case T-669/14 *Trioplast Industrier AB v Commission* EU:T:2016:285, paras 92-98.

[31] *Matthews v the United Kingdom* ECHR 1999-I 251, para 32. See also *Connolly v 15 Member States of the European Union* (dec.) App no 73274/01 (ECtHR, 9 December 2008); *Cooperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v the Netherlands* (dec.) App no 13645/05 (ECtHR, 20 January 2009); *Lechouritou and Others v Germany and 26 other Member States of the European Union* (dec.) App no 37937/07 (ECtHR, 3 April 2012).

exhausted.[32] Bearing in mind that the competition judgments of the CJEU may need to be executed at national level, the crucial question arising here is how the ECtHR would handle applications contesting acts or omissions that the respondent State performed due to its participation in the EU.

1.2.1. The presumption of equivalent protection

The Strasbourg jurisprudence has provided a clear solution to the problem of national acts associated with the EU by formulating the presumption of equivalent protection.

Bosphorus is the landmark judgment.[33] In conformity with a Regulation of the EU (then European Community) compelling Member States to impound aircrafts owned by Yugoslav undertakings, Ireland seized an aircraft leased by the Turkish applicant company. The latter alleged a breach of its right to the peaceful enjoyment of its possessions. By virtue of what is now Article 267 TFEU, the Irish Supreme Court brought the matter before the Court of Justice which found the implementation of the Regulation entirely lawful. Bosphorus subsequently turned against Ireland in Strasbourg.

Although the signatories to the Convention are not precluded from transferring sovereign power to an international organisation, the ECtHR declared that they would not be absolved from their obligation to respect human rights under Article 1 ECHR in the areas covered by such transfer.[34] It then explained that due to

[32] See Articles 33, 34 and 35 ECHR. Applications must be submitted to the ECtHR within a deadline of six months after the final domestic decision on the matter.

[33] *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland* ECHR 2005-VI 107. See also *Michaud v France* ECHR 2012-VI 39; *Avotiņš v Latvia* ECHR 2016.

[34] *Bosphorus*, para 154. See also *Prince Hans-Adam II of Liechtenstein v Germany* ECHR 2001-VIII 1, paras 47-48; *Gasparini v Italy and Belgium* (dec.) App no 10750/03 (ECtHR, 12 May 2009), page 5.

comity there would be a 'presumption' that the Convention has not been violated by national acts or omissions dictated by an international organization as long as two cumulative conditions are met.

At the outset, the international organization should generally defend fundamental rights in a manner at least 'equivalent', viz. 'comparable' and not necessarily identical,[35] to that of the ECHR. Next, the respondent country must have implemented a legal obligation flowing strictly from its membership to the above entity.[36] Nevertheless, the interest of international cooperation will subside and the presumption will be rebutted at cases where the protection of Convention rights was 'manifestly deficient'.

The ECtHR held that Ireland benefited from the foregoing presumption. Firstly, the overall substantive and procedural guarantees for fundamental rights within the EU were deemed equivalent to that of the Convention.[37] Secondly, insomuch as EU Regulations and the rulings of the Court of Justice are directly binding to the Member States,[38] Ireland had complied with commitments deriving from the EU without having exercised any State discretion.[39] Thirdly, no element indicated a blatantly inadequate safeguard of rights.

[35] *Bosphorus*, para 155; *Michaud*, note 33, para 103; *Avotiņs*, note 33, para 101.

[36] *Bosphorus*, paras 156-157; *Michaud*, para 103; *Avotiņš*, para 115.

[37] *Bosphorus*, paras 160-165; *Michaud*, paras 105-111; *Avotiņš*, para 104.

[38] *Bosphorus*, paras 83, 99, 145 and 147.

[39] See, a contrario, *M.S.S. v Belgium and Greece* ECHR 2011-I 255, paras 339-340; *Tarakhel v Switzerland* ECHR 2014-VI 195, paras 90-91.

It must be clarified that the existence of comparable protection will be conceded to the EU solely where its supervisory mechanism has been deployed to its full potential.[40]

In *Michaud*, the ECtHR did not refrain from entering into the substance of the dispute and examining whether the French legislation transposing an EU Directive observed Article 8 ECHR. The judgment noted that the presumption of equivalent protection was inapplicable not just because Member States enjoy a 'margin of manoeuvre' in the implementation of Directives. The main reason was that although the Court of Justice had never assessed the compliance of the EU act in question with Article 8 ECHR, the French Council of State refused to seek a preliminary ruling on the issue.[41] The Irish Supreme Court had done the opposite in *Bosphorus*.[42]

1.2.2. The presumption of equivalent protection for EU competition law

It appears that the standard of review in EU competition law cannot be successfully challenged directly or indirectly at Strasbourg. Not only are the relevant judgments of the CJEU acts of a party which has not signed the Convention, but also Member States implementing them, for example through the issuance of a writ of execution for an upheld Commission fine,[43] would be presumed not to infringe the Convention.

More precisely, the ECtHR accepts that Article 52(3) of the Charter in combination with the full involvement of the CJEU at the EU system for overseeing

[40] *Avotiņš*, note 33, para 105.

[41] *Michaud*, note 33, paras 112-116. See also *Avotiņš*, note 33, paras 109-111; *Satakunnan Markkinapörssi Oy and Satamedia Oy v Finland* ECHR 2017, para 150.

[42] See also *Povse v Austria* (dec.) App no 3890/11 (ECtHR, 18 June 2013), paras 81-82.

[43] See *M. & Co. v Germany* (dec.) App no 13258/87 (European Commission of Human Rights, 9 February 1990).

fundamental rights ensure comparable protection to that of the ECHR.[44] In addition, the Member States enjoy no leeway when called to enforce a competition measure of the EU. The principle of primacy of Union law compels national authorities, including judicial ones,[45] to disapply prior or subsequent domestic law conflicting with binding EU acts and provisions.[46]

Nevertheless, the 'manifestly deficient' trigger means that the ECtHR examines every situation individually and reserves the last word for itself. Irrespective of the high threshold for its rebuttal,[47] the *Bosphorus* presumption should not be taken for granted, especially after Opinion 2/13 on the EU's accession to the ECHR. Therein, the CJEU demanded a filter on the powers of the ECtHR so that the EU could accede to the ECHR. The Strasbourg Court retaliated by adopting a stricter approach in *Avotiņs*.[48] It warned that a Member State's 'literal and automatic application' of an EU provision about the recognition and enforcement of foreign judgments was in theory capable of rebutting the *Bosphorus* presumption with regard to rights guaranteed under Article 6(1) ECHR.[49] The judgment undertook a

[44] *Avotiņš*, note 33, paras 103-104.

[45] Joined Cases C-10 to 22/97 *Ministero delle Finanze v IN.CO.GE.'90 and Others* [1998] ECR I-6307, para 21; Case C-314/08 *Krzysztof Filipiak v Dyrektor Izby Skarbowej w Poznaniu* [2009] ECR I-11049, paras 84-85; Case C-414/16 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.* EU:C:2018:257, para 82. See also 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, Article 16.

[46] Case C-6/64 *Flaminio Costa v E.N.E.L.* [1964] ECR 585, 593-594; Case C-106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629, para 17; Case C-341/08 *Domnica Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* [2010] ECR I-47, para 80. See also Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L24/1, Article 21(3); Paul Craig and Gráinne de Búrca, *EU Law Text, Cases, and Materials* (6th edn, OUP 2015) 266-272.

[47] See Cathryn Costello, 'The *Bosphorus* Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe' (2006) 6 Human Rights Law Review 87, 102.

[48] See Paul Gragl, 'An Olive Branch from Strasbourg? Interpreting the European Court of Human Rights' Resurrection of *Bosphorus* and Reaction to Opinion 2/13 in the *Avotiņs* Case' (2017) 13 EuConst 551, 566.

[49] *Avotiņs*, note 33, para 121.

meticulous review of the case before deciding that there was no actual rebuttal. Things were not pushed too far, but Latvia and the EU were given a hard time.

Let us now assume that a fined company exhausted all Union remedies by contesting the adverse competition measure to the General Court and by appealing to the Court of Justice. The penalty was then executed in the Member State where the sanctioned firm was keeping its funds, inescapably in view of the fact that national tribunals are precluded from invalidating judgments of the CJEU.[50] Should the company claim to be a victim and apply to Strasbourg under Article 34 ECHR, the ECtHR could deem the circumstances exceptional and resolve that the CJEU performed an ad hoc 'manifestly deficient' review for the purposes of the right to a fair trial.[51]

The presumption of equivalent protection would be put aside and a violation of the Convention would be attributed to the respondent country. The public image of the EU would suffer and its Member State would probably have to compensate the victim too. No matter how low it may seem, the risk of such ruling by the ECtHR is the second reason why the standard of judicial review in EU competition law must comply with Article 6(1) ECHR.

[50] See Case C-314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199, para 20; Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677, para 40; *Otis*, note 25, paras 53-54.

[51] See, a contrario, for the judicial review in an EU civil service case, *Andreasen v the United Kingdom and 26 other Member States of the European Union* (dec.) App no 28827/11 (ECtHR, 31 March 2015), page 17.

1.3. The Accession of the EU to the ECHR

Since its entry into force in 2009, Article 6(2) TEU obliges the EU to accede to the ECHR. Accession aims to enhance the protection of fundamental rights in the Union by assigning a supervisory role to the ECtHR. Nevertheless, the project has been stalled by the objections of the Court of Justice and its prospects of success are currently uncertain.

1.3.1. The significance of accession

Due to the nature of the EU as a sui generis international organization, the details of its accession to the ECHR were the subject of complex negotiations between the two sides. A draft accession agreement was concluded in 2013.[52] Although many modifications will need to be made in that agreement in the aftermath of Opinion 2/13, its essential impact on the relationship between the two legal regimes is expected to remain the same.

Should it be finalized, accession will not bring any major substantive changes in the EU's internal mechanism of fundamental rights protection. The Convention is already radiant in the EU legal order through recourse to the general principles of Union law and the Charter rights corresponding to Convention ones. The notable changes will be of procedural character. The ECHR, including of course Article 6(1), will be incorporated into Union law. Hence, it will become directly binding for all

[52] Fifth Negotiation Meeting Between the CDDH Ad Hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights, Final Report to the CDDH, 5 April 2013 (the Accession Agreement).

Union institutions and the CJEU will acquire the power to check the compliance of EU acts with the foregoing legal instrument directly as well.[53]

The most important reform envisaged by accession is the conferral to an international, specialized human rights court of the power to put the EU to an external scrutiny as regards its respect for fundamental rights.[54] In relation to the level of the scrutiny, an aspect not prescribed by the draft accession agreement, I side with Paul Craig who maintains that the *Bosphorus* presumption should stop being employed.[55] Its reason of existence, namely the interest of international cooperation, will disappear with the EU's voluntary submission to the jurisdiction of the ECtHR. Consequently, the legislative, administrative and judicial acts of the EU, as well as of the Member States when implementing them, will not receive any preferential treatment at Strasbourg proceedings in comparison to all other impugned acts of the Contracting Parties to the Convention.

If the EU joins the ECHR therefore, the ECtHR will be unrestrainedly enabled to review, directly or incidentally, the compliance of the CJEU's judgments with the right to a fair trial of a given applicant and hold the EU responsible for a potential violation. This is the third and last factor ascribing practical significance to the compatibility of the standard of judicial review in EU competition law with Article 6(1) ECHR.

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[53] In Case T-99/04 *AC-Treuhand AG v Commission* [2008] ECR II-1501, para 45, the CJEU declined jurisdiction to assess the lawfulness of an EU competition law investigation in the light of the ECHR.

[54] Accession Agreement, note 52, Annex I, Article 3(3); Adam Lazowski & Ramses A. Wessel, 'When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR' (2015) 16 German Law Journal 179, 212; Piet Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky' (2015) 38 FORDHAM INT'L L.J. 955, 961.

[55] Paul Craig, 'EU Accession to the ECHR: Competence, Procedure and Substance' (2013) 36 FORDHAM INT'L L.J 1115, 1140-1141. See also Wolfgang Weiss, 'Human Rights in the EU: Rethinking the Role of the European Convention on Human Rights after Lisbon' (2011) 7 EuConst 64, 94-95.

1.3.2. The objections of the Court of Justice

In view of the immense implications of a completed accession for the present thesis, it would be useful to elaborate on the chances of the overall project to succeed in the near future. There was considerable optimism until the Court of Justice delivered Opinion 2/13 pursuant to Article 218(11) TFEU.[56] It concluded that seven parts of the accession agreement were incompatible with the Lisbon Treaties and in particular with the autonomy and the specific characteristics of EU law.[57]

Firstly, it observed that the agreement did not coordinate Article 53 of the Charter with Article 53 ECHR, both setting the upper limit of national standards of human rights protection. The latter provision could permit a higher floor of protection than the Charter's in areas already harmonized by the EU, to the detriment of the primacy, unity and effectiveness of EU law.[58]

Secondly, upon accession, the ECHR would necessitate EU countries to check that their counterparts have observed fundamental rights in areas commanded by EU law. On the other hand, the principle of mutual trust asks them to presume such observance, save in exceptional circumstances.

Thirdly, the agreement did not define the relationship between the preliminary instruments of Protocol No 16 to the ECHR and Article 267 TFEU. If the issue at stake concerned a Charter right corresponding to a Convention one, Member States

[56] Opinion 2/13 EU:C:2014:2454

[57] ibid, paras 179-258. See Declaration on Article 6(2) of the Treaty on European Union, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon [2012] OJ C326/339.

[58] See *Åkerberg Fransson*, note 10, para 29; Case C-399/11 *Stefano Melloni v Ministerio Fiscal* EU:C:2013:107, para 60.

could refer to the ECtHR for an advisory opinion and thereby circumvent the preliminary ruling of the CJEU.

Fourthly, an EU country would not be prevented from sidestepping Article 344 TFEU that obliges it not to submit disputes about the Treaties and their application to external methods of settlement. Since the ECHR will be embodied in EU law, the obligation should extend to disputes on alleged Convention violations caused from EU acts or their implementation at national level.

Fifthly, there existed three shortcomings in the envisaged co-respondent mechanism. The EU or the Member States would be able to ask to become co-respondents in proceedings where Union law would be questioned.[59] In choosing whether it would be plausible to accept such requests however, the ECtHR would have to interfere with the internal rules on the division of powers between the EU and its members The same would apply in relation to a judgment which, having found that an act or omission violated the ECHR, would apportion responsibility to either the respondent or the co-respondent party and not to both of them. Lastly, contrary to Article 2 Protocol No 8 EU,[60] a co-respondent Member State might be held accountable for the infringement of a Convention right despite having made a valid reservation in accordance with Article 57 ECHR.

Sixthly, the Court of Justice noted a couple of problems with the proposed procedure for its prior involvement in pending proceedings where the EU has become a co-respondent. It would be called to step in if it had not yet assessed the compatibility of the contested EU provision with the rights of the Convention, but the

[59] Accession Agreement, note 52, Annex I, Article 3(2) and 3(3).

[60] Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human rights and Fundamental Freedoms [2012] OJ C326/273.

ECtHR and not the competent EU institution would decide whether that precondition was satisfied. Moreover, the CJEU would be precluded from intervening in Strasbourg cases whose outcome would be contingent on the interpretation of EU secondary law. The two above circumstances would equal to a forbidden definitive interpretation of the EU's jurisprudence and law respectively by an external tribunal.

Finally, insofar as the CJEU does not enjoy jurisdiction on a number of acts and omissions adopted in the context of the Common Foreign and Security Policy (CFSP), it was ruled that their review cannot be granted exclusively to an international tribunal outside the framework of the EU.[61]

1.3.3. The ominous future

At the end of the day, irrespective of the plausibility or implausibility of Opinion 2/13, its aftermath on accession is decisive. Under Article 218(11) TFEU, the project may go head solely if the objections raised by the Court of Justice are addressed. Potential remedies must be contemplated at this stage.

Altering the accession agreement comprises an indispensable part of a realistic solution. Once agreed between the representatives of the Council of Europe and the EU, the new draft will require the consent of the European Parliament together with the unanimous approval of the Council, the EU Member States[62] and the Contracting Parties to the Convention.[63] Asking the Court of Justice for a fresh opinion is not legally mandatory, but it is politically inevitable given that any Member State, the European Parliament, the Council or the Commission can unilaterally make such

[61] See also Opinion 1/09 [2011] ECR I-1137, para 89.

[62] Article 218(6)(a) and 218(8) TFEU

[63] Accession Agreement, note 52, Annex I, Article 10(3).

request by virtue of Article 218(11) TFEU. One or more of these parties would prefer not to come across the possible non-resolved or new caveats of the Court after accession when the flexibility for addressing them would be dramatically reduced.

As to the content of the modifications in the existent agreement, the Court's objections one, three, five and six may be entertained by painless clarifications providing that Article 53 ECHR shall not confer on Member States 'additional rights' to those of Article 53 of the Charter,[64] that the co-respondent mechanism shall not affect past reservations of the Member States and that the EU shall be entitled to resolve the other aforementioned issues before the ECtHR gets involved.

For objection two, the new version of the agreement could profess explicitly the validity of the principle of mutual trust and at the same time specify, pursuant to what Strasbourg demands,[65] that its application must not be automatic or unconditional. The CJEU has accepted that.[66] Its case law conveys the message that mutual trust does not outweigh the protection of fundamental rights.[67]

Dealing with objection four will entail the exclusion of Strasbourg's jurisdiction for cases under Article 33 ECHR between EU countries or between them

[64] Daniel Halberstam, '"It's the Autonomy, Stupid!" A Modest Defence of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward' (2015) 16 German Law Journal 105, 125-126.

[65] *Avotiņš*, note 33, para 116. See also *Ignaoua and Others v the United Kingdom* (dec.) App no 46706/08 (ECtHR, 18 March 2014), para 55.

[66] *N. S. and Others* (judgment), note 19, paras 83-94; Joined Cases C-404/15 and C-659/15 PPU *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* EU:C:2016:198, paras 82-104; Georgios Anagnostaras, 'Mutual confidence is not blind trust! Fundamental rights protection and the execution of the European arrest warrant: *Aranyosi and Căldăraru*' (2016) 53 CML Rev 1675, 1698-1700.

[67] Koen Lenaerts, 'La vie après l'avis: Exploring the principle of mutual (yet not blind) trust' (2017) 54 CML Rev 805, 840. See, to this effect, Case C-578/16 PPU *C. K. and Others v Republika Slovenija* EU:C:2017:127, para 59.

and the Union which fall within the ratione materiae of Union law.[68] Again, an EU body should be the one deciding whether a certain dispute concerns Union law.

Unlike the rest, objection seven cannot be accommodated by reforming the accession agreement. An EU exemption in respect of CFSP matters would have to touch on all Convention provisions. As such, it would be deemed of a general character and would not stand under Article 57 ECHR and the pertinent jurisprudence of the ECtHR.[69] Amending Article 57 ECHR in order to make room specifically for the EU's reservation constitutes a hypothetical option. Nevertheless, the Contracting Parties to the Convention, and mostly the 19 non-EU ones, would not want to allow that overly preferential treatment to the EU.[70]

The only other way ahead is through a laborious Lisbon Treaty amendment, whose completion needs mutual consent by the governments of the 28 Member States as well as subsequent ratification in accordance with their constitutional procedures.[71]

A Treaty amendment might include the adoption of a 'Notwithstanding Protocol', an idea conceived by Leonard Besselink.[72] It will mandate that accession

[68] Opinion 2/13, note 57, para 213.

[69] See *Sargsyan v Azerbaijan* (dec.) App no 40167/06 (ECtHR, 14 December 2011), paras 68-70; *Schädler-Eberle v Liechtenstein* (dec.) App no 56422/09 (ECtHR, 18 July 2013), paras 60-62; Bruno de Witte and Šejla Imamović, 'Opinion on Accession to the ECHR: Defending the EU Legal Order against a Foreign Human Rights Court' (2015) 40 EL Rev 683, 703-704.

[70] A French proposal to exclude CFSP acts from the ECtHR's jurisdiction was rejected by before Opinion 2/13, see Sionaidh Douglas-Scott, 'The Relationship Between the EU and the ECHR Five Years on from the Treaty of Lisbon' in Sybe de Vries, Ulf Bernitz and Stephen Weatherill (eds), *The EU Charter of Fundamental Rights as a Binding Instrument: Five Years Old and Growing* (Hart Publishing 2015) page 27; Friends of Presidency (FREMP), 'Accession of the EU to the ECHR' (Working Document from the Presidency, Brussels, 4 November 2011), points 9-10 <www.statewatch.org/news/2011/nov/eu-council-echr-accession-fop-ds-1675-11.pdf> accessed 02 October 2018.

[71] Article 48(2) to (5) TFEU.

[72] Leonard Besselink, 'Acceding to the ECHR notwithstanding the Court of Justice Opinion 2/13' BlogActiv (24 December 2014) <http://acelg.blogactiv.eu/2014/12/24/acceding-to-the-echr-notwithstanding-the-court-of-justice-opinion-213/> accessed 02 October 2018.

shall take place notwithstanding the entire[73] or some parts[74] of Opinion 2/13. The first version of the Protocol is highly unlikely to gain support. The EU countries or at least a number of them should be able to realize that defying and discrediting outright a prominent EU institution like the CJEU will pay lip service to the Union's endurance in light of the internal vulnerability caused by the impending Brexit, the Eurozone crisis and the discord on asylum and immigration policy. A Notwithstanding Protocol limited to the Court's caveat on CFSP matters, in combination with the foregoing modifications in the accession agreement, is a less pugnacious and more pragmatic choice.

Instead of the above plan, the TFEU may be amended in the direction of granting the CJEU jurisdiction on the totality of CFSP measures.[75] Thereby, the ECtHR shall not be the exclusive tribunal reviewing various EU acts and omissions on that area. This seems like the exact opposite of a Notwithstanding Protocol. Again, thinking that the Member States will suddenly concede extra powers to the CJEU by neutralizing Article 275 TFEU a few years after the Treaty's entry into force looks naively optimistic.

It transpires that accession has become rather distant. The achievement of the necessary unanimity for a Convention or a Lisbon Treaty amendment is hard at the current juncture. Since the publication of Opinion 2/13, almost four years have passed without any material progress. Bearing in mind that Article 6(2) TEU does not

[73] ibid.

[74] Tobias Lock, 'The future of the European Union's accession to the European Convention on Human Rights after Opinion 2/13: is it still possible and is it still desirable?' (2015) 11 EuConst 239, 267.

[75] 'Editorial Comments: The EU's Accession to the ECHR: a "NO" from the ECJ!' (2015) 52 CML Rev 1, 14.

stipulate a deadline for accession, it is safe to say that the interested parties will take more time prior to choosing a path forward.

1.4. Synopsis

The right to a fair trial of Article 6(1) ECHR, as interpreted by the ECtHR, is significant for the standard of judicial review in EU competition law for three fundamental reasons.

Firstly, it exerts an indirect binding force to the EU legal order. More specifically, it determines the content of a general principle of Union law and of the corresponding right of Article 47(2) of the Charter, both being compulsory for the institutions of the EU. Essentially, the General Court is obliged to carry out its control in accordance with the requirements deriving from the Strasbourg jurisprudence on Article 6(1) ECHR or risk being censured by the Court of Justice in an appeal by the natural or legal person concerned.

Secondly, although the EU is not a Contracting Party to the Convention, the ECtHR has jurisdiction over the acts of the Member States implementing competition law judgments of the CJEU. In this connection, it could potentially find that the review performed by the EU judicature breached Article 6(1) ECHR and hold the respondent State responsible for the infringement. On the one hand, under the *Bosphorus* doctrine the EU is generally presumed to protect fundamental rights in a manner at least equivalent to that of the ECHR. One the other hand, the presumption may be rebutted ad hoc if the protection was manifestly deficient.

Thirdly, should the EU accede to the ECHR, the Strasbourg Court will acquire jurisdiction to directly scrutinize the compatibility of the competition rulings of the CJEU with the right to a fair trial and to attribute any detected violation to the EU. However, accession appears unlikely at the moment in view of the objections raised against the draft accession agreement by the Court of Justice in Opinion 2/13. Those caveats can be overcome only by means of a Lisbon Treaty amendment. The latter requires unanimity among the 28 Member States which cannot be realistically achieved under the current state of affairs within the Union.

2. EU Competition Decisions and their Relationship with Article 6(1) ECHR

The following lines deal with the object of judicial review in EU competition law, namely Commission decisions on antitrust and merger cases. The process for their adoption and the rights afforded to the entities involved will be discussed first. These two parameters will give us an idea about the issues the EU courts are subsequently called to handle whereas they can also be taken into account by the ECtHR when it assesses the standard of judicial control of domestic tribunals. Secondly, it will be demonstrated that EU competition acts fall within the ambit of Article 6(1) ECHR which applies only to civil or criminal disputes. Lastly, it will be explained that the pivotal guarantees stemming from the above provision cannot be offered in full by the Commission. Inevitably, the burden has to fall on the shoulders of the EU judges.

2.1. The Adoption of EU Competition Decisions

For the purpose of keeping competition undistorted across the internal market, the Commission adopts decisions affecting the interests of natural and legal persons.[76] It would be useful to become acquainted with the legal framework under which those

[76] See Protocol (No 27) on the internal market and competition [2008] OJ C115/01.

measures are taken, just like the EU judicature has to do in order to effectively review them. Focusing on every small detail would take us outside the scope of this thesis. Consequently, I will present in a concise manner the administrative procedure generating antitrust and merger decisions, the rights of the parties and the protection afforded to them by the EU.

2.1.1. The antitrust procedure

The term 'antitrust' encompasses all matters relating to the application of Articles 101 and 102 TFEU.[77] Article 101 TFEU prohibits:

> [A]ll agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market (…).[78]

Article 102 TFEU stipulates that:

> Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States (…).

Suspected violations of the two aforementioned provisions are investigated, prosecuted and penalized by the Commission according to Article 105(1) TFEU and Regulation 1/2003.

[77] The term is used in the same context by the Commission, see <http://ec.europa.eu/competition/antitrust/overview_en.html> accessed 02 October 2018.

[78] An undertaking is 'every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed', see Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH* [1991] ECR I-1979, para 21; Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751, para 77, Case C-516/15 P *Akzo Nobel NV and Others v Commission* EU:C:2017:314, para 47.

Acting on its own initiative or on a complaint from either a person with a legitimate interest or a Member State,[79] the Commission will search for evidence and indicia substantiating the existence of an antitrust offence.[80] If and when it thinks that it has collected sufficient material, it will initiate the inter partes stage by sending a statement of objections to the suspected parties for them to reply within a time limit of at least four weeks.[81] If its objections are not allayed by the reply, it will issue a decision by virtue of Article 7 of Regulation 1/2003 requiring the undertakings concerned to bring their infringement of Article 101 or of Article 102 TFEU to an end. In circumstances of urgency, it can issue interim measures beforehand.[82]

Instead of making a finding of violation, the Commission has for reasons of procedural economy the broad discretion to take a final decision pursuant to Article 9 of Regulation 1/2003 rendering binding the behavioural or structural commitments already offered by the addressees. It can do so solely in situations where it does not intend to impose a fine for the conduct in question.[83] The accepted commitments must be sufficient to meet the concerns it has expressed in its preliminary assessment, a formal act following an investigation of the case.[84]

[79] Regulation 1/2003, note 45, Article 7(1) and 7(2).

[80] The Commission may request information from undertakings, hold interviews, inspect books, records, business and private property, see Regulation 1/2003, Articles 18-21.

[81] 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, Article 10 and 17(2). The time limit may be shortened to just one week for proceedings with a view to adopting interim measures.

[82] Regulation 1/2003, note 45, Article 8.

[83] ibid, recital 13.

[84] The statement of objections may be neglected for present purposes, see *Ship classification* (Case COMP/39.416) Commission Decision C(2009)7796 [2010] OJ C2/5; Paul McGeown & Juliette Orologas, 'You Made a Pledge, Then Keep Your Promise: Article 9 Commitments Decisions in European Antitrust Law' (March 2013) 3 CPI Antitrust Chronicle 1, 4. However, if sent, the statement of objections can serve as a preliminary assessment, see Wouter P.J. Wils, 'Settlements of EU Antitrust Investigations: Commitment Decisions under Article 9 of Regulation No. 1/2003' (2006) 29 World Competition 345, 353.

Each undertaking or association of undertakings breaching Article 101 or Article 102 TFEU or a commitment decision or an interim measure is liable to pay, depending on the gravity and duration of its infringement, a fine of up to 10% of its aggregate turnover in the preceding business year.[85] There is also the risk of incurring fines, albeit smaller, for procedural offences as well as periodic penalty payments for failure to comply with any decision regarding Regulation 1/2003.[86]

2.1.2. The merger control procedure

Contrary to Regulation 1/2003, Regulation 139/2004 ('the Merger Regulation') sets up an ex ante system of administrative control. It empowers the Commission to authorize or block impending 'concentrations'[87] depending on their ability to significantly impede effective competition in the internal market.[88]

If a concentration has an EU dimension,[89] a parameter contingent on the combined worldwide and EU turnovers of the undertakings concerned,[90] the merging entities or the ones acquiring control are compelled to suspend its implementation[91]

[85] Regulation 1/2003, note 45, Article 23(2) and 23(3).

[86] ibid, Articles 23(1) and 24. Such fines may not exceed 1% of the aggregate annual turnover of the undertaking concerned and periodic penalty payments cannot exceed 5% of its average daily turnover per day of delay to comply.

[87] A concentration is a change of control on a lasting basis resulting: (a) from the merger of two or more previously independent undertakings, or (b) the acquisition by at least one undertaking of the whole or parts of one or more other undertakings; see Merger Regulation, note 46, Article 3.

[88] Merger Regulation, note 46, Article 2(2) and 2(3).

[89] Even if a concentration does not have an EU dimension, the parties or a Member State may still ask the Commission to examine it, see Merger Regulation, Articles 4(5) and 22.

[90] An EU dimension shall exist where the worldwide and the EU-wide turnovers of the undertakings concerned both exceed certain thresholds, unless more than two-thirds of their EU-wide turnover is achieved in a single Member State, see Merger Regulation, Article 1.

[91] Merger Regulation, Article 7. For further analysis on this obligation, see Frederic Depoortere and Stephane Lelart, 'The Standstill Obligation in the ECMR' (2010) 33 World Competition 103.

and notify it to the Commission together with certain business information.[92] The Commission must establish whether the transaction should be approved unconditionally,[93] approved subject to the commitments the parties have offered,[94] prohibited[95] or declared to fall out of the scope of the Merger Regulation.[96] The case may also be referred, even before notification, to a Member State if the latter comprises a distinct market where competition is significantly threatened by the transaction.[97]

The administrative investigation will start after the receipt of a complete notification.[98] Phase I investigation will contain a concise, preliminary assessment of the effects of the merger or acquisition on competition across the EU whereas Phase II investigation will entail an in-depth, final economic assessment of those effects.[99] The Commission shall initiate Phase II only if it entertains serious doubts as to the compatibility of the concentration with the internal market that were not allayed by

[92] Merger Regulation, Article 4; Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings [2004] OJ L133/1, Article 4 and Annexes.

[93] Merger Regulation, Articles 6(1)(b) and 8(1).

[94] ibid, Articles 6(2) and 8(2). See also Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 [2008] OJ C267/1.

[95] Merger Regulation, Article 8(3).

[96] ibid, Article 6(1)(a). There is no presumption of compatibility or incompatibility of the notified concentration with the internal market, see Case C-413/06 P *Bertelsmann AG and Sony Corporation of America v Independent Music Publishers and Labels Association (Impala)* [2008] ECR I-4951, para 48; Case T-79/12 *Cisco Systems, Inc. and Messagenet SpA v Commission* EU:T:2013:635, paras 47-48.

[97] Merger Regulation, note 46, Articles 4(4) and 9.

[98] The Commission can request additional information from the parties, hold interviews, inspect books, records and business property, see Merger Regulation, Articles 11 to 13.

[99] Merger Regulation, Article 10(1), 10(3), 10(4) and 10(6). Phase I and Phase II investigations shall last no more than 25 and 90 working days respectively. These periods can be increased to 35 and 125 days respectively or suspended under certain circumstances. Where the Commission has not taken a decision pursuant to the above time limits, the concentration shall be deemed approved.

any commitments proposed during Phase I.[100] In the event that it intends to adopt a prohibition decision, it shall address to the undertakings concerned a statement of objections and set a reasonable time limit for them to reply.[101]

Lastly, reference ought to be made to the sanctions provided for delinquent entities. The Commission may require the dissolution of a transaction unlawfully put into effect as well as take interim measures to repair the distorted competition.[102] It may also impose a fine not exceeding 10% of the aggregate turnover of any undertaking which implemented a concentration with an EU dimension before or without getting the green light from the Commission or which did not adhere to a condition incorporated in an approval decision.[103] Smaller fines and periodic penalty payments may be inflicted for failure to comply with certain acts issued under the Merger Regulation, principally of procedural nature.[104]

2.1.3. The procedural rights of the involved parties

The entities concerned as well as interested third parties have been granted certain rights which enhance the fairness of the administrative competition procedure,[105] a

[100] Merger Regulation, Article 6(1)(c).

[101] ibid, Article 18; Regulation 802/2004, note 92, Article 13.

[102] Merger Regulation, Article 8(4) and 8(5).

[103] ibid, Article 14.

[104] ibid, Articles 14(1) and 15. Such fines may not exceed 1% of the aggregate annual turnover of the undertaking concerned and periodic penalty payments cannot exceed 5% of its average daily turnover for each working day of delay.

[105] See the detailed chapter of Anca Chirita, 'Procedural Rights in EU Administrative Competition Proceedings: *Ex Ante* Mergers' in Caroline Cauffman and Qian Hao (eds), *Procedural Rights in Competition Law in the EU and China* (Springer 2014).

quality the ECtHR may give attention to when appraising the adequacy of the ensuing judicial review.[106]

Firstly, undertakings and associations of undertakings put through to an investigative measure must be informed of their procedural status together with the subject matter and purpose of the investigation.[107] Secondly, they may seek to protect the confidentiality of their written communications with independent lawyers by claiming legal professional privilege.[108] Thirdly, they have a limited right against self-incrimination, meaning that they cannot be compelled to admit directly the perpetration of an infringement.[109] Fourthly, they may ask an extension of the imposed time limit for replying to requests of information under Regulation 1/2003.[110] Fifthly, they may object to the disclosure of their business secrets to others.[111]

The parties to whom a statement of objections has been addressed may develop their arguments not only in writing, but also to an oral hearing should they so

[106] See Chapter 3.2.1.

[107] Decision 2011/695/EU of the President of the European Commission of 13 October 2011 on the function and terms of reference of the Hearing Officer in competition proceedings [2011] OJ L275/29, Article 4(2)(d).

[108] ibid, Article 4(2)(a). See also Case C-155/79 *AM & S Europe Limited v Commission* [1982] ECR 1575, para 22; Joined Cases T-125 and 253/03 *Akzo Nobel Chemicals and Akcros Chemicals v Commission* [2007] ECR II-3523, paras 78, 169 and 177.

[109] Decision 2011/695/EU, Article 4(2)(b). See also Regulation 1/2003, note 45, recital 23; Merger Regulation, note 46, recital 41; Case C-374/87 *Orkem v Commission* [1989] ECR 334, para 35. Undertakings do not have the right to not divulge information to the Commission from which the latter may infer that they committed an infringement, see Joined Cases C-204, 205, 211, 213, 217 and 219/00 P *Aalborg Portland and Others v Commission* [2004] ECR I-123, para 61; Case C-411/15 P *Timab Industries and Cie financière et de participations Roullier (CFPR) v Commission* EU:C:2017:11, para 83.

[110] Decision 2011/695/EU, Article 4(2)(c).

[111] ibid, Article 8.

request.[112] They are entitled to access the file and obtain all the relevant documents without prejudice to confidential information.[113] Moreover, they can ask for a longer deadline to respond to the Commission.[114]

Third parties proving a sufficient interest have the right to be heard, to access the file, to protect their business secrets and to request for more time to make their views known to the Commission.[115] Finally, where a commitment decision is to be adopted under Article 9 of Regulation 1/2003, they shall be given at least 30 days to submit their observations.[116]

All of the aforementioned procedural rights are safeguarded by the Hearing Officer of the Commission. The post is currently held by two individuals.[117] The Hearing Officer conducts the oral hearing and adopts decisions on the right of the parties to be informed of their procedural status, applications by interested persons to be heard, access to the file, the disclosure of business secrets and the extension of time limits. Furthermore, she issues non-binding reasoned recommendations to the

[112] Regulation 1/2003, note 45, Article 27(1); Regulation 773/2004, note 81, Article 12; Merger Regulation, Article 18; Regulation 802/2004, note 92, Article 14. See also Article 41(2)(a) of the Charter.

[113] Regulation 1/2003, Article 27(2); Regulation 773/2004, Articles 15-16; Merger Regulation, Article 18(3); Regulation 802/2004, Articles 17 and 18. See also Article 41(2)(b) of the Charter.

[114] Decision 2011/695/EU, note 107, Article 9.

[115] Regulation 1/2003, note 45, Article 27(3); Regulation 773/2004, note 81, Articles 7, 8, 13 and 16; Merger Regulation, note 46, Article 18(4); Regulation 802/2004, note 92, Articles 16 and 17(2); Decision 2011/695/EU, Articles 6 and 8. Their attendance at an oral hearing may be refused, see Regulation 773/2004, Articles 6(2) and 13(2); Regulation 802/2004, Article 16(2); Decision 2011/695/EU, Article 6(2).

[116] Regulation 1/2003, Article 27(4).

[117] See <http://ec.europa.eu/competition/hearing_officers/hearing_officers.html> accessed 02 October 2018.

Commissioner for Competition over disputes on legal professional privilege and the right against self-incrimination.[118]

The Hearing Officer strengthens the adversarial elements and the integrity of the decision-making process. She is an official attached solely to the Commissioner of Competition.[119] She has no connection with the Commission's Directorate-General for Competition (DG Comp) which carries out investigative and prosecutorial actions.[120] Although she cannot determine the substantive matters of a given case, she is to a large extent capable of exercising independent and objective judgment on procedural questions.[121]

Finally, the undertakings and associations of undertakings concerned are entitled to contest aspects of the administrative procedure regardless from how the final act of the Commission concludes the whole case.[122] Decisions requesting information[123] or authorising inspections[124] and disputes over legal professional

[118] Decision 2011/695/EU, note 107, Articles 4-9. See also Pieter Van Cleynenbreugel, 'The hearing officer's extended mandate: whose special friend in the conduct of EU competition proceedings?' (2012) 33 ECLR 286, 288-290; Wouter P.J. Wils, 'The Role of the Hearing Officer in Competition Proceedings before the European Commission' (2012) 35 World Competition 431, 435-451.

[119] Decision 2011/695/EU, Article 2(2).

[120] ibid, recitals 5-6.

[121] See Anne MacGregor and Bogdan Gecic, 'Due Process in EU Competition Cases Following the Introduction of the New Best Practices Guidelines on Antitrust Proceedings' (2012) 3 JECLAP 425, 436.

[122] See James 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 Articles 81 and 82' in Claus-Dieter Ehlermann and Mel Marquis (eds), *European Competition Law Annual 2009: Evaluation of Evidence and its Judicial Review in Competition Cases* (Hart Publishing 2011) 212-213.

[123] See Regulation 1/2003, note 45, Article 18(3); Merger Regulation, note 46, Article 11(3); Case T-112/98 *Mannesmannröhren-Werke AG v Commission* [2001] ECR II-0729; Case T-297/11 *Buzzi Unicem SpA v Commission* EU:T:2014:122.

[124] See Regulation 1/2003, Articles 20(4), 20(8) and 21(2); Merger Regulation, Article 13(4); Case T-135/09 *Nexans France SAS and Nexans SA v Commission* EU:T:2012:596; Case T-402/13 *Orange v Commission* EU:T:2014:991.

privilege[125] or confidential information[126] can all be submitted on their own to the General Court for examination.[127] An additional ex post guarantee is thereby provided against a possible arbitrariness of the Commission, a fact which is important for the observance of Article 6(1) ECHR[128] and also of Article 8 ECHR.[129]

2.2. The Applicability of Article 6(1) ECHR to EU Competition Decisions

Unlike the all-inclusive corresponding right of Article 47(2) of the Charter, the Convention's right to a fair trial applies exclusively to the determination of criminal charges and civil rights and obligations. Consequently, I need to establish the applicability of at least one of the two limbs of Article 6(1) ECHR to the substantive competition decisions of the Commission, namely the ones on infringements, concentrations of undertakings, antitrust commitments and complaints. Otherwise, the practical significance of the present thesis would be severely undermined. Irrespective of an alleged rebuttal of the *Bosphorus* presumption or the EU's possible accession to the ECHR, the ECtHR would always reject as inadmissible any

[125] See note 108.

[126] See Regulation 1/2003, Article 30; Case T-341/12 *Evonik Degussa GmbH v Commission* EU:T:2015:51; Case T-465/12 *AGC Glass Europe and Others v Commission* EU:T:2015:505.

[127] Decisions on interim measures can also be contested, see Regulation 1/2003, note 45, recital 33; Joined Cases C-228 and 229/82 *Ford of Europe Incorporated and Ford-Werke Aktiengesellschaft v Commission* [1984] ECR 1129; Case T-23/90 *Automobiles Peugeot SA and Peugeot SA v Commission* [1991] ECR II-0653.

[128] See Chapter 3.2.1.; *Société Métallurgique Liotard Frères v France* App no 29598/08 (ECtHR, 05 May 2011), paras 17-23.

[129] See *DELTA PEKÁRNY a.s. v the Czech Republic* App no 97/11 (ECtHR, 2 October 2014), paras 87-94; *Janssen Cilag S.A.S. v France* (dec.) App no 33931/12 (ECtHR, 21 March 2017); Veronica Pinotti, '*Janssen Cilag S.A.S. v. France*: Antitrust Dawn Raids do not Violate Human Rights Law in Case of Effective Judicial Review' (2018) 9 JECLAP 28.

challenge against the compatibility of the standard of judicial review in EU competition law with the right to a fair trial.

2.2.1. The applicability of the criminal limb

Since the EU is not a Contracting Party to the Convention, the ECtHR has never ruled if EU competition law comes under the criminal limb of Article 6(1) ECHR.[130]

In the interest of solving the problem, I will outline the general criteria on the basis of which the criminal nature of a dispute is determined by Strasbourg and then scrutinize the way they have been applied to national competition cases. In the light of the two above steps, I shall be able to infer that the infringement decisions of the Commission belong to the wider realm of criminal law within the meaning of the Convention.

2.2.1.1. The *Engel* criteria

In order to appraise whether criminal a criminal charge exists, the ECtHR uses the so called '*Engel* criteria', whose initial version was developed in the namesake judgment.[131] Those are: (a) the classification of the offence in domestic law, (b) the very nature of the offence, (c) the nature and degree of severity of the penalty that the person concerned risks incurring.[132]

[130] In *M. & Co.*, note 43, para 29, the now abolished European Commission of Human Rights maintained, without providing a detailed explanation, that the EU antitrust proceedings would fall under Article 6(1) ECHR had they been conducted by national and not European authorities.

[131] *Engel and Others v the Netherlands* (1976) Series A no 22, para 82.

[132] *Escoubet v Belgium* ECHR 1999-VII 37, para 32; *Ezeh and Connors v the United Kingdom* ECHR 2003-X 101, paras 90-107; *Blokhin v Russia* ECHR 2016, paras 179-180.

The three criteria are alternative.[133] Every single one of them suffices to ascribe a penal quality to a charge. Still, the adoption of a 'cumulative approach' is permissible when the separate analysis of each factor cannot lead to a definite conclusion.[134]

The first criterion has 'only a relative value'.[135] If the Contracting States possessed the power to bind the ECtHR by classifying a wrongdoing as disciplinary or administrative instead of criminal, the operation of the Convention would be 'subordinated' to their sovereign will.[136]

The nature of the offence is defined by its scope. Offences addressed to the whole population pursue general objectives and are usually penal whereas ones directed towards 'a group possessing special status' have limited application and are more likely to be disciplinary.[137]

As to the nature of the penalty, a punitive and deterrent purpose would place it within the criminal sphere.[138] That would not happen with measures intended as pecuniary compensation for damage.[139] The degree of severity of the penalty is

[133] *Mamidakis v Greece* App no 35553/04 (ECtHR, 11 January 2007), para 20; *Chatzinikolaou v Greece* App no 33997/06 (ECtHR, 21 February 2008), para 19; *Kapetanios and Others v Greece* App no 3453, 42941/12 and 9028/13 (ECtHR, 30 April 2015), para 52.

[134] *Bendenoun v France* (1994) Series A no 284, para 47; *Garyfalloy AEBE v Greece* 1997-V 1830, para 33; *Maresti v Croatia* App no 55759/07 (ECtHR, 25 June 2009), para 57.

[135] *Öztürk v Germany* (1984) Series A no 73, para 52; *Albert v Romania* App no 31911/03 (ECtHR, 16 February 2010), para 31; *Blokhin*, note 132, paras 179-180.

[136] *Engel*, note 131, para 81; *Campbell and Fell v the United Kingdom* (1984) Series A no 80, para 68; *Ezeh and Connors*, note 132, para 100.

[137] *Weber v Switzerland* (1990) Series A no 177, para 33; *Flisar v Slovenia* App no 3127/09 (ECtHR, 29 September 2011), para 26; *Kasparov and Others v Russia* App no 21613/07 (ECtHR, 03 March 2013), para 42.

[138] *Jussila v Finland* ECHR 2006-XVI 1, para 38; *Maresti*, note 134, para 60; *Mikhaylova v Russia* App no 46998/08 (ECtHR, 19 November 2015), para 64.

[139] *Ziliberberg v Moldova* App no 61821/00 (ECtHR, 1 February 2005), para 33; *Kovacs v Hungary* App no 8174/05 (ECtHR, 17 July 2008), para 15; *Igor Pascari v the Republic of Moldova* App no 25555/10 (ECtHR, 30 August 2016), para 21.

dependent on the maximum potential level provided for the committed illegal act whilst the level actually imposed is merely a relevant factor.[140] Hence, the risk of imprisonment[141] or of a substantial fine[142] would lend a penal connotation to the charge regardless of the possible lenience of the final decision.

2.2.1.2. The application of the *Engel* criteria in national competition cases

We shall now have a look at how the *Engel* criteria have been employed in Strasbourg disputes involving national competition law.

At the outset, there has been so far solely one occasion in which the ECtHR decided that an antitrust violation was not covered by the criminal limb of Article 6(1) ECHR. In *Neste,*[143] the Russian authorities found the applicant companies guilty of concerted practices and ordered them to pay the Treasury the profit they had obtained from their unlawful activity. The offence was not considered criminal for three major reasons: (a) it was not qualified as such in Russian law, (b) the domestic legislation exclusively concerned commodity markets and did not have universal application, (c) most crucially, the money the offenders had to pay constituted pecuniary compensation for damage and not punishment to prevent re-offending.[144]

[140] *Ezeh and Connors*, note 132 , para 120; *Balsytė-Lideikienė v Lithuania* App no 72596/01 (ECtHR, 4 November 2008), paras 59-60; *Dubus S.A. v France* App no 5242/04 (ECtHR, 11 June 2009), para 37.

[141] *Galstyan v Armenia* App no 26986/03 (ECtHR, 15 November 2007), paras 59-60; *Sergey Zolotukhin v Russia* ECHR 2009-I 291, para 56; *Alenka Pečnik v Slovenia* App no 44901/05 (ECtHR, 27 September 2012), paras 32-35.

[142] *Janosevic v Sweden* ECHR 2002-VII 1, para 69; *Pákozdi v Hungary* App no 51269/07 (ECtHR, 25 November 2014) paras 21-22. See also *Jussila*, note 138, para 38.

[143] *OOO Neste St. Petersburg, ZAO Kirishiavtoservice, OOO Nevskaya Toplivnaya, ZAO Transservice, OOO Faeton, OOO PTK-Service v Russia* App no 69042, 69050, 69054, 69055, 69056 and 69058/01 (ECtHR, 3 June 2004)

[144] See also *Rigolio v Italy* (dec.) App no 20148/09 (ECtHR, 13 May 2014), paras 37-38.

On the contrary, it stated in *Lilly France* that according to the criteria of its case law the contested fine for an abuse of a dominant position related to the criminal head of the right to a fair trial.[145] Since the opposing sides had not disagreed on this, it did not elaborate any further.

In *Jussila*, the Court cited the example of *Societé Stenuit* so as to demonstrate that competition law belongs to the broader criminal sphere.[146] In the latter case, the now abolished European Commission of Human Rights had adopted a report accepting the relevance of the criminal part of Article 6(1) ECHR to a 50,000 franc fine for bid rigging in France.[147] It had given weight to the last two *Engel* criteria. The domestic legislation aimed at maintaining free competition in the French market and therefore affected general interests of society. The largest possible penalty, equaling 5% of the applicant company's annual turnover, had a deterrent goal and the penalty actually imposed was not 'negligible'.

In *Menarini*, the ECtHR applied itself the *Engel* criteria to a 6 million euro fine inflicted by the Italian competition authority on a pharmaceutical company for participating in a cartel.[148] The Court followed the approach of the European Commission of Human Rights in *Societé Stenuit*. Firstly, it pointed out that the classification of anti-competitive practices as non-criminal in Italian law was not decisive. Secondly, the competition authority impacted, through its oversight on

[145] *Lilly France S.A. v France* (dec.) App no 53892/00 (ECtHR, 14 October 2003). In *Fortum Corporation v Finland* App No 32559/96 (ECtHR, 15 July 2003), para 40, the respondent country had not contested the applicability of Article 6(1) ECHR to an abuse of a dominant position and the ECtHR did not think it was necessary to determine whether it applied under its civil or criminal head.

[146] *Jussila*, note 138, para 43. See also *Hüseyin Turan v Turkey* App no 11529/02 (ECtHR, 4 March 2008), para 32.

[147] *Societé Stenuit v France* (report of the European Commission of Human Rights, 30 May 1991) Series A no. 232-A, paras 60-67. The case was never adjudicated by the ECtHR because the application was withdrawn, see *Societé Stenuit v France* (1992) Series A no 232-A, paras 8-9.

[148] *Menarini*, note 3, paras 38-41.

agreements restrictive to competition, on the general interests of society normally safeguarded by criminal law.[149] Thirdly, the fine incurred was punitive and preventive because it intended to punish an irregularity and dissuade re-offending. Furthermore, its level was described as 'high'. On account of the nature of the offence and the nature and degree of severity of the sanction, the judgment concluded that the charge at issue was criminal.[150]

2.2.1.3. The criminal character of infringements of EU competition law

Having in mind the Strasbourg jurisprudence, I will use the three *Engel* criteria in order to assess whether infringements of Articles 101 and 102 TFEU, of commitments decisions and of the Merger Regulation would fall under Article 6(1) ECHR.[151]

To begin with, Article 23(5) of Regulation 1/2003 and Article 14(4) of the Merger Regulation stipulate that Commission decisions imposing fines for competition law violations 'shall not be of a criminal law nature'. The EU judicature has confirmed the validity of this declaration on several occasions.[152] However, it recently clarified in *Sasol* that competition law is 'similar to criminal law', but simply not 'at the heart' of it.[153] In addition, in the Air Freight cases it lent particular

[149] See also *Debút Zrt. and Others* (dec.) App no 24851/10 (ECtHR, 20 November 2012), para 3.

[150] *Menarini*, note 3, paras 42-45.

[151] Commission decisions examining concentrations, accepting commitments and rejecting complaints neither determine any charges nor impose any penalties.

[152] *Aalborg Portland*, note 109, para 200; Joined Cases T-109, 118, 122, 125, 126, 128, 129, 132 and 136/02 *Bolloré SA and Others v Commission* [2007] ECR II-947, para 86; Case T-191/06 *FMC Foret, SA v Commission* [2011] ECR II-2959, para 138.

[153] Case T-541/08 *Sasol and Others v Commission* EU:T:2014:628, para 206.

significance to the ECtHR's judgment in *Menarini*.[154] In a plain display of realism, it conceded that EU antitrust penalties in fact 'pertain to criminal matters' for the purposes of Article 6 ECHR.

As to the nature of the offences, the prohibitive provisions of EU competition law apply to all markets of products and services, not just to commodities as the Russian legislation in *Neste*. Their objective is to maintain free and undistorted competition across the EU. Thus, similarly to penal law, they protect general interests of society.

Penalties in EU competition law have a punitive and preventive nature.[155] They serve as punishment to deter actual and prospective offenders from engaging in illegal conduct. Although they concurrently seek to remove the profits accumulated by anti-competitive practices, they may very well surpass that amount.[156] Besides, pecuniary compensation for damage can only be obtained through private actions before national courts and not through fines.[157]

The maximum potential pecuniary sanctions are considerably harsh. As we have already seen, they can reach up to 10% of the aggregate annual turnover of each

[154] Case T-9/11 *Air Canada v Commission* EU:T:2015:994, para 33; Case T-28/11 *Koninklijke Luchtvaart Maatschappij NV v Commission* EU:T:2015:995, para 38; Case T-56/11 *SAS Cargo Group A/S and Others v Commission* EU:T:2015:990, para 39.

[155] See Case T-59/02 *Archer Daniels Midland Co v Commission* [2006] ECR II-3627, para 130; *Almamet*, note 11, para 271; Case T-436/10 *HIT Groep BV v Commission* EU:T:2015:514, para 155.

[156] Case T-460/13 *Sun Pharmaceutical Industries Ltd, formerly Ranbaxy Laboratories Ltd and Ranbaxy (UK) Ltd v Commission* EU:T:2016:453, para 323; Case T-467/13 *Arrow Group ApS and Arrow Generics Ltd v Commission* EU:T:2016:450, para 404; Case T-471/13 *Xellia Pharmaceuticals ApS and Alpharma, LLC, formerly Zoetis Products LLC v Commission* EU:T:2016:460, para 429.

[157] See Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and the European Union [2014] OJ L349/1; Case C-453/99 *Courage Ltd v Bernard Crehan and Bernarnd Crehan v Courage Ltd and Others* [2001] ECR I-6297, paras 26-28; Case T-480/15 *Agria Polska sp. z o.o. and Others v Commission* EU:T:2017:339, paras 80-81.

undertaking which has breached Article 101 or Article 102 TFEU or a commitment decision or the provisions of EU Merger Control.[158] Given that there are companies with an annual turnover of billions of euros, they are liable to fines whose level may outweigh both the 'high' amount of 6 million euros imposed by the Italian competition authority on Menarini and the record amount of 4.34 billion euros inflicted by the Commission on Google.[159]

It appears that the offences in EU competition law differ from the one in *Neste*, but are akin to the ones in *Societé Stenuit* and *Menarini*. Notwithstanding their formal classification as non-criminal in the EU legal order, they have a general scope of application, a punitive and deterrent aim and the perpetrators risk incurring severe financial sanctions.[160] Irrespective of the actual imposition of a fine, the cumulative examination of the second and third *Engel* criteria drives me to the conclusion that the criminal limb of Article 6(1) ECHR would be applicable to Commission decisions on infringements of EU competition law.[161]

2.2.2. The applicability of the civil limb

Do EU competition law decisions deal with civil rights and obligations? The ECtHR has never expressed its authoritative opinion on the subject and neither has done so

[158] Regulation 1/2003, note 45, Article 23(2); Merger Regulation, note 46, Article 14(2).

[159] See Commission, 'Commission Fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine' (Press Release, 18 July 2018) <http://europa.eu/rapid/press-release_IP-18-4581_en.htm> accessed 02 October 2018.

[160] All these also apply to penalties for failure to comply with investigative or interim measures under Regulation 1/2003 and the Merger Regulation.

[161] See also Donald Slater, Sebastien Thomas and Denis Waelbroeck, 'Competition Law Proceedings before the European Commission and the Right to a Fair Trial: No Need for Reform?' (2009) 5 European Competition Journal 97, 121; Venit, note 122, 179; Wouter P.J. Wils 'The Compatibility with Fundamental Rights of the EU Antitrust Enforcement System in Which the European Commission Acts Both as Investigator and as First-Instance Decision Maker' (2014) 37 World Competition 5, 6-7.

for any corresponding national decisions. Hence, to provide an answer to the above question, I should draw inferences from the general jurisprudence on allegedly civil disputes.

2.2.2.1 The principles stemming from the case law of the ECtHR

Certain principles have been developed for deciding about the applicability of the civil limb of the right to a fair trial in Strasbourg cases.

At the outset, there must be a 'contestation', viz. a disagreement requiring 'determination', over a right recognized at least on arguable grounds under domestic law.[162] The ECtHR may not create itself a substantive right that has no legal basis in the respondent country.[163]

On the contrary, the term 'civil' is autonomous.[164] The administrative or other character of the national legislation and that of the competent authority both have indicative value.[165] The ECtHR may not have enunciated an exact definition of its own, but private law rights such as ones relating to contracts[166] or family affairs[167] together with business related issues such as the running of a clinic,[168] the license to

[162] *Boulois v Luxembourg* ECHR 2012-II 385, paras 90 and 95-105; *Károly Nagy v Hungary* ECHR 2017, para 60; *Regner v the Czech Republic* ECHR 2017, para 99.

[163] *Boulois*, para 91; *Károly Nagy*, para 61; *Regner*, para 100.

[164] *Roche v the United Kingdom* ECHR 2005-X 87, para 119; *Micallef v Malta* ECHR 2009-V 289, para 84; *Naït-Liman v Switzerland* App no 51357/07 (ECtHR, 15 March 2018), para 106.

[165] *Benthem v the Netherlands* (1985) Series A no 97, paras 34-35; *Micallef*, para 74; *Naït-Liman*, para 106.

[166] *Ringeisen v Austria* (1971) Series A no 13, para 94; *Lolić v Serbia* App no 44095/06 (ECtHR, 22 October 2013), paras 5-8 and 28-30.

[167] *Airey v Ireland* (1979) Series A no 32, paras 20-28.

[168] *König v Germany* (1978) Series A no 27, paras 92-95.

sell alcoholic beverages[169] or the compulsory administration of a bank[170] have all been held to be 'civil' in nature.[171]

The contestation must be 'genuine and serious'.[172] Although the applicant does not need to win, his claim should not be frivolous or vexatious or lacking in foundation.[173] It may concern the actual existence of a civil right or its scope and manner of exercise.[174]

Lastly, the outcome of the domestic proceedings must be 'directly decisive' for the civil right in question.[175] Tenuous connections or remote consequences, as for example the abstract effect of a power station on the physical integrity of citizens,[176] do not suffice to bring Article 6(1) ECHR into play.

2.2.2.2. The civil character of EU competition decisions

It is time to place the principles deployed at the previous subsection in EU competition law, an area where the Commission regulates the conduct of undertakings on the market.

[169] *Tre Traktörer Aktiebolag v Sweden* (1989) Series A no 159, paras 41-44.

[170] *Credit and Industrial Bank v the Czech Republic* ECHR 2003-XI 25, paras 64-67. See also *Feldman and Slovyanskyy Bank v Ukraine* App no 42758/05 (ECtHR, 21 December 2017), para 40.

[171] See also the relevant examples in William A. Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2015) 273-274. Taxation, despite its pecuniary repercussions, is not civil in nature because it forms 'part of the hard core of public-authority prerogatives', see *Ferrazzini v Italy* ECHR 2001-VII 349, para 29.

[172] *Rolf Gustafsson v Sweden* ECHR 1997-IV 1160, paras 38-39; *Skorobogatykh v Russia* (dec.) App no 37966/02 (ECtHR, 8 June 2006); *Oleynikov v Russia* App no 36703/04 (ECtHR, 14 March 2013), para 50.

[173] See *Petrović and Others v Montenegro* App no 18116/15 (ECtHR, 17 July 2018), para 37.

[174] *Boulois*, note 162, para 90; *Károly Nagy*, note 162, para 60; *Regner*, note 162, para 99.

[175] ibid; *Regner*, para 119.

[176] *Balmer-Schafroth and Others v Switzerland* ECHR 1997-IV 1357, paras 32-40.

In the EU legal order, Article 16 of the Charter recognizes the freedom to conduct a business. Natural and legal persons are entitled to exercise an economic activity, form contracts unrestrainedly and compete freely across the internal market.[177] Matters pertaining to the operation of a private business belong to the civil sphere according to the ECtHR. It transpires that Article 16 of the Charter comprises a civil right. Furthermore, Articles 4(2)(f), 12 and 169 TFEU together with Article 38 of the Charter give rise to a right to consumer protection. The latter is civil in nature because it covers the relationship between two private parties, namely the consumer and the trader.[178]

Decisions on the control of concentrations affect considerably the strategy and financial affairs of the undertakings involved as well as the commercial situation of rival entities which might be compelled to compete with an artificially dominant player.[179] Decisions making commitments binding pursuant to Article 9 of Regulation 1/2003 restrict the market structure or behavior of their addressees and may also impinge on vital trade interests of counterparties and competitors.[180] Decisions turning down complaints can lead to the foreclosure of competitors or to consumer harm by allowing certain undertakings to continue their anti-competitive practices.

[177] See Charter explanations, note 10, Explanation on Article 16; Case C-283/11 *Sky Österreich GmbH v Österreichischer Rundfunk* EU:C:2013:28, paras 41-43; Case C-477/14 *Pillbox 38 (UK) Limited, trading as Totally Wicked v Secretary of State for Health* EU:C:2016:34, paras 154-156.

[178] See also David Harris, Michael O'Boyle, Edward Bates and Carla Buckley, *Harris, O'Boyle & Warbrick Law of the European Convention on Human Rights* (3rd edn, OUP 2014) 380. The trader can be a state-owned enterprise carrying out an economic activity.

[179] See Case T-119/02 *Royal Philips Electronics NV v Commission* [2003] ECR II-1433, paras 280-286; Case T-282/06 *Sun Chemical Group BV, Siegwerk Druckfarben AG and Flint Group Germany GmbH v Commission* [2007] ECR II-2149, paras 12 and 49; *Cisco*, note 96, para 36.

[180] See Case T-170/06 *Alrosa Company Ltd v Commission* [2007] ECR II-2601, paras 36-41; Case T-76/14 *Morningstar, Inc v Commission* EU:T:2016:481, paras 27-36. There is no right to a commitment decision under EU law, but once such binding decision has been adopted it impacts on the rights of its addressees and of third parties.

It turns out that the acts of the Commission controlling mergers, accepting commitments and rejecting complaints produce 'genuine and serious' disputes which are 'directly decisive' for the scope and manner of exercise of the EU civil right to conduct a business and, as concerns the last category of acts, of the EU civil right to consumer protection as well. Consequently, all those measures would fall under the civil head of Article 6(1) ECHR if the EU were a Contracting Party to the Convention.[181]

One could argue that the same would be true with proceedings relating to pecuniary sanctions for infringements of EU competition law.[182] However, resolving this problem appears redundant.[183] As it was displayed in the previous section, Article 6(1) ECHR applies to such sanctions anyway under its criminal limb.

[181] See also Denis Waelbroeck and Denis Fosselard, 'Should the Decision-Making Power in EC Antitrust Procedures be left to an Independent Judge? – The Impact of the European Convention of Human Rights on EC Antitrust Procedures' (1994) 14 Yearbook of European Law 111, 124-125; Wouter P.J. Wils, '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, 209; Heike Schweitzer, 'Judicial Review in EU Competition Law' in Damien Geradin & Ioannis Lianos (eds), *Handbook On European Competition Law* (Edward Elgar Publishing 2013) 532-533.

[182] Commission decisions ordering inspections and requesting information would also come under the civil head of Article 6(1) ECHR since they affect the rights to respect for private and family life (Article 7 of the Charter) and to protection of personal data (Article 8 of the Charter) respectively, see *Compagnie de gaz de pétrole Primagaz v France* App no 29613/08 (ECtHR, 21 December 2010), paras 23-33. The civil limb of Article 6(1) ECHR would probably also apply to Commission decisions ordering interim measures, see *Micallef*, note 164, paras 78-86.

[183] See also Chapter 3.3.3.

2.3. The Compatibility of EU Competition Decisions with Article 6(1) ECHR

It has been now demonstrated that the competition decisions of the Commission come within the ambit of Article 6(1) ECHR. Persons subject to them have the right to be heard by an independent and impartial tribunal established by law. On the one hand, the Commission is unable to provide the totality of these guarantees. On the other hand, the foregoing deficiency can be potentially remedied by the EU courts and thereby the Convention will not be eventually contravened.

2.3.1. The Commission is not an independent and impartial tribunal

For the purposes of the right to a fair trial, the establishment and the jurisdiction of the Commission are clearly prescribed by the EU Treaties and Regulations.[184] Its independence and impartiality in competition cases are correctly in question nonetheless.

The ECtHR has specified that a tribunal must be independent of the executive and also of the parties.[185] The Commission ensures the application of the Treaties, implements the EU budget and exercises coordinating, executive and management tasks.[186] Since the executive power 'is in fact vested in it',[187] it cannot be considered

[184] See Articles 13 and 17 TEU. For competition law in particular, see Article 105 TFEU; Regulation 1/2003, note 45; Merger Regulation, note 46.

[185] *Beaumartin v France* (1994) Series A no 296-B, para 38; *Pohoska v Poland* App no 33530/06 (ECtHR, 10 January 2012), para 34; *Backović v Serbia* App no 47997/06 (ECtHR, 7 February 2012), para 46.

[186] See Article 17 TEU and Article 105 TFEU.

[187] Joined Cases C-209 to 215 and 218/78 *Heintz van Landewyck SARL and others v Commission* [1980] ECR 3125, para 80.

independent from it. Likewise, the fact that it prosecutes and aims to convict companies suspected of antitrust violations renders it akin to a party in the relevant proceedings.[188]

Impartiality denotes the absence of subjective and objective prejudice or bias.[189] Subjective impartiality must be presumed unless there is proof to the contrary.[190] In connection to objective impartiality, appearances may be important.[191] Article 6(1) ECHR shall not be fully observed if there is a 'consecutive exercise of investigative and judicial functions within one body'.[192] The ECtHR found this to be the case in *Grande Stevens* where the prosecuting and the decision-making branch of an Italian regulatory authority were under the supervision of a single chairman.

An analogous situation can be discerned inside the Commission whose different branches are not completely separated. More specifically, the Commissioner for Competition supervises both the officials of the DG Comp, who conduct the investigation, prepare the statement of objections and draft the final decision,[193] and the Hearing Officers, who safeguard the rights of the undertakings at the

[188] See the similar conclusion for the Greek Competition Commission in Case C-53/03 *Synaiterismos Farmakopoion Aitolias & Akarnanias (Syfait) and Others v GlaxoSmithKline plc and GlaxoSmithKline AEVE* [2005] ECR I-4609, para 33.

[189] *Micallef*, note 164, para 93; *Morice v France* ECHR 2015, para 73; *Mitrinovski v the former Yugoslav Republic of Macedonia* App no 6899/12 (ECtHR, 30 April 2015), para 35.

[190] *Micallef*, paras 93-95; *Morice*, paras 73-75; *Mitrinovski*, paras 35-36. Subjective impartiality refers to the personal conviction and behaviour of a particular judge.

[191] *Kleyn and Others v the Netherlands* ECHR 2003-VI 61, para 191; *Micallef*, paras 97-98; *Kamenos v Cyprus* App no 147/07 (ECtHR, 31 October 2017), paras 100-101.

[192] *Grande Stevens and Others v Italy* App no 18640, 18647, 18663, 18668 and 18698/2010 (ECtHR, 4 March 2014), para 137. See, mutatis mutandis, *Procola v Luxembourg* (1995) Series A no 326, para 45; *Hood v the United Kingdom* ECHR 1999-I 465, paras 74 and 76-77; *Dubus*, note 140, paras 53-62.

[193] Wils, 'The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function', note 181, 203.

administrative procedure.[194] The same Commissioner is concurrently competent to decide, together with the whole College of Commissioners by a majority vote, about the imposition of fines and the prohibition of mergers and acquisitions.[195]

As Wouter Wils rightly points out, this fusion of different, consecutive functions within the same body is capable of giving rise to prosecutorial bias.[196] The natural desire to confirm its initial suspicion that something was wrong, to justify the effort and resources devoted to the investigation and prosecution and to show high enforcement activity may steer the Commission towards decisions finding infringements and obstructing concentrations, by prohibiting them or subjecting their approval to conditions.

In the light of its executive duties and its triple role as investigator, prosecutor and adjudicator in EU competition law, I can conclude that the Commission is not an independent and impartial tribunal within the meaning of the Convention.[197]

[194] Decision 2011/695/EU, note 107, Article 2(1) and 2(2). See also Andreas Scordamaglia-Tousis, *EU Cartel Enforcement: Reconciling Effective Public Enforcement with Fundamental Rights* (Wolters Kluwer Law & Business 2013) 91-92; Ben Holles, 'The Hearing Officer: Thirty Years Protecting the Right to Be Heard' (2013) 36 World Competition 5, 19.

[195] Commission Decision 2010/138/EU, Euratom of 24 February 2010 amending its Rules of Procedure [2010] OJ L55/60, Article 8. See also Bo Vesterdorf, 'Judicial Review in EC Competition Law: Reflections on the Role of the Community Courts in the EC System of Competition Law Enforcement' (2005) 1(2) CPI Journal 3, 7; Scordamaglia-Tousis, note 194, 66.

[196] Wils, 'The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function', note 181, 214-217. See also Ian S. Forrester, 'Due Process in EC Competition Cases: A Distinguished Institution with Flawed Procedures' (2009) 34 EL Rev 817, 836-837.

[197] See also *Van Landewyck*, note 98, para 81; Joined Cases C-100 to 103/80 *Musique Diffusion française and others v Commission* [1983] ECR 1825, para 7; Cases T-56 and 73/09 *Saint-Gobain Glass France SA and Others v Commission* EU:T:2014:160, para 77.

2.3.2. The pivotal significance of the judicial control

EU competition decisions fall under the ambit of Article 6(1) ECHR and yet they are taken by a body not thoroughly complying with this provision. Nevertheless, the preceding shortcoming does not amount to an automatic violation of the Convention.

At the outset, the ECtHR plainly accepts the resolution of civil disputes by a non-judicial organ as long as they are subject to review by a tribunal affording all the guarantees of the right to a fair trial.[198] It turns out that the Commission is conditionally permitted to adopt merger and commitments decisions. The onus is transferred to the EU judges.

Things are more complicated in the criminal sphere. Pursuant to the case law, there are criminal charges of 'differing weight'.[199] Although there is not a clear cut separation criterion, offences carrying imprisonment and therefore a considerable degree of stigma usually belong to the hard core of criminal law[200] whereas ones not carrying a deprivation of liberty and therefore a significant stigma constitute minor offences.[201]

Major criminal charges have to be adjudicated exclusively by independent and impartial courts established by law. Any relevant defects at first instance cannot be corrected by ensuing review proceedings as was made clear in the judgments of *De*

[198] *Albert and Le Compte v Belgium* (1983) Series A no 68, para 29; *Sigma Radio Television Ltd v Cyprus* App no 32181/04 and 35122/05 (ECtHR, 21 July 2011), para 151; *Saghatelyan v Armenia* App no 7984/06 (ECtHR, 20 October 2015), para 39.

[199] *Jussila*, note 138, para 43; *Kammerer v Austria* App no 32435/06 (ECtHR, 12 May 2010), paras 26-27; *Suhadolc v Slovenia* (dec.) App no 57655/08 (ECtHR, 17 May 2011).

[200] *Zaicevs v Latvia* App no 65022/01 (ECtHR, 31 July 2007), para 55; *Marčan v Croatia* App no 40820/12 (ECtHR, 10 July 2014), para 38; Anca Chirita, 'The Judicial Review of the European Union Industrial Cartels' (2015) 18 German Journal of European Legal Studies 407, 424.

[201] See note 199.

Cubber,[202] involving a car-theft, and *Findlay*,[203] where the applicant had threatened to kill people with a pistol.

On the contrary, minor offences such as the traffic violation in *Öztürk*,[204] the noisy behaviour in *Kadubek*[205] and the tax surcharges in *Janosevic* may be punished by administrative authorities even if the imposed penalties 'come to large amounts'.[206] The criminal-head guarantees will not necessarily apply 'with their full stringency' for reasons of efficiency and procedural economy.[207] The administration operates faster than the courts. Where the stakes are not that high, it is allowed to relieve national justice systems from dispensable workload. Still, same as in civil disputes, affected parties must have the possibility of a later control by a body complying altogether with Article 6 ECHR.[208]

In *Menarini*, Italy did not breach the right to a fair trial notwithstanding that a non-judicial organ punished violations of the domestic antitrust legislation with a substantial fine.[209] According to Marco Bronckers and Anne Vallery, we should not draw implicit conclusions from this judgment.[210] However, acts speak louder than words. The ECtHR did not explicitly state so, but as a matter of fact it definitively

[202] *De Cubber v Belgium* (1984) Series A no 86, para 32.

[203] *Findlay v the United Kingdom* 1997-I 263, para 79.

[204] *Öztürk*, note 135, para 56.

[205] *Kadubek v Slovakia* ECHR 1998-VI 2518, para 57.

[206] *Janosevic*, note 142, para 81; *Västberga Taxi Aktiebolag and Vulic v Sweden* App no 36985/97 (ECtHR, 23 July 2002), para 93; *Steininger v Austria* App no 21539/07 (ECtHR, 17 April 2012), para 55.

[207] See note 199; Slater, Thomas and Waelbroeck, note 161, 126.

[208] *Lauko v Slovakia* ECHR 1998-VI 2508, para 64; *Malige v France* ECHR 1998-VII 2923, para 45; *Tolmachev v Estonia* App no 73748/13 (ECtHR, 9 July 2015), para 43.

[209] *Menarini*, note 3, paras 58-59. See also *Debút*, note 149, para 1.

[210] Marco Bronckers and Anne Vallery, 'Fair and Effective Competition Policy in the EU: Which Role for Authorities and Which Role for the Courts After *Menarini*?' (2012) 8 European Competition Journal 283, 297.

placed antitrust infractions and fines outside the hard core of criminal law by not fully applying the criminal-head guarantees of Article 6(1) ECHR to them.

Since infringements of EU competition law are of similar content to the ones of Italian competition law in *Menarini* and do not entail jail time and the stigma of traditional crimes, they also constitute minor offences.[211] The Commission can be lawfully entrusted with the task of investigating, prosecuting and penalizing them even with large pecuniary sanctions depending on the subsequent review of the EU courts.[212] The opposite position, espoused by many commentators in the academic literature prior to *Menarini*,[213] is no longer tenable from Strasbourg's perspective.

2.4. Synopsis

The current chapter did not grapple directly with the required or applied standard of judicial review in EU competition law. Its aim was to fully prepare the ground for such discussion.

We saw how the Commission finds and punishes infringements of Articles 101 and 102 TFEU, accepts commitments by companies suspected of those offences and determines the compatibility of concentrations between undertakings with the Merger Regulation. We also studied the rights of the entities involved in the administrative proceedings. Those rights, safeguarded by the Hearing Officers and

[211] See *Schindler* (CoJ), note 5, paras 33-35; *Saint-Gobain*, note 197, para 70; *Sasol*, note 153, para 206.

[212] See Wils, 'The Compatibility with Fundamental Rights of the EU Antitrust Enforcement System', note 161, 11; Scordamaglia-Tousis, note 194, 64-65.

[213] See Slater, Thomas and Waelbroeck, note 161, 127-129; Ian S. Forrester, 'A Challenge for Europe's Judges: The Review of Fines in Competition Cases' (2011) 36 EL Rev 185, 202-203.

subsequently by the CJEU, aim to protect firms from a possible ill-treatment by the Commission.

Next, just like the ECtHR has to do in actual cases before it, I established the applicability of the criminal limb of Article 6(1) ECHR to infringement decisions, due to their punitive and deterrent nature and the degree of severity of the potential penalties, and of its civil limb to merger, commitments and complaint decisions, on account that they affect the right to conduct a business or the right to consumer protection.

I then proved that the Commission is not an independent and impartial tribunal for the purposes of the Convention due to its triple role as investigator, prosecutor and judge. An enforcement system whereby the same administrative authority combines different functions is not prohibited in competition law, an area not belonging to the hard core of criminal law, provided that the subsequent judicial control will meet on its own all the requirements emanating from the right to a fair trial.

Having outlined the details necessary for understanding and analysing the central issues of the present thesis, I am now free to concentrate on them without further distractions.

3. The Standard of Judicial Review Required under Article 6(1) ECHR

In EU competition law, natural and legal persons are entitled to resort to the CJEU and impugn administrative measures which would come under Article 6(1) ECHR if the EU was a signatory to the Convention. The ECtHR interprets the above provision as implicitly imposing certain minimum requirements for the judicial control. The following lines discuss pertinent Strasbourg judgments originating in principle from a variety of national administrative acts. This overarching analysis will allow us to infer the necessary standard of review specifically within EU competition law.

3.1. The Need for a Full Jurisdiction

For there to be judicial review, an aggrieved entity must possess and make use of the right to institute proceedings before an independent and impartial tribunal established by law.[214] According to the Strasbourg Court, that tribunal must have 'full jurisdiction' when reviewing a decision taken by an institution, such as the European

[214] For this right, which may be subject to limitations, see *Z and Others v the United Kingdom* ECHR 2001-V 1, paras 91 and 93; *Baka v Hungary* ECHR 2016, paras 120-122; *Centre for the Development of Analytical Psychology v the former Yugoslav Republic of Macedonia* App no 29545 and 32961/10 (ECtHR, 15 June 2017), paras 39-40.

Commission, not satisfying the complete guarantees of the right to a fair trial.[215] The content and the scope of the concept of 'full jurisdiction' shall now be elaborated.

3.1.1. The power to examine and quash on all questions of fact and law

It has been specified in disputes concerning civil rights and obligations[216] as well as criminal charges[217] that full jurisdiction comprises 'the power to quash in all respects, on questions of fact and law, the decision of the body below'. The foregoing power presupposes a competence to examine all question raised by the litigants.[218]

Non-judicial bodies must not decide irrevocably about any matter. That would neutralize a person's right to have her case tried and determined by an independent and impartial tribunal. In *Schmautzer*, where a car driver had incurred a fine for not wearing his safety-belt, the Austrian administrative courts were precluded from verifying the facts substantiating the traffic violation. The ECtHR held this 'limited' review not to comply with the Convention.[219] An adjacent violation occurred in *Capital Bank AD*.[220] The domestic tribunals were explicitly blocked from reviewing

[215] *Albert and Le Compte*, note 198, para 29; *Menarini*, note 3, para 59; *Al-Dulimi and Montana Management Inc. v Switzerland* ECHR 2016, para 128.

[216] *Moldovan and Others v Romania (no. 2*) ECHR 2005-VII 167, para 118; *Bistrović v Croatia* App no 25774/05 (ECtHR, 31 May 2007), para 51; *Ivanovski* v *the former Yugoslav Republic of Macedonia* App no 29908/11 (ECtHR, 21 January 2016), para 125.

[217] *Schmautzer v Austria* (1995) Series A no 328-A, para 36; *Menarini*, note 3, para 59; *Grande Stevens*, note 192, para 139.

[218] For civil cases, see *Chevrol v France* ECHR 2003-III 195, para 77; *Sâmbata Bihor Greek Catholic Parish v Romania* App no 48107/99 (ECtHR, 12 January 2010), para 72. For criminal cases, see *Janosevic*, note 142, para 82; *Silvester's Horeca Service v Belgium* App no 47650/99 (ECtHR, 4 March 2004), para 27.

[219] *Schmautzer*, note 217, paras 35-37. See also the identical judgments in *Umlauft v Austria* (1995) Series A no 328-B, para 38-40, *Gradinger v Austria* (1995) Series A no 328-C, para 43-45, *Pramstaller v Austria* (1995) Series A no 329-A, para 40-42, *Palaoro v Austria* (1995) Series A no 329-B, para 42-44 and *Pfarrmeir v Austria* (1995) Series A no 329-C, para 39-41.

[220] *Capital Bank AD v Bulgaria* ECHR 2005-XII 37, paras 104-105 and 115-116.

the decision of the Bulgarian National Bank to revoke a private bank's licence on the particular ground of insolvency.

For the particular task of scrutinizing the veracity of established facts, judges need to be able to undertake an unhindered assessment of all admissible evidence.[221] Although Article 6 ECHR does not lay down any rules on admissibility,[222] overly restrictive situations would be problematic. An outright prohibition on the admission of evidence not used in the challenged act would allow its author to exclude potentially crucial data. This would not only run against the principle of equality of arms between the opposing sides,[223] but would also restrain excessively the intensity of the judicial control on the conclusions of the administration.[224]

The review of a decision does not amount to a mere academic exercise ending right after the consideration of the submitted complaints. The dispute must be determined[225] and a solution must be given. Hence, the ECtHR has declared that the power to annul, should one of the pleas be upheld, is 'generally inherent in the notion of judicial review'.[226]

In *Veeber*, an infringement of the right to a fair trial was detected inasmuch as the Estonian courts could not void the impugned police search and seizure of

[221] See *Janosevic*, note 142, para 82; *Ivanovski*, note 216, para 126. See also, mutatis mutandis, *Ieremeiov v Romania* App no 4637/02 (ECtHR, 24 November 2009), para 28; *Kashlev v Estonia* App no 22574/08 (ECtHR, 26 April 2016), para 38.

[222] *Gäfgen v Germany* ECHR 2010-IV 247, paras 162-163; *Al-Khawaja and Tahery v the United Kingdom* ECHR 2011-VI 191, para 126; *Pavlović and Others v Croatia* App no 13274/11 (ECtHR, 2 April 2015), para 42.

[223] For this principle, see *Olujic v Croatia* App no 22330/05 (ECtHR, 5 February 2009), paras 77-85; *Mala v Ukraine* App no 4436/07 (ECtHR, 3 July 2014), para 48; *Duško Ivanovski v the former Yugoslav Republic of Macedonia* App no 10718/05 (ECtHR, 24 April 2014), paras 45 and 60-61.

[224] See, mutatis mutandis, *Navalnyy v Russia* App no 29580/12, 36847/12, 11252/13, 12317/13 and 43746/14 (ECtHR, 2 February 2017), para 71.

[225] *Kutić v Croatia* ECHR 2002-II 81, para 25; *Dubinskaya v Russia* App no 4856/03 (ECtHR, 13 July 2006), para 41*; Lupeni Greek Catholic Parish and Others v Romania* ECHR 2016, para 86.

[226] *Kingsley v the United Kingdom* ECHR 2002-IV 57, para 32.

documents, but solely appraise their lawfulness in the context of the subsequent tax evasion proceedings against the applicant.[227] In *Denisov*, Article 6(1) ECHR was breached for a similar reason.[228] The reviewing tribunal would have been unable to quash the dismissal of a judge from his presidential post even if that dismissal had been declared unlawful.

A judge can serve justice when she is competent to effect on the decisions before her and annihilate their adverse consequences. Purely compensatory remedies may provide consolation in some instances, but they cannot operate as permanent substitutes of fundamental rights in societies imbued by the rule of law.[229] Finally, a moral vindication in the form of a favourable verdict would be inadequate to afford an appropriate redress to the affected party and would make her right to a fair trial deceptive.[230]

3.1.2. The power to review proportionality

Proportionality review allows a court to go beyond conventional questions of law and to retain the last, decisive word over the validity of any distress suffered by any person. I shall show that this technique is an essential tool on the judicial arsenal for

[227] *Veeber v Estonia (no. 1)* App no 37571/97 (ECtHR, 7 November 2002), paras 71, 72 and 75.

[228] *Denisov v Ukraine* App no 76639/11 (ECtHR, 25 September 2018), paras 73-78 and 81-82. See also *Kingsley*, para 32; *Oleksandr Volkov v Ukraine* App no 21722/11 (ECtHR, 09 January 2013), paras 124-126.

[229] For the right to an appellate review under Article 2 of Protocol No 7 to the ECHR, see *Shvydka v Ukraine* App no 17888/12 (ECtHR, 30 October 2014), para 54.

[230] Article 6(1) ECHR constitutes a lex specialis and absorbs the similar safeguards of Article 13 ECHR (Right to an effective remedy), see *Kudla v Poland* ECHR 2000-XI 197, paras 146; *Ravon and Others v France* App no 18497/03 (ECtHR, 21 February 2008), paras 28-35; *Xenos v Greece* App no 45225/09 (ECtHR, 13 July 2017), para 45.

the purposes of Article 6(1) ECHR, in contrast to the adjacent power to alter the operative part of a questioned measure.

At the outset, in *Diennet*, the French Council of State was regarded as not possessing full jurisdiction by reason that it could not appraise the proportionality of an administrative act disqualifying a doctor from practising medicine.[231] Next, in *Grande Stevens*, the Convention was deemed observed on the ground that the Italian tribunal examined the proportionality of certain penalties sanctioning the manipulation of a stock price.[232]

Diennet and *Grande Stevens* evince that the competence to evaluate the proportionality of an act, and concomitantly the competence to annul it if it has been found disproportionate, is absolutely necessary for complying with the right to a fair trial. Domestic courts must therefore ensure that, in the light of the circumstances of the case, the adverse measure is indeed suitable, meaning capable of contributing, and necessary, meaning not overly onerous, to the aim sought to be realized.[233]

As to the adjustment of decisions imposing penalties, things are not that straightforward. In *Silvester's Horeca Service*, the Belgian judges reviewed the legality of tax fines without being competent to grant 'a full or partial remission'.[234] The ECtHR held that Article 6(1) ECHR was infringed. In *Grande Stevens*, it did not do the same after pointing out the fact that the incurred fines were decreased at the

[231] *Diennet v France* (1995) Series A no 325-A 14, para 34.

[232] *Grande Stevens*, note 192, para 149. See also *Menarini*, note 3, para 66.

[233] See, mutatis mutandis, *Allan Jacobsson v Sweden (no. 1)* (1989) Series A no 163, para 55; *Jahn and Others v Germany* ECHR 2005-VI 55, para 93; *Paulet v the United Kingdom* App no 6219/08 (ECtHR, 13 May 2014), paras 64 and 68.

[234] *Silvester's Horeca Service*, note 218, para 28.

judicial proceedings.[235] On the contrary, in *Segame*,[236] the French courts were unable to vary the tax surcharge at issue. They were only able to cancel it or reduce it to the fixed percentage of the unpaid tax provided by the law if the administration had failed to abide by it. After confirming that the dispute did not belong to the hard core of criminal law, the ECtHR did not find the rate of the surcharge, which equaled 25% of the tax the applicant had not paid, disproportionate. It did not therefore detect a violation of Article 6(1) ECHR.[237]

Maciej Bernatt argues that according to Strasbourg jurisprudence courts are required to have the power 'both to lower and annul' the amount of fines.[238] Indeed, the above ability was viewed as a token for the observance of the Convention in *Silvester's Horeca Service*, *Grande Stevens* and, as we will see below, in *Menarini*.[239] Nevertheless, in *Segame*, the French tribunals had their hands tied. They could not bring the fine to any level other than the single one provided by law and as such they were precluded from adapting it to the particular circumstances of the offence. Although the amending authority of the domestic judicial bodies was virtually non-existent or at least excessively constrained, the ECtHR was not concerned. In my opinion, this stance refutes any argument supporting the indispensability of the power to lower, and not just quash, an impugned sanction.

The adjustment of a flawed or disproportionate penalty entails that the applicant shall incur the exact sum that an independent and impartial tribunal deems

[235] *Grande Stevens*, note 192, para 149.

[236] *Segame SA v France* ECHR 2012-III 437.

[237] ibid, paras 58-60.

[238] Maciej Bernatt 'The Compatibility of Deferential Standard of Judicial Review in EU Competition Proceedings with Article 6 of the European Convention on Human Rights' (2014) Institute for Consumer Antitrust Studies Working Papers, 23-24 <http:ssrn.com/abstract=2447884> accessed 02 October 2018.

[239] See Chapter 3.3.1.

proper. Still, the Strasbourg Court recognizes that annulment constitutes a more drastic remedy which absorbs the positive consequences of any adjustment. A zero amount due is preferable than all other figures. And should the administration re-impose the sanction, the recipient shall once more have the opportunity to bring it to the attention of a judicial body with full jurisdiction.

3.1.3. The actual exercise of the judicial powers

The ECtHR professes that the Convention 'is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective'.[240] It is therefore of the utmost importance that the necessary judicial powers under the right to a fair trial are exercised when the circumstances so demand. Those powers must be assigned to the national tribunal, directly or indirectly. If it were to overstep its legal jurisdiction so as to afford a more thorough hearing, it would not comply with the rules governing it and would risk being characterized as not 'established by law' within the meaning of Article 6(1) ECHR.[241]

In *Chevrol*, there existed a Convention violation because a key complaint and the connected evidence were not actually assessed.[242] The case started from the refusal of the French Medical Association to permit a qualified doctor in Algeria to practice medicine in France. The Council of State thought it was best to refer a

[240] *Airey*, note 167, para 24; *Aït-Mouhoub v France* ECHR 1998-VIII 3227, para 52*; Cudak v Lithuania* ECHR 2010-III 153, para 58.

[241] See, mutatis mutandis, *Sokurenko and Strygun v Ukraine* App no 29458 and 29465/04 (ECtHR, 20 July 2006), paras 24-29; *OAO Neftyanaya Kompaniya Yukos v Russia* (dec.) App no 14902/04 (ECtHR, 29 January 2009), paras 455; *Aviakompaniya A. T.I., ZAT v Ukraine* App no 1006/07 (ECtHR, 5 October 2017), paras 44-45. See, a contrario, *Menarini*, note 3, concurring opinion of judge Sajó.

[242] See also *Putter v Bulgaria* App no 38780/02 (ECtHR, 2 December 2010), paras 52-56; *Fazliyski v Bulgaria* App no 40908/05 (ECtHR, 16 April 2013), paras 59-63; *Oleksandr Volkov*, note 228, paras 128-129.

preliminary question to the Minister for Foreign Affairs about the interpretation of an international treaty between France and Algeria. On the basis of his response, the action was dismissed. The Strasbourg Court found that the Council of State had taken the view that it was bound by the opinion of the Minister, 'thereby voluntarily depriving itself of the power to examine […] factual evidence' that may have proved 'crucial for the practical resolution of the dispute'.[243]

Moving on, a different pattern was followed in *Ruiz Torija*.[244] The Spanish appeal court remained silent to the claim of a bar's lessee that his lessor's first-instance lawsuit against him had been time-barred. According to the respondent government, the plea was implicitly rejected. The ECtHR retorted that judicial bodies are compelled under the Convention to give reasons for their judgments, albeit a detailed answer to every advanced argument is not indispensable.[245] It then acknowledged the significance of the time limitation plea for the outcome of the domestic proceedings and asked for a 'specific and express reply'.[246] In its absence, it was impossible to ascertain if Mr Ruiz Torija's submission was simply overlooked and if not what the motives were for its tacit rejection.[247] Ipso facto, the right to a fair trial was infringed.[248]

[243] *Chevrol*, note 218, para 82. See also *Karin Andersson and Others v Sweden* App no 29878/09 (ECtHR, 25 September 2014), paras 69-70, where the Swedish courts ruled that they were bound by a previous decision of the government.

[244] *Ruiz Torija v Spain* (1994) Series A no 303-A.

[245] ibid, para 29. Also *Hiro Balani v Spain* (1994) Series A no 303-B, para 27; *Talmane v Latvia* App no 47938/07 (ECtHR, 13 October 2016), para 28.

[246] *Ruiz Torija*, para 30. Also *Gheorghe v Romania* App no 19215/04 (ECtHR, 15 March 2007), para 50; *Moreira Ferreira v Portugal (no. 2)* ECHR 2017, para 84.

[247] ibid.

[248] A submitted claim was also not given an answer in *Rotaru v Romania* ECHR 2000-V 109, paras 74-79; *Paliutis v Lithuania* App no 34085/09 (ECtHR, 24 November 2015), para 47; *Pleş v Romania* App no 37213/06 (ECtHR, 12 April 2016), paras 26-27.

In *Yanakiev*, where the contestation started from a mayor's refusal to sell a state-owned flat to the applicant, it was noted that 'adequate reasons' should be provided[249] while in *Boldea*, which involved an administrative fine, it was clarified that the decision of a first or second instance court must address the 'essential issues' submitted for evaluation.[250]

There can be a fair trial solely if the requests and observations of the parties have been truly heard.[251] The abstract authority to examine and quash the act of the lower body on all raised questions of fact and law, including proportionality, will become an empty letter if the competent tribunal does not duly consider and respond to those questions.

Should it self-restrain its review by declining jurisdiction to contemplate an averment put forward, it will ultimately render the challenged measure immune to effective control. Likewise, it would not comply with the Convention if it were to bypass a topical complaint without offering any explanation. The inclusion of adequate and specific reasons to judicial decisions boosts the confidence of the public to them[252] and evinces to the litigants as well as to appeal organs and the ECtHR that

[249] *Yanakiev v Bulgaria* App no 40476/98 (ECtHR, 10 August 2006), para 72. Also *Deryan v Turkey* App no 41721/04 (ECtHR, 21 July 2015), para 43; *Nikolay Genov v Bulgaria* App no 7202/09 (ECtHR, 13 July 2017), paras 32 and 34.

[250] *Boldea v Romania* App no 19997/02 (15 February 2007), paras 30 and 34-35. Also *Taxquet v Belgium* ECHR 2010-VI 145, para 91; *Ivan Stoyanov Vasilev v Bulgaria* App no 7963/05 (ECtHR, 4 June 2013), para 33.

[251] *Perez v France* ECHR 2004-I 119, para 80; *Choromidis v Greece* App no 54932/08 (ECtHR, 26 July 2011), para 75; *Ilgar Mammadov v Azerbaijan (no. 2)* App no 919/15 (ECtHR, 16 November 2017), para 206.

[252] See, mutatis mutandis, *Suominen v Finland* App no 37801/97 (ECtHR, 1 July 2003), para 37.

the duty to conduct a proper examination of all arguments and admissible evidence has been discharged.[253]

Lastly, it must be made clear that the manner in which any sufficiently appraised complaint ought to be determined on its merits is not something prescribed by Article 6(1) ECHR.[254] The Strasbourg Court does not function as a 'fourth instance' body and will not impose its own interpretation of the evidence, the facts and the domestic law.[255] Exceptionally, it may intervene on the occurrence of arbitrary or manifestly unreasonable judgments, namely ones that no reasonable court could ever make.[256] An entirely unfounded denial of a tribunal to invalidate an act, despite having upheld a ground for its annulment, would lead to a violation of the Convention.

3.1.4. The exception of appeal courts

The ECtHR holds that the Convention neither dictates the creation of courts of appeal or of cassation[257] nor does it guarantee a right to appeal,[258] without prejudice to

[253] See *Kraska v Switzerland* (1993) Series A no 254-B, para 30; *Van de Hurk v the Netherlands* (1994) Series A no 288, para 59; *Perez*, note 251, para 80; *Letinčić v Croatia* App no 7183/11 (ECtHR, 3 May 2016), para 48.

[254] *Klasen v Germany* App no 75204/01 (ECtHR, 5 October 2006), para 43; *Subicka v Poland (no. 2)* App no 34043/05 and 15792/06 (ECtHR, 21 June 2011), paras 72-74; *Centro Europa 7 S.r.l. and Di Stefano v Italy* ECHR 2012-III 339, paras 197-199.

[255] See *Schatschaschwili v Germany* ECHR 2015, para 124; *De Tommaso v Italy* ECHR 2017, para 170; *Kuparadze v Georgia* App no 30743/09 (ECtHR, 21 September 2017), paras 71-74.

[256] See *Dulaurans v France* App no 34553/97 (ECtHR, 21 March 2000), paras 38-39; *Anđelković v Serbia* App no 1401/08 (ECtHR, 9 April 2013), paras 24-29; *Bochan v Ukraine (no. 2)* ECHR 2015, paras 61-65; *Okan Güven and Others v Turkey* (ECtHR, 14 November 2017), paras 83-94.

[257] *Meftah and Others v France* ECHR 2002-VII 265, para 41; *Andrejeva v Latvia* ECHR 2009-II 71, para 97; *Hokkeling v the Netherlands* App no 30749/12 (ECtHR, 14 February 2017), para 56.

[258] *Evrenos Önen v Turkey* App no 29782/02 (ECtHR, 15 February 2007), para 28; *Mercieca and Others v Malta* App no 21974/07 (ECtHR, 14 June 2011), para 36; *Rassohin v Moldova* App no 11373/05 (ECtHR, 18 October 2011), para 32.

offences belonging in the hard core of criminal law.[259] Human rights are sufficiently secured as long as a minor criminal or civil case has been thoroughly heard at least once before an organ satisfying the requirements of Article 6(1) ECHR. As a result, appeal tribunals are exempted from the compulsory rule of full jurisdiction on the premise that a lower tribunal has already exercised it in the given dispute.

It would be beneficial for natural and legal persons to avail themselves of multiple consecutive full jurisdictions as their chances of seeing at some stage either a desirable factual and legal appraisal or errors being spotted would be greater. On the other hand, this would make the courts' caseload management more burdensome and at the same time increase legal uncertainty by having the final examination of simple cases pending for years, possibly decades. Moreover, the adversary state authorities would also have the right to appeal. In order to strike a fair balance between the conflicting interests, many countries have confined the appellate control on specific questions, usually questions of law.[260]

The ECtHR does not object. In *Tsonyo Tsonev*, the inability of the Bulgarian Supreme Court of Cassation to examine the evidence and the findings of fact contained in the impugned judgment was not deemed to breach the right to a fair trial.[261]

Be that as it may, second and third instance bodies must satisfy certain conditions. The aforementioned case of *Ruiz Torija* shows that they are not absolved from the obligation to consider pleas that fall within their assigned powers of review,

[259] See Article 2 of Protocol No 7 to the ECHR.

[260] *Hermi v Italy* ECHR 2006-XII 91, paras 61-62 and 66; *Cani v Albania* App no 11006/06 (ECtHR, 6 March 2012), para 51; *Zubac v Croatia* App no 40160/12 (ECtHR, 11 October 2016), para 34.

[261] *Tsonyo Tsonev v Bulgaria (no. 3)* App no 21124/04 (ECtHR, 16 October 2012), para 55. Also *Hauser-Sporn v Austria* App no 37301/03 (ECtHR, 7 December 2006), paras 51-52.

whichever they are, and state reasons for their rulings.[262] Even when they just endorse the reasons of a lower judicial decision, they have to do so in a manner ensuring that the admissible pleas of the parties have been duly heard.[263]

Lastly, they must always meet the guarantees of Article 6 ECHR as regards their organization, composition and establishment.[264] Otherwise, the Contracting States would have room to annihilate the essence of the right to a fair trial through the institution of dependent and partial appeal organs empowered to override the views of courts fully complying with the requirements of the Convention.[265] Unsurprisingly, an infringement was detected in *Morice* on account that one member of the French Court of Cassation lacked impartiality toward the applicant[266] and in *Gurov* because the Moldovian Court of Appeal was composed of a judge whose lawful term had expired.[267]

3.1.5. The features of full jurisdiction

To outline everything discussed so far, the qualities of full jurisdiction shall be enumerated together. This preliminary analysis shall be finalized later on whereas the

[262] See also *García Ruiz v Spain* ECHR 1999-I 87, para 26; *Constantinescu v Romania* ECHR 2000-VIII 25, para 55; *Angel Angelov v Bulgaria* App no 51349/99 (ECtHR, 15 February 2007), para 38.

[263] *Helle v Finland* ECHR 1997-VIII 2930, paras 59-60; *Hansen v Norway* App no 15319/09 (ECtHR, 2 October 2014), para 82. See also Harris, O'Boyle, Bates and Buckley, note 178, 431.

[264] See *Delcourt v Belgium* (1970) Series A no 11, para 35; *De Cubber*, note 202, para 32; *Gurov v Moldavia* App no 36455/02 (ECtHR, 11 July 2006), para 33.

[265] See, mutatis mutandis, *Findlay*, note 203, para 77; *Morris v the United Kingdom* ECHR 2002-I 387, para 73.

[266] *Morice*, note 189, paras 79-92. See also *San Leonard Band Club v Malta* ECHR 2004-IX 57, paras 61-66; *Sturua v Georgia* App no 45729/05 (ECtHR, 28 March 2017), paras 34-36.

[267] *Gurov*, note 264, para 38. See also, mutatis mutandis, *Coëme and Others v Belgium* ECHR 2000-VII 75, paras 107-110.

first two of the following paragraphs would not normally be relevant for appeal courts.

At the outset, national tribunals must possess the authority to examine and quash the decision of the administrative body below on all questions of fact and law put forward by the parties. The capability to evaluate the admissible evidence is indispensable for performing this task.

Secondly, the ECtHR stresses that judicial organs need to be able to undertake a review of proportionality and cancel adverse measures going beyond what is suitable and necessary for achieving their objectives. A modification capacity is also desirable, but not imperative.

Thirdly, courts are obliged to exercise their inspection powers should the litigants so request. They must not evade or decline jurisdiction to consider admissible complaints before them and the adduced evidence. In this connection, they have a responsibility to provide adequate and specific reasons for their judgments. The ECtHR shall not assess the substance of those judgments unless they are arbitrary or manifestly unreasonable.

3.2. Defining the Permissible Limitations in Full Jurisdiction

One would think that judicial review must be entirely unconstrained since national courts are compelled under the Convention to examine all questions of fact and law. However, the Strasbourg case-law also holds that there exists ‘full jurisdiction’ where ‘sufficient jurisdiction’ has been exercised or ‘sufficient review’ has been

provided.[268] This statement has offered room for some permissible limitations. The latter are not exceptions to the norm of full jurisdiction, but an integral part of it.

3.2.1. Adapting the standard of judicial review to the circumstances

Although the right to a fair trial is unqualified, what constitutes a fair trial 'cannot be the subject of a single unvarying rule'.[269] The adequacy of the judicial control is always appraised in the light of the circumstances of the particular case.[270] Some of them may impose a more intense scrutiny, others may allow a more restrained one. Aiming to categorize those circumstances, the ECtHR came up with a three-pronged test in its judgment in *Bryan*.[271] The test is only a tool. Its format is directly employed in civil-head disputes, but as we shall later see most elements of its logic are topical in minor criminal disputes too.

The test concentrates on three criteria preceding adjudication: (a) the subject matter of the impugned decision, namely whether it belongs to a technical or political area of the law, (b) the manner in which that decision was arrived at, more specifically the robustness of the procedural guarantees at the administrative procedure, and (c) the content of the dispute, including the desired and actual grounds of appeal put forward by the applicant.

[268] *Sigma,* note 198, para 152; *Steininger*, note 206, para 49. See also *Potocka and Others v Poland* 2001-X 49, paras 53 and 59.

[269] *O' Halloran and Francis v the United Kingdom* ECHR 2007-III 179, para 53; *Ibrahim and Others v the United Kingdom* ECHR 2016, para 250; *Butkevich v Russia* App no 5865/07 (ECtHR, 13 February 2018), para 86.

[270] See the seminal judgment in *Zumtobel v Austria* (1993) Series A no 268-A, para 32.

[271] *Bryan v the United Kingdom* (1995) Series A no 335-A, para 45.

In order to define the few restrictions allowed in the concept of full jurisdiction, we ought to look at the application of the format or the logic of the *Bryan* test to specific disputes at Strasbourg.

3.2.2. Non-compulsory review ex officio

In the criminal-head judgment of *Schmautzer*, the ECtHR noted that a court's powers of review must be evaluated on the basis of the complaints raised before it.[272] It did not elaborate any further.

The civil-head judgment of *Sigma* made things more clear. The applicant company had incurred numerous fines from a regulatory authority for transmitting radio and television broadcasts in violation of the Cypriot legislation. The Supreme Court upheld most of the fines and Sigma resorted to Strasbourg. It argued that the Cypriot tribunal did not exercise 'full jurisdiction' inasmuch as it could merely determine the legality of the administrative measures and not their substance.[273] The ECtHR relied inter alia on the third part of the *Bryan* test. It noticed that the totality of the grounds of appeal submitted at the national proceedings, alleging procedural shortcomings, discriminatory treatment and other legal errors, had been adequately examined.[274] On the other hand, the applicant had not challenged the necessity and proportionality of the imposed fines. Hence, it could not blame the Supreme Court for not examining those issues.

[272] *Schmautzer,* note 217, para 36. See all the judgments in note 219.

[273] *Sigma,* note 198, paras 119 and 131.

[274] ibid, paras 163-166.

The ECtHR stated explicitly what it had implied in *Schmautzer*, to wit that it is not its task to gauge the judicial control 'in abstracto'.[275] The concept of full jurisdiction does not go as far as obligating national tribunals to consider or be able to consider of their own motion pleas that were not actually put before them. This affects both the scope and the intensity of the review. Article 6(1) ECHR shall not be contravened if for example a court is not competent to touch on factual allegations or carry out technical assessments from scratch, but no relevant allegations or requests were brought forward by the parties.

3.2.3. Absence of de novo review and substitution power

As it emphasized in *Sigma*, the ECtHR pays significant attention to the features in the systems of judicial control of administrative acts across the Convention countries and in particular to 'the nature of review proceedings'.[276]

The first corollary is that tribunals must not necessarily adopt 'factual decisions'.[277] Thus, they are not required to re-open the administrative procedure, search for evidence and re-establish the events anew as if the questioned measure never existed. Their task is not to reconstruct or duplicate the latter, but to verify in depth the factual and legal findings contained therein.

The second corollary relates to the exercise of 'administrative discretion'.[278] In this respect, 'it is not the role of Article 6 of the Convention to give access to a

[275] ibid, paras 167-168. See also *Avotiņs*, note 33, para 108.

[276] *Sigma*, note 198, para 15; *Müller and others v Austria* (dec.) App no 26507/95 (ECtHR, 23 November 1999); *Bryan*, note 271, para 47.

[277] *Sigma*, para 153; *Fazia Ali v the United Kingdom* App no 40378/10 (ECtHR, 20 October 2015), para 77.

[278] *Sigma*, para 161.

level of jurisdiction which can substitute its opinion for that of the administrative authorities'.[279]

The foregoing statement in *Sigma* confirmed the validity of the judgment in *Bryan.* A local British council had demanded the demolition of two buildings erected by the applicant on a conservation area without a lawful planning permission. Mr Bryan appealed to the Secretary of State who appointed an inspector to conduct an inquiry. Noting the non-agricultural purpose of the two buildings and their harmful impact on the countryside and the environment, the inspector decided that demolition was indispensable. Although the High Court subsequently dealt with all of Mr Bryan's submissions against the refusal of the planning permission and the demolition, it was precluded from substituting the contested view of the inspector on the merits with its own.[280] The third criterion of the newly introduced *Bryan* test seemed to indicate that the standard of review carried out was not acceptable.

However, the other two criteria were also taken into account. As to the decision-making procedure, it had a quasi-judicial character. The inspector was under duty to exercise independent judgment and observe the principle of openness.[281] Most importantly, the ECtHR recognized that the subject of the dispute belonged to a 'specialized' area of the law and constituted an example of 'discretionary judgment […] in the sphere of town and country planning'.[282] Attaching greater value to these last two points, the Court held that a substitution power was not indispensable. The

[279] ibid, para 153. See also *Chaudet v France* App no 49037/06 (ECtHR, 29 October 2009), para 37; *Fazia Ali*, note 277, para 77.

[280] *Bryan*, note 271, paras 10, 44 and 47.

[281] ibid, paras 21 and 46.

[282] ibid, para 47.

'scope' of the performed judicial review sufficed to comply with Article 6(1) ECHR.[283]

3.2.4. Curbing a permissible limitation: the authority to substitute simple assessments of fact

One must not exaggerate the range of the judgment in *Bryan*. The Strasbourg jurisprudence has clarified that national tribunals are not at liberty to abstain from intervening in every single kind of opinion espoused by non-judicial bodies.

Tsfayo had a different verdict from *Bryan* despite being originated from the same national court.[284] An Ethiopian citizen residing in the UK had not requested the renewal of her housing and tax benefits in time. Asserting that the delay was due to her lack of familiarity with the designated system and her poor English, she submitted a claim for the lost benefits. The local council maintained that she had failed to show 'good cause' for not seeking the benefits earlier. Ms Tsfayo appealed initially to the Housing Benefits Review Board, which found her explanations unconvincing, and afterwards to the High Court, which upheld the Board's decision.

Upon the applicant complaining that she was not offered the guarantees of Article 6(1) ECHR, the ECtHR observed that the decision's subject-matter did not involve any professional knowledge or the exercise of policy-making discretion. What had to be puzzled out was whether Ms Tsfayo had a valid excuse for not submitting the benefits claim on time. As to the second *Bryan* criterion, it was noted

[283] ibid. See, mutatis mutandis, *Chapman v the United Kingdom* ECHR 2001-I 41, paras 124-125; *Jane Smith v the United Kingdom* App no 25154/94 (ECtHR, 18 January 2001), paras 133-134; *Alatulkkila and Others v Finland* App no 33538/96 (ECtHR, 28 July 2005), paras 52-54.

[284] *Tsfayo v the United Kingdom* App no 60860/00 (ECtHR, 14 November 2006), para 49. See also *W. v the United Kingdom* (1987) Series A no 121, paras 82-83.

that the Housing Benefits Review Board was not impartial because it included members connected to the local authority which would pay the housing benefit if awarded. Thirdly, the grounds of appeal at the High Court indeed opposed the administration's conclusion that Ms Tsfayo was not telling the truth.[285]

The ECtHR underscored that the possibly biased factual findings of the administration could not be adequately rectified by judicial review. The domestic tribunal did not have jurisdiction to 'rehear the evidence or substitute its own views' as to the applicant's credibility. Thus, the 'central issue' of the dispute was never 'determined' by a judicial body with full jurisdiction.[286]

In *Ramos Nunes*, the Court did not use the format of the *Bryan* test.[287] Still, it was not prevented from detecting a violation of the right to a fair trial for an almost identical reason with the one in *Tsfayo*.

The case arose from three disciplinary proceedings instituted against the same judge by the Portuguese Higher Council of the Judiciary. The decision-making organ was composed by a majority of non-judicial members and could not afford in full the guarantees of independence and impartiality. Ms Ramos Nunes incurred one cumulative penalty of 240 days' suspension from duty for calling a judicial inspector 'liar' during a telephone conference, for using another person's false testimony in the previous proceedings and for asking a judge in a meeting behind closed doors not to take action against her above defence witness. The accusations and the sanction were challenged unsuccessfully before the Portuguese Supreme Court.

[285] *Tsfayo*, paras 17 and 46-48.

[286] ibid, paras 47-48. See, a contrario, *Crompton v the United Kingdom* App no 42509/05 (ECtHR, 27 October 2009), paras 78-79; *Fazia Ali*, note 277, paras 84-88.

[287] *Ramos Nunes de Carvalho e Sá v Portugal* App no 55391, 57728 and 74041/13 (ECtHR, 21 June 2016). See also the similar case of *Tato Marinho dos Santos Costa Alves dos Santos and Figueiredo v Portugal* App no 9023 and 78077/13 (ECtHR, 21 June 2016).

Citing *Tsfayo*, the ECtHR stated that the Supreme Court was enabled to perform a review of lawfulness in relation to the establishment of the disputed facts[288] without being competent to 're-examine' them.[289] The latter term was not further analysed. It probably demonstrates that the domestic tribunal was unable to look at the evidence autonomously in order to reach its own conclusion as to the truthfulness of the allegations against the applicant. If necessary, this conclusion should have replaced the one adopted by the non-judicial organ.

Tsfayo and *Ramos Nunes* prima facie appear to rebut *Bryan*. In the older judgment a substitution power was not considered necessary whereas in the more recent ones the exact lack of that power entailed infringements of the Convention. This observation sidesteps a pivotal detail. The required standard of review in the aforementioned instances was different because certain elements were different.[290]

The degree of impartiality of the administrative agency was high in *Bryan* and very low in *Tsfayo*. It is true that no attention was paid to that factor in *Ramos Nunes*. It seems that even if a decision has been to a large extent taken unbiasedly, that alone cannot condone a subsequent limited judicial control.

The ECtHR ascribes higher value to the first criterion of the *Bryan* test, viz. the subject matter of the act appealed against. The case of *Bryan* touched on town and county planning, a specialized area where complex factual decisions had to be taken.

[288] *Ramos Nunes*, para 86; *Tato Marinho*, para 53.

[289] *Ramos Nunes*, para 84; *Tato Marinho*, para 51. See, mutatis mutandis, *Belilos v Switzerland* (1988) Series A no 132, para 70; *Koskinas v Greece* App no 47760/99 (ECtHR, 20 June 2002), para 30;

[290] See Renato Nazzini, 'Administrative enforcement, judicial review and fundamental rights in EU competition law: A comparative contextual-functionalist perspective' (2012) 49 CML Rev 971, 985.

On the contrary, the focal issue in *Tsfayo* was 'a simple question of fact'[291] and the same occurred in *Ramos Nunes*. The answer to those questions does not rest on technical expertise or on policy judgments vested to the executive branch. Consequently, judges must do their usual job. They have no justification for not forming their own view with respect to the evidence and imposing it on the lower body. The courtesy of deference cannot be extended to realms such as the assessment of simple facts or the interpretation of the law since that would restrict excessively the judicial control and would make the provision of a fair trial impossible.

Lastly, it would be interesting to see what the ECtHR would say in a specialized case first decided by a blatantly partial organ and then adjudicated by a tribunal unable to substitute the technical opinion of the administration. Would the first *Bryan* criterion prevail over the second and lead to a finding of non-violation, or would it be the other way around?

3.2.5. Flexible review of the discretionary central issue in dispute

The ECtHR indicated in *Sigma* that the power to replace the opinion of the lower body is not an indispensable component of an adequate standard of review. Quite confusingly, it added in the same judgment that judicial bodies must not be precluded from 'determining the central issue in dispute'.[292] This phrase was not used in *Bryan*. How can we be sure that the 'central issue' therein was indeed 'determined'? Bearing in mind that the applicant company in *Sigma* had only raised points of law and not of fact, we are coming across a fundamental problem not directly addressed by the jurisprudence perused until now. When the exercise of the administrative discretion

[291] *Tsfayo*, note 284, para 46.

[292] *Sigma*, note 198, para 157.

composes the crux of the case, will a substitution power still be regarded as unnecessary?

Tsanova-Gecheva offered a definitive answer.[293] The applicant was one of the two final candidates for the presidential post of the Sofia City Court. Both of them satisfied all the requirements prescribed by law. The Supreme Judicial Council, a higher administrative organ, selected the other candidate. Ms Tsanova-Gecheva resorted to the Supreme Administrative Court, unsuccessfully in the end.

The ECtHR was asked to look at the performed judicial control. The domestic tribunal could consider factual and legal points, but it refused to question or substitute the assessment of the Supreme Judicial Council as to who was the best candidate for the post.[294] Although this predominant matter did not require any specialized knowledge, it involved the exercise of discretion for securing the autonomous management of the Bulgarian judiciary. There were safeguards protecting the transparency and fairness of the election procedure. In addition, the Supreme Administrative Court checked the adequacy of the reasons provided in the decision and ensured that the contested choice was not made in violation of the purpose of the law. In light of the above, it was held that the 'scope' of review complied with Article 6(1) ECHR.[295]

The validity of impugned findings of simple fact or law, for example that the available candidates fulfilled all the prescribed qualifications for a presidential post, must be appraised without any deference to the administrative authority. If those

[293] *Tsanova-Gecheva v Bulgaria* App no 43800/12 (ECtHR, 15 September 2015).

[294] ibid, para 96.

[295] ibid, paras 98-105.

findings are proved accurate, the ensuing intricate factual assessment, to wit that one of the legit candidates was more suitable for the job, may be treated less invasively.

The Strasbourg Court distinguished *Tsanova-Gecheva* from cases such as *Chevrol* and *Capital Bank AD* where the domestic tribunals failed to 'examine' a central issue of the dispute.[296] In *Tsfayo* and *Sigma*, it had used the term 'determine', possibly inspired by the phrase 'determination of' in Article 6(1) ECHR.[297] 'Determine' could falsely convey that national judges must develop their own supreme opinion over the core of the discretionary matter before them. 'Examine' denotes a more flexible standard of judicial review and fits better with the Court's rationale.[298]

Nevertheless, *Özmurat* reminded that this flexibility does not go as far as allowing judicial bodies to evade ascertaining the reliability of the evidence used for taking a discretionary decision.[299] The applicant company had incurred an administrative fine for quarrying sand 5,000 square meters outside of its licensed mining area. It admitted trespassing on the nearby plots by only 400 meters and put forward that its conviction was based on an inspection report drawn up by two public officials later prosecuted for extortion. Even though the subject matter of the dispute had a 'technical nature', the Turkish tribunal infringed the Convention by not addressing the serious argument advanced against the credibility of the inspection report.

[296] ibid, para 95. The ECtHR mentioned *Chevrol*, note 218, para 78; *Capital Bank AD*, note 220, paras 99-108; *Tsfayo*, note 284, para 48; *Obermeier v Austria* (1990) Series A no 179, paras 66-70; *Terra Woningen B.V. v the Netherlands* ECHR 1996-VI 2105, paras 50-55; *I.D. v Bulgaria* App no 43578/98 (ECtHR, 28 April 2005), paras 50-55; *Fazliyski*, note 242, para 59.

[297] *Tsfayo*, note 284, para 48; *Sigma*, note 198, para 157.

[298] The term 'flexible' was also used in *Al-Dulimi and Montana*, note 215, para 130.

[299] *Özmurat İnşaat Elektrik Nakliyat Temizlik San. ve Tic. Ltd. Şti. v Turkey* App no 48657/06 (ECtHR, 28 November 2017), paras 34-38.

Overall, the permissible concession of administrative discretion, namely the ability to decide with the highest authority about the issue at hand,[300] is strictly confined and depends on two conditions. Firstly, the domestic law must not stipulate a specific course of action. That would strip the administrative organ of any lawful alternative options and would leave it no room for manoeuvre. Secondly, the resolution of the contested matter should either constitute a question of policy, viz. a part of a general strategy devised to serve the common good, or necessitate specialized knowledge, in other words technical expertise not possessed by an average person.

Judges do not have the legitimacy to dictate policy, which is incumbent upon democratically elected or delegated institutions, nor the training to resolve complex scientific questions. They may therefore refrain from replacing a political or technical opinion and defer to the choice of the competent non-judicial body for the sake of preserving the balance of power among the executive and the judiciary in a democratic society.[301] The essence of the right to a fair trial will remain intact as long as they are enabled to review the credibility of the evidence used for making the discretionary decision, the sufficiency of the reasons given and whether there has been a misuse of powers. In this way, judges can rebuke a misled,[302] untenable[303] or

[300] Alexander Fritzsche 'Discretion, Scope of Judicial Review and Institutional Balance in European Law' (2010) 47 CML Rev 361, 364.

[301] In *Athanassoglou and Others v Switzerland* ECHR 2000-IV 173, para 54, the judgment stated: 'how best to regulate the use of nuclear power is a policy decision for each Contracting State to take according to its democratic processes. Article 6(1) ECHR cannot be read as dictating any one scheme rather than another'.

[302] E.g., a decision to impose a fine based on an incriminatory inspection report adopted by two corrupt officials.

[303] E.g., 'We all know that A is better for the job than B'.

contradictory[304] conclusion and reveal ulterior motives[305] which illegally guided the administration.

3.2.6. The permissible limitations

In the interest of simplicity, I will sum up the permissible restrictions on the standard of judicial review as they derive from the case-law of the ECtHR.

To begin with, national tribunals do not have to examine pleas or requests that were not actually raised before them. Judicial control shall be evaluated in concreto, by the submitted and not the omitted points of law and fact brought forward by the parties.

Next, tribunals are not obliged to search for new evidence or establish the facts of a case from scratch. These tasks are normally entrusted to the administrative authorities whose relevant findings need to be verified and not duplicated by the reviewing courts.

Finally, domestic courts may decline to replace the appraisal of a lower body with their own when that appraisal truly belongs to a field either requiring specialized knowledge or involving policy decisions irrespective of whether it constitutes the central issue of the dispute.[306] That permissible limitation might not apply in the exceptional case of a blatantly partial administrative organ. It must be clarified that courts are always compelled to check the reliability of the evidence and the adequacy of the reasons provided for discretionary choices as well as confirm that there has not

[304] E.g., 'We believe A is better for the job because B is overqualified'.

[305] E.g., A was selected over B for the job because he supports the ruling political party.

[306] The ECtHR shall be the final judge as to whether a given appraisal belongs to a technical or policy-making field.

been a misuse of administrative powers. They should be able to substitute simple assessments of fact too.

3.3. Full Jurisdiction in Competition Law

I must now become more specific and place the concept of full jurisdiction in the area of competition law. The objects of adjudication are again impugned administrative acts.[307] *Menarini* constitutes a landmark judgment and shall be analysed in depth. This was the first and so for the only time the ECtHR examined the substance of a complaint alleging that the control carried out in a competition law dispute was inadequate. Some clarifications will also be made on the distinction between antitrust and major criminal offences in the first place and between civil and criminal-head competition cases in the second place. Eventually, I will draw inspiration from everything written in the present chapter so as to infer the required standard of review.

3.3.1. Limited review in competition law: the case of *Menarini*

All started when the pharmaceutical company Menarini incurred a 6 million euro fine for price-fixing and market-sharing in the Italian market of diagnostic tests for diabetes. The case was investigated, prosecuted and decided by the Italian competition authority.

[307] A few parties to the Convention such as Ireland and Austria have given decision-making powers to courts instead of administrative bodies, see *Commission staff working paper accompanying the Communication from the Commission to the European Parliament and Council - Report on the functioning of Regulation 1/2003* COM(2009)206 final, para 193.

In rejecting the action against the fining measure, the Administrative Tribunal of Latium indicated that its review was exclusively one of legality.[308] Although it had complete control on the evaluation of the facts and the application of the sanction, it could not substitute its own technical appraisal for that of the lower body. The Council of State and later the Court of Cassation held this limitation not to compromise the right to a fair trial.[309] Menarini disagreed and resorted to Strasbourg. It also complained that the established facts and their legal characterization could not be altered by the Italian system of administrative justice.[310]

The ECtHR observed that the dispute fell under the criminal head of Article 6(1) ECHR and that the fine was imposed by an administrative organ.[311] It did not detect an infringement of the Convention ipso facto. Signifying that antitrust offences do not belong in the hard core of criminal law, it checked whether there was ex post control by a tribunal having full jurisdiction.[312] It pointed out three factors which led to an affirmative answer and to a judgment of non-violation by six votes to one.

To begin with, the national judges reflected on the various factual and legal allegations put forward by the applicant company. In so doing, they looked at the evidence gathered by the Italian competition authority.[313]

It transpires that any contested findings were duly examined. The submitted pleas were neither rejected because of a lack of jurisdiction, in contrast to

[308] *Menarini*, note 3, paras 14-15.

[309] ibid, para 18 and 21.

[310] ibid, paras 51-56.

[311] ibid, para 58.

[312] ibid, para 59.

[313] ibid, para 63.

Schmautzer, Capital Bank AD and Ramos Nunes,[314] nor sidestepped due to an evasive or self-restrained strategy, in contrast to *Ruiz Torija, Chevrol* and *Özmurat*.[315] The ECtHR did not ask for anything more such as the re-establishment or the legal re-characterization of the facts suggested by Menarini. Thus, it implicitly accepted the reviewing nature of the domestic proceedings, in consonance with *Bryan* and *Sigma*.[316]

Secondly, the judgment stated that although the Italian tribunals were unable to 'substitute' the view of the competition authority, they had jurisdiction to assess whether that authority had made 'an appropriate use' of its powers.[317] They could 'examine the merits and the proportionality of its choices and even verify its technical evaluations'.[318] Unfortunately, the last phrase was not explained any further. I assume that the word 'choices' refers to the selected technical methods. A judge has to ensure that they are scientifically valid and that they do not produce unnecessarily harsh outcomes.[319] As to the task of verifying technical evaluations, I believe that it requires a check on the reliability, factual accuracy and completeness of the evidence and on the reasonableness of the conclusions drawn from that evidence.[320]

Remarkably, the ECtHR vindicated the Council of State and the Court of Cassation. It recognized unreservedly that the judicial power to 'substitute', to wit

[314] See Chapter 3.1.1.

[315] See Chapter 3.1.3. and 3.2.5.

[316] See Chapter 3.3.2.

[317] *Menarini*, note 3, para 63 states in the official French version that '(...) lorsque l'administration dispose d'un pouvoir discrétionnaire, même si le juge administratif n'a pas le pouvoir de se substituer à l'autorité administrative indépendante, il peut toutefois vérifier si l'administration a fait un usage approprié de ses pouvoirs'. See also *Valico S.r.l. v Italy* (dec.) ECHR 2006-III 397.

[318] *Menarini*, para 64.

[319] E.g., an economic method which manifestly under-represents the range of the relevant product market and therefore makes the finding of a dominant position unduly easy.

[320] The CJEU has prescribed a similar standard of review for complex economic appraisals in EU competition law, see Chapter 5.1.2.

second-guess or duplicate, the discretionary assessments of a body combining investigatory, prosecutorial and adjudicative functions is not indispensable even where the minor criminal limb of Article 6(1) ECHR applies. The more deferential standard prevalent in *Bryan*, *Sigma* and *Tsanova-Gecheva*[321] was welcomed at the field of competition law as well. The opposite position of Csongor István Nagy, according to whom the ECtHR would demand 'a de novo review' if the same entity investigated, prosecuted and adjudicated the infringement,[322] manifestly misreads the ruling of non-violation in *Menarini* especially when considered together with the dissenting opinion of judge Pinto de Albuquerque who lamented the lack of de novo reviewing powers by the Italian courts.[323]

The third factor denoting a full jurisdiction was that the domestic judicial organs were able to appraise in detail the 'appropriateness' of the sanction to the committed offence and to 'replace' it if that was necessary. In particular, they went beyond an external inquiry on the administrative authority's reasoning by grappling with elements such as the proportionality of the incurred fine.[324]

Unlike the situation in *Veeber*, *Denisov* and *Silvester's Horeca Service*,[325] the Italian courts were competent to effect on the impugned measure. Whereas the term 'replace' encompasses both an annulment and an amending judicial power, only the former was deemed essential in the subsequent ruling in *Segame*.[326] Moreover,

[321] See Chapter 3.2.3. and 3.2.5.

[322] Csongor István Nagy, 'EU competition law's fair trial revolution: much ado about nothing?' (2016) 37 ECLR 232, 234-236.

[323] *Menarini*, note 3, dissenting opinion of judge Pinto de Albuquerque, paras 8-9. The view that a deferential standard of review was accepted by the ECtHR in *Menarini* is also shared by Renato Nazzini, *Competition Enforcement and Procedure* (2nd edn, OUP 2016) 194-195.

[324] *Menarini*, paras 65-66.

[325] See Chapter 3.1.1. and 3.1.2.

[326] See Chapter 3.1.2.

Menarini confirmed the pivotal importance of the review of proportionality, along the same lines with *Diennet* and *Grande Stevens*.[327] Apart from that, it did not clarify whether courts must be able to substitute the opinion of the administrative authority even when the level of the penalty is not disproportionate, as Rein Wesseling and Marc Van der Woude seem to suggest.[328] I maintain that a rigorous review of proportionality guarantees that there shall be no cell of arbitrariness in the amount of a sanction and it therefore ought to suffice for the observance of the right to a fair trial.

3.3.2. Distinguishing competition law from traditional criminal law

The criminal-head judgment in *Menarini* laid out the minimum acceptable judicial powers for ruling on competition law infringements. Interestingly, they seem to differ from the ones demanded for the adjudication of classic criminal offences. The boundaries of the two sets of minimum powers and the justification of the contrast can only be delineated if we look closely at the section judgment in *Kyprianou*[329] and the dissenting opinion in *Menarini.*

In *Kyprianou*, a lawyer had been sentenced to five days' imprisonment for contempt of court. His conviction was considered biased because it was decided by the same tribunal to which the contempt was addressed. The Cypriot Supreme Court could have remedied the defect through a 'retrial'.[330] Nevertheless, it did not have the competence to 'deal de novo with the case' and determine 'ab initio' the criminal

[327] ibid.

[328] Rein Wesseling and Marc Van der Woude, 'The Lawfulness and Acceptability of Enforcement of European Cartel Law' (2012) 35 World Competition 573, 576.

[329] *Kyprianou v Cyprus* App no 73797/01 (ECtHR, 27 January 2004).

[330] ibid, paras 43-44.

charge. It was only able to review the appealed judgment for 'possible legal or manifest factual errors'. Even worse, it conceded 'a margin of appreciation' to the first instance tribunal on the imposition of the sentence.[331] As a result, a violation of Mr Kyprianou's right to a fair trial was detected.[332]

Of the seven judges sitting in *Menarini*, Pinto de Albuquerque was the only one who voted in favour of a breach of Article 6(1) ECHR.[333] Opposing a two-speed criminal law, he contended that a truly full jurisdiction calls for a 're-examination' of the case and not a mere 'review'. Tribunals have to conduct 'afresh' the assessment of the evidence, the establishment and the characterization of the facts. Moreover, they must be able to substitute the technical views of the administrative authorities. Overall, they should be given 'the last word' and in his view the Italian courts lacked that authority. Judge Sajó sided with judge Pinto de Albuquerque on the required standard of review, albeit he maintained that the Italian Council of State analysed the merits of the case de facto and thereby provided a fair trial.[334]

We have seen that the ECtHR distinguishes between minor offences, such as the antitrust infractions in *Menarini*, and offences belonging to the hard core of criminal law, for example the contempt of court in *Kyprianou*.[335] The former may be tried by administrative organs at the first stage, the latter may not. Excluding this difference, judge Pinto de Albuquerque transposed the extensive judicial powers required in the hard-core criminal area to the soft-core area of competition law.

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[331] ibid, para 44.

[332] The Grand Chamber of the ECtHR confirmed the violation, see *Kyprianou v Cyprus* ECHR 2005-XIII 67, para 134.

[333] *Menarini*, note 3, dissenting opinion of judge Pinto de Albuquerque, paras 8-9.

[334] *Menarini*, concurring opinion of judge Sajó.

[335] See Chapter 2.3.2.

The majority in *Menarini* rejected the equation advanced by the Portuguese judge. On major offences, a court must decide undistracted without having the burden to debate and refute the conclusions of a partial or dependent institution. It is obliged to 'retry', to re-establish every aspect of the dispute anew with absolutely no strings attached. On minor offences, it may 'review', namely operate on the basis of a decision taken for reasons of efficiency by an authority not fully satisfying the guarantees of Article 6(1) ECHR. It must autonomously ascertain the validity of the factual and legal inferences therein, but it is not compelled to automatically discard the act and remake its content. It is also allowed to refrain from substituting certain discretionary views as long as they are well-substantiated and not impaired by a misuse of powers.

The question arising here is why should there be criminal charges whose adjudication is exempt from the typical safeguards of criminal law and procedure? Bearing in mind that the right to a fair trial functions as a shield for the protection of other rights, the answer lies in the severity of the prescribed penalties.

Offences as the contempt of court in *Kyprianou* may be punished with stigmatizing incarceration. When something that vital as a person's right to liberty under Article 5 ECHR is at stake, the content of the right to a fair trial becomes very exacting. The need to have the case determined from scratch by an independent and impartial tribunal overrides any other conflicting factor such as the superior technical expertise of the administration in certain areas, for instance insider trading, or the balance of power between the executive and the judicial branch, for instance when government agencies would want to impose long prison sentences to defend their interests against tax evasion.

On the other hand, wrongdoings committed by companies as the competition law violations in *Menarini* may only be punished with pecuniary penalties.[336] Those penalties are liable to compromise the protection of property provided in Article 1 of Protocol No 1 to the ECHR.[337] Notwithstanding, the ECtHR recognizes that there is an unwritten hierarchy of human rights.[338] The right to peaceful enjoyment of possessions cannot be said to carry the immense weight of the right to liberty as concerns the self-determination, the physical and moral integrity of a person.[339] Consequently, the fair balance among the conflicting factors described in the previous paragraph shifts slightly and some limited room for manoeuvre to the standard of judicial review becomes acceptable for minor offences.

3.3.3. Comparing civil and criminal competition cases

Disputes on civil rights and obligations, which may very well affect major interests of a person including her business,[340] employment[341] or housing,[342] resemble minor offences in that they do not entail prison sentences restricting the right to liberty. What remains to be answered is whether the standard of review for the two above

[336] Apart from fines addressed to companies, many Contracting Parties to the Convention (e.g. the UK) have introduced prison sentences for individuals involved in antitrust offences (see Enterprise Act 2002, Sections 188-190). The latter penalties must always be imposed by courts from the start for the reasons explained right above.

[337] *Phillips v the United Kingdom* ECHR 2001-VII 29, para 51; *Konstantin Stefanof v Bulgaria* App no 35399/05 (ECtHR, 27 October 2015), paras 57-58.

[338] *Vasiliauskas v Lithuania* ECHR 2015, para 158.

[339] For similar reasons greater weight was ascribed to Article 8 ECHR (Right to respect for private and family life) over Article 1 of Protocol No 1 to the ECHR in *Gladysheva v Russia* App no 7097/10 (ECtHR, 6 December 2011), paras 93 and 105; *Stolyarova v Russia* App no 15711/13 (ECtHR, 29 January 2015), paras 59 and 74.

[340] See *Capital Bank AD*, note 220; *Ruiz Torija*, note 246.

[341] See *Chevrol*, note 218, *Ramos Nunes*, note 287; *Tsanova-Gecheva*, note 293.

[342] See *Tsfayo*, note 284; *Yanakiev*, note 249; *Fazia Ali*, note 277.

types of cases should be of analogous stringency.[343] The issue is highly topical in EU competition law given that antitrust infractions fall under the criminal limb of the right to a fair trial whereas mergers, acquisitions, commitments and complaints belong to the civil limb.

Before starting, one ought to reject the argumentum a contrario saying that wherever the Convention intended to distinguish minimum requirements between civil and criminal instances it did so explicitly as in Article 6(2) and (3) ECHR. The ECtHR has enunciated separate standards of review for minor and hardcore criminal offences. Unavoidably, civil cases will diverge from one or both of those standards.

It would be useful to look at the way the ECtHR appraises the admissibility of complaints invoking both heads of Article 6(1) ECHR by reason of a deficient judicial control.

On some occasions it deals with the pertinence of the civil head first,[344] on other occasions it does the exact opposite.[345] Furthermore, we saw earlier that the applicant company in *Sigma* was fined for breaching the Cypriot broadcasting legislation. The imposed penalties served as punishment to deter re-offending in an area affecting the general public. Surprisingly, the ECtHR observed that since the parties had not questioned the applicability of the civil limb, it did not need to consider whether the criminal limb applied too.[346] In *Oleksandr Volkov* however,

[343] This was described as a 'thorny question' in *Menarini*, note 3, dissenting opinion of judge Pinto de Albuquerque, para 8.

[344] See *Janosevic*, note 142, paras 64-71; *Loncke v Belgium* App no 20656/03 (ECtHR, 25 September 2007), paras 40-41; *Oleksandr Volkov*, note 228, paras 87-95.

[345] See *Zlínsat, spol. s r.o v Bulgaria* App no 57785/00 (ECtHR, 15 June 2006), paras 71-72; *Galina Kostova v Bulgaria* App no 36181/05 (ECtHR, 12 November 2013), paras 51-53.

[346] *Sigma*, note 198, paras 126-127. See also *Tato Marinho*, note 287, paras 38-43; *Ramos Nunes*, note 287, paras 57-63.

after stating that the dismissal of a Ukrainian judge constituted a civil dispute, the judgment carried on and held that no criminal charge was involved.[347]

The foregoing pattern is rather inconsistent. This signifies that the ECtHR does not operate according to a hierarchy among the civil and the minor criminal field. If such a settled order existed, the most rigorous limb of the right to a fair trial would always be examined first and its confirmed applicability would render superfluous the consideration of the weaker limb, in the interest of saving time and resources.

For the purpose of supplementing the preceding analysis, I shall discuss the manner in which the concept of full jurisdiction is treated on its merits in criminal and non-criminal context.

In *Steininger*, the ECtHR summarized some civil-head judgments in which it had accepted limitations on the judicial powers.[348] Without becoming any more specific, it maintained that it follows 'a different approach as regards the scope of review of penal sanctions imposed by administrative authorities'.[349] There is certainly a different methodological technique. Until today, the format of the *Bryan* test has never been employed to a criminal charge. Be that as it may, it is sometimes ignored even in civil disputes like *Ramos Nunes*.

Moreover, in *Menarini*, two of the three criteria of the *Bryan* test were essentially taken into account. As to the subject-matter of the decision appealed against, the Court recognized the discretionary nature of the Italian competition

[347] *Oleksandr Volkov*, note 228, paras 87-95.

[348] *Steininger*, note 206, paras 50-51.

[349] ibid, para 52.

authority's technical appraisals and singled out their control from the other impugned elements. In relation to the content of the dispute, an aspect also referred to in the criminal-head ruling of *Schmautzer*,[350] it was underscored that the national tribunals responded to all of the applicant's pleas.

As to the remaining component of the *Bryan* test, Maciej Bernatt writes that the independence of the Italian competition authority 'might have played a role in the reasoning in this case'.[351] Nevertheless, the text of the substantive part of the *Menarini* judgment made absolutely no mention to that factor.[352] The fact that no apparent attention was paid to the manner in which the antitrust measure was arrived at merely means that judicial scrutiny will neither be permitted to loosen should the safeguards at the administrative stage be robust nor be forced to tighten should they be scanty.

Overall, the presented jurisprudence evinces that the required standard of review is equivalent for both types of cases. Courts must be able to annul an act on every raised question without prejudice to the gist of discretionary assessments. It is true that the nature of certain contestations on civil rights and obligations is deeply political, as the town and county planning in *Bryan* or the election of a judge in a presidential post in *Tsanova-Gecheva*. A lawful deference to the opinion of the administration may be more conspicuous therein, but *Menarini* shows unequivocally that it can be present within the minor criminal sphere as well. Hence, the complex economic evaluations of the competition authorities, which are indispensable in

[350] See Chapter 3.2.2.

[351] Bernatt, 'The Compatibility of Deferential Standard of Judicial Review', note 238, 26.

[352] No direct or indirect reference was made to the independence of the Italian competition authority in *Menarini*, note 3, paras 57-67.

establishing most antitrust infringements, do not have to be performed de novo or second-guessed by judicial organs.

3.4. The Standard of Judicial Review Required in EU Competition Law

The right to a fair trial of Article 6(1) ECHR embodies a right to an adequate review and, reversely, a relevant obligation for the courts of the Contracting Parties to the Convention. The EU and its institutions are indirectly bound to respect that right and fulfil that obligation, not to mention that they may become directly bound in the future.[353] The goal of the current chapter was to decipher the minimum requirements for a sufficient judicial control in the field of national administrative law and transpose them in the field of EU competition law where administrative decisions taken by the Commission are inspected by the General Court at first instance and by the Court of Justice at second instance.

Menarini is by far the most pertinent dispute resolved by the ECtHR. The Italian and the EU competition law enforcement systems share many common elements, for example the similarity of the offences coupled with the investigative and adjudicatory role of a body not satisfying the guarantees of independence and impartiality.[354] Notwithstanding, it would have been incomplete and unsound to rely

[353] See Chapter 1.1.2. and 1.3.3.

[354] See Albert Sanchez-Graells, 'The EU's Accession to the ECHR and Due Process Rights in EU Competition Law Matters: Nothing New Under the Sun?' (2012) 5 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2156904> accessed 02 October 2018; Nils F.W. Hauger & Christoph Palzer, 'Investigator, Prosecutor, Judge… and Now Plaintiff? The Leviathanian

exclusively on a single sample given the volatility, ambiguity and perplexity of the Strasbourg jurisprudence. Thus, I analysed many other civil and minor criminal judgments relating to administrative acts. A hardcore criminal judgment was also perused so at to gain a better understanding of the borderline between competition and classic criminal law.

It is now time to assume and outline altogether the standard of judicial review necessitated by Article 6(1) ECHR in EU competition law. This constitutes the lowest tolerable floor whereas a higher ceiling is acceptable.[355] The second and the third-instance proceedings are exempted as long as the following conditions have all been fulfilled at first instance.

To begin with, an EU tribunal must possess the power to examine and quash the measure before it on all raised aspects of simple fact and law. In the process of ascertaining the accuracy of contested findings, it should be able to apply the law unrestrainedly, look independently at any admissible piece of evidence and attach to it the weight it deems proper without adhering to the view of the Commission. Nonetheless, it will not be asked by the ECtHR to formulate of its own motion pleas that were not invoked by the litigants. Moreover, it is not obliged to conduct a retrial, namely to re-establish the facts of the case anew or alter their legal characterization.

Secondly, apart from reviewing conventional questions of fact and law, an EU court ought to be competent to check the proportionality of an unfavorable measure and cancel it if it appears unsuitable or unnecessary to the aim sought to be realized. The authority to modify it is welcome, albeit not essential.

Role of the European Commission in the Light of Fundamental Rights' (2013) 36 World Competition 565, 572; Schweitzer, note 181, 520-521.

[355] See Ólafur Jóhannes Einarsson, 'EC Competition Law and the Right to a Fair Trial' (2006) 25 Yearbook of European Law 555, 614.

Thirdly, the required intensity of the review decreases when a policy-making or technical assessment of the administration comes into play. Combining the reasoning of the judgments in *Menarini*, *Tsanova-Gecheva* and *Özmurat*, the EU judges need to be in the position to void the discretionary assessment if: (a) defective reasons have been provided, (b) unreliable, inaccurate or incomplete evidence has been used, (c) a manifestly unreasonable conclusion has been reached, or (d) the purpose of the law has been violated. On the other hand, they are free to refrain from substituting it, in other words from setting it aside should they disagree with its advisability. It is not perfectly clear whether that permissible limitation would still be condoned at civil disputes in which the administrative procedure lacked altogether any guarantees of independence and impartiality.

Fourthly, an EU judicial organ has to exercise its inspection powers when invited to do so by the litigants irrespective of the outcome of the dispute. It cannot disregard or refuse to contemplate their complaints and the adduced evidence. In order to demonstrate that it has discharged its duty to afford an actual hearing, it is compelled to present specific and adequate reasons for its judgments. Regardless of the first-instance proceedings, the EU second-instance tribunal always has to reply to submitted pleas and duly consider them if they fall under its assigned jurisdiction.

4. The Comprehensive Review of the Facts and the Law

The present chapter serves as an introduction to the judicial proceedings in EU competition law whilst its main axis revolves around the review of the non-economic facts and the law in competition disputes. It discusses the role of the CJEU and delves into the actual case law on each one of the four grounds of annulment provided in Article 263 TFEU with the aim of discovering whether the applicable standard of judicial review is truly 'comprehensive', as the EU judicature prefers to describe it.[356]

4.1. The Judicial Stage in EU Competition Law

At the outset, we should become acquainted with the institution discharging judicial duties on administrative acts in EU competition law. The following lines deal with the CJEU and more specifically with its functioning, the powers vested to it and the limitations it faces when performing its mission.

[356] Case T-325/01 *DaimlerChrysler AG v Commission* [2005] ECR II-3319, para 81; *Bolloré*, note 152, para 664; Case T-48/04 *Qualcomm Wireless Business Solutions Europe BV v Commission* [2009] ECR II-2029, para 91; Case T-556/08 *Slovenská pošta a.s. v Commission* EU:T:2015:189, para 104.

4.1.1. The guarantees protecting the CJEU

The standard of review for any competition law matter would be meaningless under the Convention's right to a fair trial if the tribunals applying that standard were not independent, impartial and established by law. The CJEU does not fall short of these conditions.

At the outset, the establishment of the CJEU is provided in Article 13(1) TEU and its jurisdiction in Articles 256 to 279 TFEU. Under Article 19(1) TEU, it comprises two separate tribunals, the General Court and the Court of Justice. They consist of 47 and 28 members respectively.[357]

Each judge is appointed for a renewable term of six years by common accord of the governments of the Member States.[358] Her tenure may be disrupted only if she dies, retires or the Court of Justice decides unanimously that she can no longer meet the obligations arising from her office.[359] Judges are immune from legal proceedings against them whilst they are not permitted to hold any political or administrative office.[360] Their vote is always secret and thus it cannot be weighed for the renewal of their term.[361] They receive a fixed annual salary and are not entitled to bonuses

[357] Article 254 TFEU in conjunction with Protocol (No 3) on the Statute of the Court of Justice of the European Union [2010] OJ C83/210, Article 48. As from 1 September 2019, the General Court shall consist of two judges per Member State.

[358] Articles 253 to 255 TFEU. The term of some of the General Court's new judges will be shorter according to Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union [2015] OJ L341/14, Article 2.

[359] Protocol (No 3), note 357, Articles 5 and 6.

[360] ibid, Articles 3 and 4.

[361] ibid, Article 35; Rules of Procedure of the Court of Justice [2012] OJ L265/1, Articles 4 and 32(1); Rules of Procedure of the General Court [2015] OJ L105/1, Article 21(1).

depending on the outcome of the dispute before them.[362] Finally, they shall not sit in cases which they have previously adjudicated or investigated or defended in any capacity.[363]

The foregoing guarantees shield the independence of the EU judicature against any illicit pressure originating from the executive branch of the EU, the Member States and any litigant in general. Moreover, they ensure the objective impartiality of the Court by preventing members with personal ties to a certain case from getting involved in its adjudication.

Wittily, the applicant in *Otis* claimed that the independence of the CJEU is undermined by the fact that it constitutes an EU institution. This might direct it towards upholding the antitrust penalties imposed by the Commission so that the EU would receive the financial benefits.[364] Pointing to the pertinent safeguards in the Treaties, the Court of Justice rejected the allegation. It added that 'all judicial bodies necessarily form part of the State or supranational organization to which they belong'. That on its own does not entail 'an infringement of Article 47 of the Charter or Article 6 of the ECHR'.[365] In other words, if Otis' assertion were to succeed, the integrity of national tribunals could also be called into question. Since the State is their employer, they could be deemed to favor it in disputes over pecuniary issues such as administrative fines.

I ought to complement the correct judgment in *Otis* by addressing the core of the argument it rejected. Nobody can honestly deny that EU judges have an actual

[362] See Council Regulation (EU) 2016/300 of 29 February 2016 determining the emoluments of EU high-level public office holders [2016] OJ L58/1.

[363] Protocol (No 3), note 357, Article 18.

[364] See also Forrester, 'Due process in EC competition cases', note 196, 827.

[365] *Otis*, note 25, para 64.

interest in the fulfilment of the financial commitments by the Union to them. Even so, the competition fines the Commission expected to collect in 2017, already heavily adjusted for judicial proceedings,[366] were a tiny 0.82% of the EU's projected revenue in the same year.[367] In the extraordinary case that all those fines were somehow cancelled, it would not have been hard for the EU to offset the budget imbalance by either gathering higher revenue from other sources or curbing expenditure. The absolutely worst case scenario would have been the implementation of the second option coupled with some future decrease on the yearly payment of the EU judiciary,[368] which amounts to a negligible 0.024% of the EU's projected expenditure for 2018.[369]

In essence, the risk of an income reduction remains so theoretical, remote and trivial that it is not objectively or subjectively capable of influencing the judges' state of mind in the adjudication of antitrust cases. The 50.1% success rate for fined applicant companies attests to this position.[370] In combination with all the aforementioned safeguards, the General Court and the Court of Justice undoubtedly satisfy the requirements of independence, impartiality and establishment by law laid down in Article 6 ECHR and Article 47 of the Charter. On this account, the perusal of their standard of review in EU competition law makes perfect sense.

[366] The competition fines the Commission expected to collect in 2017 equalled 1.1 billion euros, see Definitive adoption (EU, Euratom) 2017/292 of the European Union's general budget for the financial year 2017 OJ L51/1, 139. The competition fines actually collected in 2017 equalled 3.21 billion euros, see Definitive adoption (EU, Euratom) 2018/251 of the European Union's general budget for the financial year 2018 [2018] OJ L57/1, 142.

[367] The EU's projected revenue for 2017 equalled 134.49 billion euros, see EU budget for 2017, 14.

[368] The projected expenditure for the members of the CJEU in 2018 equals 34.61 million euros, see EU budget for 2018, note 366, 2042.

[369] The EU's projected expenditure for 2018 equals 144.681 billion euros, see EU budget for 2018, 13.

[370] See Chapter 6.4.2.4.

4.1.2. The jurisdiction of the CJEU

The CJEU is enabled by Article 263 TFEU to review the legality of EU competition acts intended to produce autonomous and binding legal effects.[371] Its jurisdiction is exclusive and not concurrent with national courts.[372]

Decisions finding infringements,[373] rejecting complaints about infringements,[374] making commitments binding,[375] dissolving implemented concentrations,[376] authorizing notified concentrations[377] or prohibiting them[378] or referring them to a Member State[379] or declaring them to fall outside the Merger Regulation[380] all bring about definitive legal repercussions and consequently they are amenable to judicial control.[381] The same does not apply with intermediate measures

[371] Case C-60/81 *International Business Machines Corporation* v *Commission* [1981] ECR 2639 (known as *IBM*), para 9; Case C-351/15 P *Commission v Total SA and Elf Aquitaine SA* EU:C:2017:27, paras 36-37; Case C-364/16 P *Trioplast Industrier AB v Commission* EU:C:2017:1008, paras 28-29.

[372] See Regulation 1/2003, note 45, Article 16(1); *Foto-Frost*, note 50, para 20; *Otis*, note 25, para 53.

[373] See Case T-138/07 *Schindler Holding Ltd and Others v Commission* [2011] ECR II-4819; *FSL*, note 80. Decisions finding procedural infringements are also reviewable, see Case T-141/08 *E.ON Energie AG v Commission* [2010] ECR II-5761.

[374] See Case T-432/05 *EMC Development AB v Commission* [2010] ECR II-1629; Case T-201/11 *Si.mobil telekomunikacijske storitve d.d. v Commission* EU:T:2014:1096.

[375] See *Alrosa*, note 180; *Morningstar*, note 180.

[376] See Case T-77/02 *Schneider Electric SA v Commission* [2002] ECR II-4201; Case T-80/02 *Tetra Laval BV v Commission* [2002] ECR II-4519.

[377] See *Sun Chemical*, note 179; *Cisco*, note 96.

[378] See Case T-310/00 *MCI, Inc. v Commission* [2004] ECR II-3253; Case T-194/13 *United Parcel Service, Inc. v Commission* EU:T:2017:144 (known as *UPS*).

[379] See *Royal Philips*, note 179; Joined Cases T-346 and 347/02 *Cableuropa SA and Others v Commission* [2003] ECR II-4251.

[380] See Case T-3/93 *Société Anonyme à Participation Ouvrière Compagnie Nationale Air France v Commission* [1994] ECR II-121; Case T-417/05 *Endesa, SA v Commission* [2006] ECR II-2533.

[381] Other types of competition decisions are also reviewable such as decisions requesting information, ordering inspections, rejecting requests for legal professional privilege or confidential treatment (see the past paragraph of Chapter 2.1.2.), refusing access to documents to third parties (see Case T-111/07 *Agrofert Holding a.s. v Commission* [2010] ECR II-128) ordering interim measures (see *Automobiles Peugeot*, note 127), rejecting requests for a waiver of imposed commitments (see

whose aim is to prepare for the final decision, for example statements of objections or the initiation of Phase II of the Merger Regulation,[382] and measures confirming or implementing an earlier decision, for example demands for payment of a fine.[383] An act's form is immaterial.[384] Even oral statements[385] or letters[386] may be admissibly challenged.

Apart from certain EU institutions and the Member States,[387] the entities that have the locus standi to institute proceedings against the reviewable competition acts of the Commission are their addressees and any natural or legal person directly and individually concerned by them.[388] Competitors of merging undertakings,[389] potential

Case T-712/16 *Deutsche Lufthansa AG v Commission* EU:T:2018:629) or approving purchasers in divestitures imposed by the Commission (see Case T-471/11 *Éditions Odile Jacob SAS v Commission* EU:T:2014:739).

[382] *IBM*, note 371, paras 21-25; Case T-48/03 *Schneider Electric SA v Commission* [2006] ECR II-0111, para 91.

[383] Case C-516/06 P *Commission v Ferriere Nord SpA* [2007] ECR I-10685, paras 28-34.

[384] *IBM*, note 371, para 9; Case T-393/10 *Westfälische Drahtindustrie GmbH and Others v Commission* EU:T:2015:515, para 99; Marcos Araujo Boyd and Nicolas von Lingen, 'Judicial Review of Commission Decisions Regarding Concentrations' in Luiz Ortiz Blanco (eds), *EU Competition Procedure* (OUP 2013) 790.

[385] An oral statement declaring a concentration to be devoid of a Community dimension was admissibly contested in *Air France*, note 380, paras 57-60.

[386] See Joined Cases T-70 and 71/92 *Florimex BV and Vereniging van Groothandelaren in Bloemkwekerijprodukten v Commission* [1997] ECR II-693, para 65; *Westfälische Drahtindustrie*, 384, paras 98 and 110; Case T-470/11 *Total SA and Elf Aquitaine SA v Commission* EU:T:2015:241, paras 74-75 and 117.

[387] Under Article 263(2) and 263(3) TFEU, the Council, the European Parliament and the Member States can bring an action unconditionally whereas the Court of Auditors, the European Central Bank and the Committee of the Regions can bring an action only for the purpose of protecting their prerogatives.

[388] Article 263(4) TFEU. The act must directly affect the legal situation of that person by reason of certain attributes particular to her or of circumstances in which she is differentiated from all other persons and the implementation of the act must be purely automatic and resulting from EU rules alone, see Case C-25/62 *Plaumann & Co. v Commission* [1963] ECR 95, 107; *Cableuropa*, note 379, paras 59-69; *Morningstar*, note 180, para 30.

[389] *Sun Chemical*, note 179; Case T-394/15 *KPN BV v Commission* EU:T:2017:756. See also Fransisco Todorov and Anthony Valcke, 'Judicial Review of Merger Control Decisions in the European Union' (2006) 51 The Antitrust Bulletin 339, 347-364.

purchasers in divestitures imposed by the Commission[390] and business partners of companies subject to a commitment decision[391] are eligible to resort to the CJEU. Actions should be brought 'within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter'.[392]

Two levels of jurisdiction are available for competition disputes pursuant to Article 256(1) TFEU. The General Court shall hear and determine them at first instance. Its judgments can be appealed to the Court of Justice on points of law.[393] Hearings shall be public without prejudice to exceptional circumstances.[394]

Article 263 TFEU stipulates that the General Court shall conduct its review on four grounds: (a) lack of competence, (b) infringement of an essential procedural requirement, (c) infringement of the Treaties or of any rule relating to their application, or (d) misuse of powers.

The first two grounds touch on external legality, the last two on internal legality and include inter alia the rules pertaining to the establishment of the facts. The General Court is thereby entrusted with checking every aspect of the underlying process or the content of a competition decision. It may look at documents, hear the parties, request information from them, summon witnesses, appoint experts[395] and

[390] Case T-342/00 *Petrolessence SA and Société de gestion de restauration Routière SA (SG2R) v Commission* [2003] ECR II-1161; *Éditions Odile Jacob*, note 381.

[391] *Alrosa*, note 180; *Morningstar*, note 180;

[392] Article 263(6) TFEU. For actions dismissed as time-barred, see Case T-252/03 *Fédération nationale de l'industrie et des commerces en gros des viandes (FNICGV) v Commission* [2004] ECR II-3795; Case T-2/09 *Internationale Fruchtimport Gesellschaft Weichert v Commission* EU:T:2009:478.

[393] Article 256(1) TFEU; Protocol (No 3), note 357, Article 56.

[394] Protocol (No 3), Articles 31 and 53.

[395] ibid, Articles 20-22, 24-29, and 32 in combination with Article 53; Rules of Procedure of the GC, note 361, Articles 91 and 93.

admit any other evidence as long as it has been lawfully obtained.[396] Its evaluation of all the evidence shall be unfettered.[397]

The integrity of the judicial phase is further enhanced by the fact that the introduction of pleas and submissions remains autonomous from the administrative phase. This was clarified in *Knauf Gips*.[398] The appellant disputed its leading role within the Knauf Group for the first time at the General Court. Upon appeal, the Court of Justice held that Article 263 TFEU permits the EU judges to consider matters of fact or law irrespective of whether they had already been raised before the Commission. Undertakings and associations of undertakings may also adduce evidence postdating the administrative measure or other evidence not previously put forward.[399]

The proceedings conclude with the delivery of a judgment or an order.[400] If the action is well founded on any of the invoked grounds, the Court shall give practical meaning to the applicant's right to a fair trial and declare the decision at

[396] Rules of Procedure of the GC, Article 85; Joined Cases C-239, 489 and 498/11 P *Siemens AG and Others v Commission* EU:C:2013:866, para 128; Case T-758/14 *Infineon Technologies AG v Commission* EU:T:2016:737, para 179.

[397] Case C-407/04 P *Dalmine SpA v Commission* [2007] ECR I-829, paras 49 and 63; Case C-411/04 P *Salzgitter Mannesmann GmbH v Commission* [2007] ECR I-0959, para 45; *Siemens AG*, note 396, para 128. See also John Ratliff, 'Judicial Review in EC Competition Cases Before the European Courts: Avoiding *double renvoi*' in Claus-Dieter Ehlermann and Mel Marquis (eds), *European Competition Law Annual 2009: Evaluation of Evidence and its Judicial Review in Competition Cases* (Hart Publishing 2011) 458-459.

[398] Case C-407/08 P *Knauf Gips KG v Commission* [2010] ECR I-6375, paras 87-92. See, a contrario, Fernando Castillo de la Torre 'Evidence, Proof and Judicial Review in Cartel Cases' (2009) 32 World Competition 505, 567-568.

[399] Case C-603/13 P *Galp Energía España SA and Others v Commission* EU:C:2016:38, para 72; Case C-616/13 P *Productos Asfálticos (PROAS), SA v Commission* EU:C:2016:415, para 43; Case T-216/13 *Telefónica, SA v Commission* EU:T:2016:369 (hereinafter *Telefónica II*), paras 87-88.

[400] See Rules of Procedure of the GC, note 361, Articles 116-132.

issue void, in part or in total, by virtue of Article 264 TFEU. The effects of annulment go back to the date the decision entered into force.[401]

Finally, I need to add that the validity of Union acts can be questioned in accordance with Article 267 TFEU through a reference for a preliminary ruling by a national tribunal to the Court of Justice. However, a person who undoubtedly had the standing, but failed to timely contest an EU measure on the basis of Article 263 TFEU, is not entitled to do so before the courts of the Member States.[402] Hence, in the interest of preserving legal certainty, the use of Article 267 TFEU for annulment purposes will hardly ever be admitted in EU competition law.[403]

4.1.3. The restrictions on the judicial powers of review

The review of legality in the context of Article 263 TFEU entails certain inherent restrictions.[404] Their extent and their impact on the effectiveness of the judicial control are analysed below.

Firstly, the CJEU may not widen the scope of the dispute before it. This is shaped exclusively by the litigants through their form of order sought.[405]

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[401] The Commission is obliged under Article 266 TFEU to restore the applicant to his original position, see Case T-102/96 *Gencor Ltd v Commission* [1999] ECR II-0753, para 41; Case T-213/01 *Österreichische Postsparkasse AG and Bank für Arbeit und Wirtschaft AG v Commission* [2006] ECR II-1601, para 54.

[402] Case C-188/92 *TWD Textilwerke Deggendorf GmbH v Bundesrepublic Deutschland* [1994] ECR I-833, paras 13 and 17; Joined Cases T-305 to 307, 313 to 316, 318, 325, 328, 329 and 335/94 *Limburgse Vinyl Maatschappij and Others v Commission* [1999] ECR II-931 (known as *PVC II*), para 168; Case C-550/09 *E and F* [2010] ECR I-6213, paras 45-46. See also Dashwood, Dougan, Rodger, Spaventa and Wyatt, note 7, 225.

[403] However, Article 267 TFEU can be used for questioning EU legislative provisions that national authorities had to apply in purely domestic competition cases. This is because natural and legal persons do not have the standing to directly challenge such provisions under Article 263 TFEU.

[404] *Kone*, note 5, para 26. These restrictions apply to both first and second-instance proceedings.

[405] See Rules of Procedure of the GC, note 361, Article 76(e).

Unchallenged aspects of the challenged Commission decision and of course other decisions shall not constitute objects of the trial.[406]

In *British Airways*,[407] the airline company had asked for a partial annulment of the antitrust measure addressed to it. In spite of a defective statement of reasons for the whole act, the General Court declared that it had to stay 'within the limits' set out in the application and solely cancelled the parts that had been impugned.[408]

Another consequence of the proceedings being inter partes is that the EU judges shall not enlarge the content of the dispute either, without prejudice to pleas involving public policy issues.[409] They shall not operate as lawyers by searching the file of their own motion in order to detect and specify flaws capable of causing partial or complete annulment of the contested act.[410] The parties bear the burden to point out such flaws and present the relevant evidence.

In *ENI*, it was put forward that the Commission had wrongly gauged certain factors for fixing the fine and that the General Court did not in its turn notice the mistake. According to the Court of Justice, since the appellant did not try to explain

[406] Case C-310/97 P *Commission v AssiDomän Kraft Products AB and Others* [1999] ECR I-5363, para 53; Case T-385/06 *Aalberts Industries NV and Others v Commission* [2011] ECR II-1223, para 125; Case C-613/13 P *Commission v Keramag Keramische Werke GmbH and Others* EU:C:2017:49, para 107.

[407] Case T-48/11 *British Airways plc v Commission* EU:T:2015:988.

[408] ibid, paras 88-92. See also Case C-122/16 P *British Airways plc v Commission* EU:C:2017:861, paras 80-111.

[409] *Kone*, note 5, paras 30-31; Case C-626/13 P *Villeroy & Boch Austria GmbH v Commission* EU:C:2017:54, para 84; Case T-406/10 *Emesa-Trefilería, SA and Industrias Galycas, SA v Commission* EU:T:2015:499, para 115.

[410] See Jürgen Schwarze, Rainer Bechtold and Wolfgang Bosch, 'Deficiencies in European Community Competition Law - Critical analysis of current practice and proposals for change' (Gleiss Lutz, September 2008) 58 <http://ec.europa.eu/competition/consultations/2008_regulation_1_2003/gleiss_lutz_en.pdf> accessed 02 October 2018.

why exactly the Commission and the General Court had erred, it would risk ruling ultra petita if it were to seek potential reasons ex proprio motu.[411]

Thirdly, the CJEU cannot act as a competition authority and deal with an antitrust or merger case de novo.[412] As it transpires from Article 19(1) TEU and Article 105(1) TFEU, it is not competent to re-open the administrative procedure and carry out a full re-investigation as to the facts.[413] It has to either dismiss the action or annul the measure, in whole or in part, by relying on what has already been done by the Commission.[414]

In *Solvay*, where the applicant had not been given access to potentially exculpatory documents at the administrative procedure, it was held that the occurred infringement of the rights of the defence could not be regularized at the judicial stage.[415] The decision had to be quashed.

Fourthly, the EU judges are not enabled to 'remake' an act even on the basis of the evidence adduced before them by the parties.[416] Without prejudice to Article

[411] Case C-508/11 P *ENI SpA v Commission* EU:C:2013:289, para 103. See also *Siemens AG*, note 396, para 321.

[412] See Jose´ Carlos Laguna de Paz, 'Understanding the limits of judicial review in European competition law' (2014) 2 Journal of Antitrust Enforcement 203, 209-213; Petre Alexandru Biolan, 'Reopening EU Competition Investigations After Judicial Annulment: Beyond Procedural Errors' (2017) 8 JECLAP 83, 85.

[413] *Aalborg Portland*, note 109, para 103; Case C-399/08 P *Commission v Deutsche Post AG* [2010] ECR I-7831, para 84; *Kone*, note 5, para 26. See also Joined Cases C-238, 244, 245, 247, 250 to 252 and 254/99 P *Limburgse Vinyl Maatschappij and Others v Commission* [2002] ECR I-8375 (known as *PVC II*), para 694.

[414] Inculpatory evidence cannot be produced for the first time before the CJEU, see Joined Cases T-67, 68, 71 and 78/00 *JFE Engineering Corp. and Others v Commission* [2004] ECR II-2501, para 176; Case T-1/89 *Rhône-Poulenc SA v Commission* [1991] ECR II-867, Opinion of AG Vesterdorf, 954.

[415] Case T-30/91 *Solvay SA v Commission* [1995] ECR II-1775, paras 98 and 103. See also Case T-36/91 *Imperial Chemical Industries plc v Commission* [1995] ECR II-1847 (known as *ICI*), paras 108 and 113.

[416] Joined Cases T-68, 77 and 78/89 *Società Italiana Vetro SpA, Fabbrica Pisana SpA and PPG Vernante Pennitalia SpA v Commission* [1992] ECR II-1403 (known as *Italian Flat Glass*), para 319. See also Damien M.B. Gerard, 'EU Antitrust Enforcement in 2025 "Why Wait? Full Appellate

261 TFEU and the amount of penalties, they may not alter the constituent elements of a decision.[417] They shall not replace the factual and legal findings at issue with new ones or substantiate them on different or additional grounds.[418] That would outreach the review of legality and would encroach on the executive powers conferred upon the Commission by the Treaties, to the detriment of the EU's institutional balance.[419]

In *Soliver*, the judgment ruled that the applicant did not participate in the wider car-glass cartel. Instead, it was involved in bilateral discussions of an anti-competitive nature which the Commission had not qualified as an autonomous breach of Article 101(1) TFEU. The Court refrained from performing the new legal characterization of the facts itself and simply annulled the measure.[420] The analogous self-restraint did not occur in *Galp*.[421] Although the sanctioned company was cleared from direct participation in two aspects of the cartel, the General Court found ex officio that it remained liable for them on the ground that it was aware of the involvement of other undertakings. On appeal, the Court of Justice noted an excess of jurisdiction and set the judgment aside.[422]

Fifthly, the CJEU will not issue declarations or directions to the Commission as regards the measures required to comply with its judgments and the future

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[417] See Joined Cases C-247 and 253/11 *Areva SA v Commission and Alstom SA and Others v Commission* EU:C:2014:257, Opinion of AG Mengozzi, para 50.

[418] *Italian Flat Glass*, note 416, paras 315-320; Joined Cases T-44, 54, 56, 60 and 61/02 OP *Dresdner Bank AG and Others v Commission* [2006] ECR II-3567, para 80; Case T-103/14 *Frucona Košice a.s. v Commission* EU:T:2016:152, paras 88-91.

[419] See Article 19(1) TEU in conjunction with Article 17(1) TEU and Article 105(1) TFEU; Case T-68/09 *Soliver NV v Commission* EU:T:2014:867, para 113.

[420] *Soliver*, paras 113-114.

[421] Case T-462/07 *Galp Energía España, SA and Others v Commission* EU:2013:459, paras 265, 266, 270, 292 and 625-626.

[422] *Galp* (CoJ), note 399, paras 78-79.

enforcement of competition law in general.[423] Its task is to inspect and potentially void the past course of action of other EU institutions, not to assume their role directly or indirectly.[424]

In *Trajektna luka Split*, the General Court rejected as inadmissible the plea asking it to order the conduct of a fresh investigation and the adoption of a new administrative decision for a reported, alleged violation of Article 102 TFEU.[425] It would have done the same for a request to order the avoidance of the above.[426]

The five foregoing limitations do not compromise the effectiveness of the judicial control and the provision of a fair trial. The first and the second merely place the ball in the hands of the parties which are able to chain or unchain the CJEU depending on their formulated demands and submissions. The third and the fourth signify that the EU judicature cannot duplicate, modify or complement the deeds of the Commission, not that it is not empowered to thoroughly review them and cancel them. The fifth limitation concerns the actions of the administration in the future. A judgment shall not dictate them ex ante, but it can always freely evaluate them ex post and nullify their repercussions.

[423] Case T-74/92 *Landbroke Racing Deutschland GmbH v Commission* [1995] ECR II-0115, para 75; Case T-145/06 *Omya AG v Commission* [2009] ECR II-0145, para 23; *Éditions Odile Jacob*, note 381.

[424] See Case T-76/08 *EI du Pont de Nemours and Company, DuPont Performance Elastomers LLC and DuPont Performance Elastomers SA v Commission* EU:T:2012:46, para 161; Case T-180/15 *Icap plc v Commission* EU:T:2017:795, para 35.

[425] Case T-70/15 *Trajektna luka Split d.d. v Commission* EU:T:2016:592, paras 17-19. See also Case T-16/91 *Rendo NV, Centraal Overijsselse Nutsbedrijven NV and Regionaal Energiebedrijf Salland NV v Commission* [1992] ECR II-2417, paras 76-77; Joined Cases T-374, 375, 384 and 388/94 *European Night Services Ltd (ENS) and Others v Commission* [1998] ECR II-3141, paras 51-53.

[426] See *Emesa-Trefilería,* note 409, para 131.

4.2. The Exhaustive First-Instance Review

We shall now look at the way first-instance competition disputes are actually reviewed by following the case law of the General Court on every one of the four grounds of annulment included in Article 263 TFEU. Given that several hundreds of different pleas have been put forward in the context of Article 263 TFEU, I tried to select the most indicative ones for the applicable standard of judicial control.

4.2.1. Grounds of lack of competence

Starting from the review with respect to the first ground of annulment in line, a ground that the Court can raise ex officio,[427] it ought to be clarified that an act will be annulled for lack of competence if it lies outside the scope of the powers of the Union or has been adopted by an institution that overstepped its assigned mandate within the Union.[428]

Some of the undertakings in *JFE Engineering*[429] asserted that the Commission was precluded from investigating their anti-competitive conduct because a binding international agreement rendered another transnational body, the European Free Trade Association Surveillance Authority, exclusively competent. The judgment interpreted the agreement and concluded that it did not deprive the Commission of the

[427] Case C-210/98 P *Salzgitter AG v Commission and Germany* [2000] ECR I-5843, paras 56-57; Case T-660/14 *SV Capital OÜ v European Banking Authority (EBA*) EU:T:2015:608, paras 57-59. See also Dashwood, Dougan, Rodger, Spaventa and Wyatt, note 7, 178.

[428] For the principle of conferral which governs the competences of the EU, see Article 5(2) TEU; Joined Cases C-281, 283 to 285 and 287/85 *Federal Republic of Germany and others v Commission* [1987] ECR 3203. For the relationship between EU law and public international law, see Case C-413/14 P *Intel Corp. v Commission* EU:C:2017:623, paras 40-47.

[429] *JFE Engineering*, note 414, para 482-486. Also Case 48/69 *Imperial Chemical Industries Ltd v Commission* [1972] ECR 619, 624-634.

authority to apply Article 101(1) TFEU to the practices at issue since trade between Member States was indeed affected by them.

On the contrary, the impugned act was voided in *SP*.[430] The EU judicature recognized that the Commission was not allowed to use the expired European Coal and Steel Community Treaty (ECSC Treaty) as sole legal basis for punishing a cartel on reinforcing bars. Apparently, an EU institution could not derive jurisdiction from provisions which were no longer in force at the time it issued its decision.

In *MCI*, the Commission was found to have exceeded the limits of its powers under the EU Merger Regulation.[431] It declared a concentration to be incompatible with the internal market despite the fact that the involved companies had formally withdrawn their notification and had informed of the abandonment of the merger.

It turns out that the judicial performance on the present field is unproblematic. The General Court duly considers the submissions before it and reviews whether the jurisdiction of the Commission is based on a correct interpretation and application of EU (see *SP* and *MCI*) as well as of international (see *JFE Engineering*) law. It does not hesitate to exercise its annulment authority accordingly (see *SP* and *MCI*).

[430] Joined Cases T-27, 46, 58, 79, 80, 97 and 98/03 *SP SpA and Others v Commission* [2007] ECR II-4331, paras 107-123.

[431] *MCI*, note 378, para 107.

4.2.2. Grounds of infringement of an essential procedural requirement

The current section focuses on the judicial examination of alleged infringements of an essential procedural requirement. The said grounds of annulment relate to the propriety of the entire process for the adoption of a competition act.[432]

To begin with a successful application, in *BASF and Others*, the decision penalizing an offence under Article 101(1) TFEU was quashed on account of various errors in its authentication.[433] One of the errors was that three of its language versions were signed by one Commissioner and not by the whole College of Commissioners as required by EU law.[434]

The outcome was different in *Goldfish*, but not the intensity of the review.[435] The General Court held that the Commission did not contravene the lawful procedure for obtaining evidence and the rights of the defence by using secret recordings of incriminating telephone conversations. Guided from the jurisprudence of the ECtHR on the right to a fair trial, the judgment explained that the recordings were made by a cartel participant without any public authority knowing about it, that they were not the sole adduced proof of the infringement and that the applicants had the opportunity

[432] Stating reasons under Article 296 TFEU is a matter of procedural legality for example. The validity of those reasons is an issue of substantive legality, see Case C-154/14 P *SKW Stahl-Metallurgie GmbH and SKW Stahl-Metallurgie Holding AG v Commission* EU:C:2016:445, para 39.

[433] Joined Cases T-80, 81, 83, 87, 88, 90, 93, 95, 97, 99 to 101, 103, 105, 107 and 112/ 89 *BASF AG and Others v Commission* [1995] ECR II-729, paras 71-121. See also Case T-32/91 *Solvay SA v Commission* [1995] ECR II-1825, para 54; Case T-37/91 *Imperial Chemical Industries plc v Commission* [1995] ECR II-1901, para 93.

[434] See Case C-137/92 P *Commission v BASF AG and Others* [1994] ECR I-2555, paras 77-78.

[435] *Goldfish*, note 22, paras 45-73.

to listen to the audio evidence and challenge its credibility already at the administrative stage.[436]

Lastly, in *Japan Airlines*, the EU judicature pointed out the defective statement of reasons ex proprio motu,[437] pursuant to what it 'may, or even must' do for every infringement of an essential procedural requirement.[438] It went on to nullify the contested measure, which contained a contradiction between its operative part, sanctioning four antitrust violations, and its grounds, citing a single violation.[439]

The above jurisprudence demonstrates that the Commission has not been granted a free pass. The CJEU carefully and unrestrainedly scrutinizes the compatibility of any procedural administrative action with EU law, including fundamental rights (see *Goldfish*), in the light of the pleas introduced by the parties (see *BASF and Others* and *Goldfish*) and also of the pleas formulated of its own motion (see *Japan Airlines*). Bearing in mind its review on lack of competence, its aggregate performance on external legality is unblemished.

[436] See also *Almamet*, note 11, paras 39-79. For detected breaches of the rights of the defence, see *ICI*, note 415, paras 87-118; Case T-189/10 *GEA Group AG v Commission* EU:T:2015:504, paras 87-88.

[437] Case T-36/11 *Japan Airlines Co. Ltd v Commission* EU:T:2015:992, para 27. See also Case T-132/07 *Fuji Electric Co. Ltd v Commission* [2011] ECR II-4091, paras 163 and 169; Case T-58/14 *Stührk Delikatessen Import GmbH & Co. KG v Commission* EU:T:2018:474, paras 311-312.

[438] ibid; Case T-240/10 *Hungary v Commission* EU:T:2013:645, para 70; *Frucona Košice*, note 418, para 84.

[439] *Japan Airlines*, note 437, paras 60 and 85-87. See also Case T-38/11 *Cathay Pacific Airways Ltd v Commission* EU:T:2015:985, paras 63 and 87-89; Case T-40/11 *Latam Airlines Group SA and Lan Cargo SA v Commission* EU:T:2015:986, paras 68 and 92-94. For defective statements of reasons pointed out by applicants, see Case T-234/07 *Koninklijke Grolsch NV v Commission* [2011] ECR II-6169, paras 92-94; Case T-517/09 *Alstom v Commission* EU:T:2014:999, paras 97-119.

4.2.3. Grounds of infringement of the Treaties or of any rule relating to their application

The third ground of annulment in Article 263 TFEU, which may not be raised ex officio,[440] could very well encompass the two aforementioned ones. It demands respect to the EU law in general, viz. the Lisbon Treaties, the general principles of EU law, EU secondary legislation, international law and the international treaties signed by the Union.[441] Its main function in the realm of competition is that it empowers the CJEU to touch on the substantive legality of Commission decisions, to wit their part assessing and regulating the behaviour of companies of undertakings on the market.

4.2.3.1. Review of the facts

Facts constitute the basis for the application of the prohibitive provisions of EU competition law on undertakings and associations of undertakings. The General Court will afford a fair trial to those entities solely if it examines thoroughly and unrestrainedly all the questions of fact submitted before it. The present subsection will study closely four relevant judgments for the purpose of finding out whether the foregoing condition is fulfilled.

[440] Case C-265/97 P *Coöperatieve Vereniging De Verenigde Bloemenveilingen Aalsmeer BA (VBA) v Florimex BV and Vereniging van Groothandelaren in Bloemkwekerijproducten (VGB)* [2000] ECR I-2061, para 114; Case C-272/12 P *Commission v Ireland and Others* EU:C:2013:812, para 28.

[441] See Trevor Hartley, *The Foundations of European Union Law* (3rd edn, OUP 2014) 423-424; Dashwood, Dougan, Rodger, Spaventa and Wyatt, note 7, 179-180. Hartley also includes two other sources of rules in the list, namely subsidiary conventions that are part of the Union legal system and binding acts of the representatives of the Member States.

It ought to be specified that in the antitrust field, the Court assesses whether the facts have been proven beyond reasonable doubt.[442] This is the requisite standard of proof, viz. the evidentiary threshold the Commission has the burden to meet so that the EU judicature can uphold the finding of an infringement.[443] Since most of the facts in merger disputes have a complex economic nature, we will grapple with them at the next chapter.[444]

Before engaging with the actual case law, it would be useful to refer to the distinction made by Hubert Legal between 'facts' and 'appraisals'.[445] He maintains that the former are subjected to a full control whereas the latter to a limited one if they are complex. In my opinion, the two concepts usually overlap. Unless there is an unqualified piece of evidence, a fact derives from an appraisal of other facts. The meetings between the directors of two rival companies may be inferred from the fact that they had reservations on the same hotel on the same dates. Will the Court treat the meetings as a 'fact' or an 'appraisal'? Apparently, the review of the two concepts in non-technical areas of the law should be equally robust. There is no justification

[442] See Case T-321/05 *AstraZeneca AB and AstraZeneca plc v Commission* [2010] ECR II-2805, para 852; Case T-519/09 *Toshiba Corp. v Commission* EU:T:2014:263, para 159; *FSL*, note 80, para 184; Case T-251/12 *EGL, Inc. and Others v Commission* EU:T:2016:114, para 149; *Telefónica II*, note 399, paras 126-127. See, a contrario, the older and isolated Case T-53/03 *BPB plc v Commission* [2008] ECR II-1333, para 64.

[443] For the burden of proof, see Regulation 1/2003, note 45, Article 2; Case T-87/05 *EDP - Energias de Portugal, SA v Commission* [2005] ECR II-3745, para 61; *Cisco*, note 96, para 62.

[444] See, however, the factual assessments regarding the acquisitions in Case T-282/02 *Cementbouw Handel & Industrie BV v Commission* [2006] ECR II-0319, paras 40-83; Case T-411/07 *Aer Lingus Group plc v Commission* [2010] ECR II-3691, paras 67-73.

[445] Hubert Legal, 'Standards of Proof and Standards of Judicial Review in EU Competition Law' in Barry Hawk (eds), *Annual Proceedings of the Fordham Corporate Law Institute* (Juris Publishing 2006).

for a self-imposed judicial limitation irrespective of the complexity involved.[446] Indeed, the judgments below do not distinguish between facts and appraisals.

To start our analysis, in *Italian Flat Glass*, the General Court refuted the factual inferences of the Commission in view of which VP had been found liable for a collectively dominant cartel together with SIV and FP. The judgment stressed that: (a) the rhythm of VP's price changes diverged significantly from that of the other two offenders,[447] (b) the content of a handwritten note stating that SIV 'cannot fight to stop VP' was incompatible with the existence of a close price agreement among the three penalized companies,[448] and (c) the monthly report of a VP's director did not show that he was in Milan when a cartel meeting started there, but that he was in Genoa.[449] These three factors led to the exoneration of VP from any breach of Articles 101 and 102 TFEU.[450]

Similar logical inconsistencies were spotted in *Kaučuk*. The Court held that the Commission 'erred' since the submitted documents and statements were contradictory and did not suffice to display the participation of the sanctioned undertaking in any of the cartel meetings.[451]

In *Aalberts Industries*, the EU judicature performed an even more invasive review of the Commission's conclusions.[452] The involvement of Simplex in the

[446] See Tony Reeves and Ninette Dodoo, 'Standards of Proof and Standards of Judicial Review in European Commission Merger Law' (2005) 29 FORDHAM INT'L L.J. 1034, 1060.

[447] *Italian Flat Glass*, note 416, paras 194-195.

[448] ibid, para 215.

[449] ibid, para 238.

[450] ibid, paras 325, 368 and 370. The other two applicant companies were not completely exonerated for the infringement of Article 101 TFEU, but their fines were reduced by 85.7% each.

[451] Case T-44/07 *Kaučuk a.s. v Commission* [2011] ECR II-4601, paras 54-67. See also Case T-53/07 *Trade-Stomil sp. z o.o. v Commission* [2011] ECR II-4657, paras 65-79.

[452] *Aalberts Industries*, note 406, paras 44-69.

illegal agreement was based on two pieces of evidence. The first was a competitor's handwritten note according to which Simplex confirmed price increases in a mutual telephone call. The second was a leniency statement from another rival company claiming that it discussed its pricing plans with the applicant. The judgment pointed out that: (a) the person who decided to raise the prices could not be identified with certainty and it might have been Simplex's independent importer, and (b) there was no justification for conferring greater value to the leniency statement than to the testimonies of two representatives of Simplex denying the supposed content of the discussion. Eventually, it was declared that the anti-competitive nature of the applicant's conduct was not proven to the requisite standard.

Finally, in *Bavaria*, the decision was partially quashed in the light of 'an error of assessment of the facts'.[453] The handwritten notes, which had allegedly revealed a constituent aspect of the infringement of Article 101(1) TFEU, were deemed vague and amenable to an alternative plausible explanation.

From everything perused so far, it turns out that the General Court carries out a meticulous and independent examination of the adduced evidence, including documents, notes and testimonies.[454] We should bear in mind that the pieces of evidence are not ends in themselves, but a means for confirming or refuting the facts. The Court is not obliged under the right to a fair trial to waste time in seeking data which would add nothing new to the factual background of the case. It is entitled to

[453] Case T-235/07 *Bavaria NV v Commission* [2011] ECR II-3239, paras 157-169.

[454] For additional examples of witness statements, see *JFE Engineering*, note 414, paras 189-221; Case T-303/02 *Westfalen Gassen Nederland BV v Commission* [2006] ECR II-4567, paras 86-93 and 124-125; *Telefónica II*, note 399, paras 189-191.

reject requests to summon witnesses[455] or commission experts' reports[456] if the information already available does not need to be clarified or supplemented, for instance because the same witness statement has been made before the Commission or the given matter does not require advanced technical knowledge.

Next, the applicable standard of review is 'correctness' and not manifest error.[457] EU judges verify whether a contested fact is undoubtedly correct in the light of the available evidence and do not confine themselves to the question of whether any reasonable person would have made a different finding from that of the Commission or whether the limits of the purported administrative discretion were exceeded. The Court may not only bring to surface logical inconsistencies (see *Italian Flat Glass* and *Kaučuk*), but also substitute the conclusions of the decision-maker by attaching to the evidence a greater or lower probative value (see point b of *Aalberts Industries*)[458] or by accepting an alternative interpretation which seems equally plausible to its eyes (see point a of *Aalberts Industries* and *Bavaria*). No inch of administrative discretion is therefore conceded on the present area.[459] The judicial opinion always prevails in the end.

[455] Case T-144/07 *ThyssenKrupp Liften Ascenseurs NV and Others v Commission* [2011] ECR II-5129, paras 152-154; *Sasol*, note 153, paras 129-130 and 170-171; Case T-208/13 *Portugal Telecom SGPS, SA v Commission* EU:T:2016:368, paras 278-292; *Telefónica II*, note 399, paras 341-366.

[456] Experts' reports are usually requested for complex economic issues, see Case T-145/89 *Baustahlgewebe GmbH v Commission* [1995] ECR II-987, paras 38-43; *BPB*, note 442, paras 490-491; Case T-352/09 *Novácke chemické závody a.s. v Commission* EU:T:2012:673, paras 183-184.

[457] Renato Nazzini, 'Judicial Review after KME: An Even Stronger Case for the Reform that Will Never Be' (2015) 40 EL Rev 490, 503-504. See also Case C-12/03 P C*ommission v Tetra Laval* [2005] ECR I-987, Opinion of AG Tizzano, para 86; Bo Vesterdorf, 'Standard of Proof in Merger Cases: Reflections in the Light of Recent Case Law of the Community Courts' (2005) 1 European Competition Journal 3, 15.

[458] For the manner in which the probative value of the evidence is assessed by the CJEU, see *E.ON Energie*, note 373, para 55; *Goldfish*, note 22, para 114; *FSL*, note 80, para 181.

[459] See the similar view in Migel Sousa Ferro, 'Judicial Review: Do European Courts Care about Market Definition?' (2015) 6 JECLAP 400, 401.

4.2.3.2. Review of factual presumptions

A presumption is a fact inferred automatically by the administration or the judge once other facts have been shown to be true. It reveals 'a common sense approach derived from experience'[460] and facilitates the establishment of competition law offences by shifting the burden of proof to penalized undertakings.[461] Such inferences pose a serious threat for the standard of review.[462] Due to the high probability of them being accurate, the EU judicature might become complacent and evade the required painstaking inquiry on pleas intending to rebut them. That is why presumptions shall be analysed separately from the rest of the facts in EU competition cases.

In *FSL*, it was ruled that the presumption of the continuous character of the infringement was not adequately substantiated and consequently a rebuttal would have been redundant.[463] As the applicant contended, the Commission failed to present evidence of facts fairly proximate in time for it to be rational to infer that the violation of Article 101(1) TFEU continued uninterruptedly between two precise and undeniable dates.

In *Shell Petroleum*,[464] the impugned presumption of parental liability was not successfully refuted.[465] The entity which owned 100% of the capital of another firm

[460] David Bailey, 'Presumptions in EU competition law' (2010) 31 ECLR 362.

[461] See Cristina Volpin, *The ball is on your court:* Evidential burden of proof and the proof-proximity principle in EU competition law (2014) 51 CML Rev 1159, 1165.

[462] Moreover, it is often argued before the CJEU, unsuccessfully, that such inferences contravene the principle of the presumption of innocence, see Case T-190/06 *Total SA and Elf Aquitaine SA v Commission* [2011] ECR II-5513, paras 122-129; Case T-348/06 *Total Nederland NV v Commission* EU:T:2012:481, paras 104-109; *Sasol*, note 153, paras 139-142.

[463] *FSL*, note 80, paras 481 and 496-499. See also Case T-154/09 *Manuli Rubber Industries SpA (MRI) v Commission* EU:T:2013:260, paras 195-196; *Volpin*, note 461, 1170.

[464] Case T-343/06 *Shell Petroleum NV, The Shell Transport and Trading Company Ltd and Shell Nederland Verkoopmaatschappij BV v Commission* EU:T:2012:478. The 'grandparent' company was also held liable for the conduct of the parent company's subsidiary.

indeed exercised decisive influence over the latter's unlawful conduct. The General Court did not confirm so mechanically. It first mentioned that the parent company supervised the management and was regularly apprised of the business issues of its delinquent subsidiary and that the whole Shell group received legal support from the same internal company.[466]

In *Total Raffinage,* the judgment rejected the objections against the presumption that an undertaking participating in a concerted action and remaining active on the market necessarily took into account the information exchanged with its competitors for the purpose of determining its commercial conduct.[467] It was concluded that the applicant was guilty since it attended more than fifty anticompetitive meetings, it was constantly informing customers of price increases whereas two other collaborating companies attested to its involvement in the implementation of the cartel.[468]

Having studied judgments about the three major presumptions in EU competition law, I can say that the CJEU considers effectively complaints either disputing the initial construction of presumptions (see *FSL*) or aiming to rebut them (see *Shell Petroleum* and *Total Raffinage*). It goes through the evidence and offers convincing, non-standardized reasons for its final conclusions which may supplant the ones of the Commission. Notwithstanding the outcome of the case, it makes

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[465] See, a contrario, Case T-25/04 *Alliance One International Inc., formerly Standard Commercial Corp and Others v Commission* [2010] ECR II-5329, paras 218-219.

[466] *Shell*, note 464, paras 69-74. See also Case T-175/05 *Akzo Nobel NV and Others v Commission* [2009] ECR II-184, paras 97-112; Case T-349/08 *Uralita, SA v Commission* [2011] ECR II-373, paras 43-50.

[467] Case T-566/08 *Total Raffinage Marketing v Commission* EU:T:2013:423, paras 188-191.

[468] See also Case T-240/07 *Heineken Nederland BV and Heineken NV v Commission* [2011] ECR II-3355, paras 186-189; Case T-588/08 *Dole Food Company, Inc. and Dole Germany OHG v Commission* EU:T:2013:130, paras 427-430.

perfectly clear that presumptions do not serve as an alibi for loosening the intensity of review of factual questions in EU competition law.

4.2.3.3. Review of the interpretation and application of substantive law

The Commission has to interpret and then apply the law to the facts of the case. It was displayed earlier that the CJEU carries out a strenuous inspection in the area of procedural law. We shall now see whether this is also true as regards the substantive field.

A vital issue in *Tomra* was the definition of the legal test for appraising whether conditional rebate schemes breach Article 102 TFEU.[469] Pursuant to the General Court, it sufficed that such practices were capable of restricting or foreclosing competition irrespective of their actual impact on the market. As a result, the complementary analysis of the Commission on the tangible effects of the dominant undertaking's behavior was deemed unnecessary.[470]

In the next two instances there was disagreement over the requisite standard of proof. The Commission asserted in *Dresdner Bank* that an antitrust violation shall be proved if its estimation of the facts is more likely than the one proposed by the applicant. The CJEU was not pleased with the 51% chance and eventually voided the decision. It must not entertain any doubts as to the existence of the infringement, in line with the principle of the presumption of innocence.[471] On the contrary, it

[469] Case T-155/06 *Tomra Systems ASA and Others v Commission* [2010] ECR II-4361, paras 215-219 and 287-290. See also Ariel Ezrachi *EU Competition Law: An Analytical Guide to the Leading Cases* (6rd edn, Hart Publishing 2018) 264-265.

[470] *Tomra*, para 219. See also Communication from the Commission–Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C45/7, paras 37-43.

[471] *Dresdner Bank*, note 418, paras 58-61, 134 and 148. For the principle of presumption of innocence, see Article 48(1) of the Charter; Article 6(2) ECHR; *AstraZeneca*, note 442, para 76; Case T-472/13 *H. Lundbeck A/S and Lundbeck Ltd* EU:T:2016:449, para 107.

recognized in *Cisco* that a comparative assessment of probabilities is the right path for endorsing or prohibiting concentrations.[472] Hence, against the applicant's contention, the Commission was not obliged to prove the lack of competition concerns for the notified acquisition beyond reasonable doubt in order to approve it without having initiated Phase II investigation of the EU Merger Regulation.

In *Bayer*, the dispute revolved around the legal characterization of the facts.[473] The applicant had reduced the supplies of a medicinal product to its French and Spanish wholesalers so as to prevent them from exporting in the United Kingdom. Although the wholesalers were constantly trying to override the unilateral measure by acquiring extra quantities for export, the Commission maintained that the continuation of their commercial relations with Bayer constituted an agreement within the meaning of Article 101(1) TFEU. The judgment quashed the act, explaining that these events did not amount to a 'concurrence of wills' between the counterparties to conduct themselves on the market in a specific way.

In contrast to the aforementioned examples, the General Court failed to respond to a pivotal point in law in *PVC II*.[474] One of the parties put forward that, after the annulment of the PVC I decision, the power to penalize the offence in question had been definitively transferred from the Commission to the EU judicature. This sole omission in the 1269 paragraphs long ruling, answering to dozens of other

[472] *Cisco*, note 96, paras 42-48.

[473] Case T-41/96 *Bayer AG v Commission* [2000] ECR II-3383, paras 157, 173 and 182-183. See also Case T-213/00 *CMA CGM and Others v Commission* [2003] ECR II-913, paras 480-517.

[474] *PVC II* (CoJ), note 413, paras 416-428.

points, was fortunately set aside. Upon appeal, the Court of Justice examined the plea itself and rejected it on the merits.[475]

The regrettable oversight in *PVC II* is an isolated incident which does not correspond to the regular judicial practice. As it can be seen from the other summarized judgments, the fixed norm is that the EU judges look closely at the submissions before them. They have a virtual monopoly in construing the whole range of Union law and thus they determine independently from the litigants the full content of the legal criteria and concepts apposite to the market conduct at hand.[476] Then, they check whether the above criteria and concepts have been lawfully applied on each case.[477]

In this connection, the Commission enjoys absolutely no margin of appreciation.[478] Its opinion shall be ignored or replaced by the CJEU if it chooses an additional (see *Tomra*) or alternative (see *Dresdner Bank* and *Cisco*) standard for evaluating the facts and the evidence or a different reading of crucial legal terms (see *Bayer*). The *Chevron* doctrine,[479] according to which administrative agencies in the United States (US) are granted latitude by courts on the interpretation of statutes with ambiguous and unclarified wording provided that the selected interpretation is

[475] ibid, paras 689-698. The Court of Justice said that the General Court had annulled the PVC I decision on procedural grounds without having ruled on the existence of the infringement or the level of the fine.

[476] See *AC-Treuhand*, note 53, para 144.

[477] Vesterdorf, 'Judicial Review in EC Competition Law', note 195, 12.

[478] See Vesterdorf, 'Standard of Proof in Merger Cases', note 457, 12; Damien Geradin and Nicolas Petit, 'Judicial Review in European Union Competition Law: A Quantitative and Qualitative Assessment' (2010) Tilburg Law School Legal Studies Research Paper No. 01/2011, 19-20 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1698342> accessed 02 October 2018.

[479] *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.* 467 U.S. 837, 842-843 (1984).

reasonable, has not been espoused in the EU.[480] The potential vagueness of Regulation 1/2003 and the Merger Regulation, let alone Articles 101 and 102 TFEU, is not a harbinger of judicial deference.

In light of all the foregoing, it is safe to conclude that the CJEU undertakes a grueling review of any raised matter pertaining to the interpretation and application of the law by the Commission.

4.2.3.4. Review of the validity of legislative acts

Article 263(4) TFEU does not permit undertakings and associations of undertakings to institute proceedings against an EU legislative act.[481] Nevertheless, they can always question it indirectly under Article 277 TFEU in the context of an admissible action against an adverse EU competition decision relying on it.[482]

The review of legislative acts regulating competition ought to be discussed alone insomuch as it does not grapple with the manner in which the Commission has implemented the law at a particular case. The EU judiciary is called to get into deeper waters by assessing complaints targeting the validity of general and abstract policy-making legal provisions.

In *Schindler*, it was claimed that Article 23(2) of Regulation 1/2003 violated the principle that penalties must have a proper legal basis by granting the

[480] See Richard J. Pierce, 'How Agencies Should Give Meaning to the Statutes They Administer: A Response to Mashaw and Strauss' (2007) 59 Administrative Law Review 197, 199-201; Maciej Bernatt, 'Transatlantic Perspective on Judicial Deference in Administrative Law' (2016) 22 Columbia Journal of European Law 275, 282-283 and 311-313; Paul Craig, 'Judicial Review of Questions of Law: A Comparative Perspective' (2016) Oxford Legal Studies Research Paper 2/2017, 22-24 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2844800> accessed 02 October 2018.

[481] See Case C-583/11 P *Inuit Tapiriit Kanatami and Others v Parliament and Council* EU:C:2013:21, paras 57-61; Stephen Weatherill, *Cases & Materials on EU Law* (12th edn, OUP 2016) 202-205.

[482] The validity of EU legislative acts can also be questioned under Article 267 TFEU in national competition cases. The latter lies outside the scope of the present thesis.

Commission an excessive discretion on the fixing of fines and concurrently stripping the Council of one of its powers under the Treaty of Nice.[483] Firstly, the CJEU found the scope of the discretion to be sufficiently clarified, just like the ECtHR necessitates. There were express criteria and a quantifiable ceiling for setting each penalty, the Commission was constrained by the principles of equal treatment and proportionality as well as by its published fining guidelines and any indeterminate notions had been defined by the consistent judicial review. Secondly, it was held that the contested Article 23(2) gave effect to Treaty provisions whose interpretation denoted that the Commission, not the Council, had to be enabled to impose fines.

Regulation 1/2003 was again challenged, this time altogether, in *Saint-Gobain*.[484] It was argued that it breaches the right to an independent and impartial tribunal of Article 6(1) ECHR in that it entrusts to the Commission both investigative and adjudicative functions for competition law infringements. Receiving guidance from the principles enunciated by the ECtHR in *Menarini*, the judgment concluded that the EU antitrust enforcement system is lawful. The decisions of the Commission, an administrative body, are subject to full control by the General Court, a judicial body satisfying all the guarantees of the Convention's right to a fair trial.[485]

Lastly, in *Gencor*, the applicant contended that the Merger Regulation contravened international law, and more specifically the principle of territoriality, by conferring jurisdiction upon the Commission to investigate a concentration occurring outside the EU. The Court replied that the application of the Merger Regulation

[483] *Schindler*, note 373, paras 93-116. See also Case T-279/02 *Degussa AG v Commission* [2006] ECR II-897, paras 66-88; *Sasol*, note 153, paras 199-208; Case T-386/10 *Aloys F. Dornbracht GmbH & Co. KG v Commission* EU:T:2013:450, paras 57-65.

[484] *Saint-Gobain*, note 197, paras 77-87.

[485] See also *Musique Diffusion*, note 197, paras 6-11; Case T-348/94 *Enso Española SA v Commission* [1998] ECR II-1875, paras 55-65.

would be compatible with public international law as long as the proposed concentration would have immediate, substantial and foreseeable effects on the internal market.[486] The EU could not be forced to turn a blind eye to the possible creation of a dominant position inside its territory.

It turns out that in order to review impugned EU secondary legislation, the Court interprets EU primary law (see *Schindler*) and international law (see *Gencor*) unrestrictedly and takes carefully into account the pertinent Strasbourg jurisprudence (see *Saint-Gobain*). Thereby, it does not leave any leeway to EU institutions for adopting legislative competition acts that either defy the constitutional edifice of the Union or compromise fundamental rights through their subsequent implementation by the Commission. In addition, it allows the parties to understand its conclusions by offering concrete and ample reasons. On the other hand, it cannot check the advisability of legislative acts as this would be tantamount to usurping the political role assigned by the Treaties to other EU institutions such as the Council and the Commission.[487]

In the present field, the CJEU provides an effective scrutiny which does not significantly differ from the one on the Commission's implementation of legal rules. This combination ensures that every submitted question of law against a competition decision shall not escape the comprehensive consideration of the Court.

[486] *Gencor*, note 401, paras 48-50 and 89-109.

[487] See Articles 103(1) and 105(3) TFEU in conjunction with Articles 16 and 17 TEU.

4.2.4. Grounds of misuse of powers

A misuse of powers takes place when an EU institution uses its competences with an exclusive or main aim other than that for which they were conferred on it.[488] Even if the totality of the essential procedural requirements and substantive rules of EU law has been formally respected, competition decisions can still be challenged by affected natural and legal persons. Again, the Court must not disregard its duties.

In *Ferriere Nord*, the complaint alleging a misuse of powers on account that the punished infringement did not really happen was dismissed.[489] The potential invalidity of the violation would not be enough to evince that the Commission did not exercise its jurisdiction for ensuring the application of the principles laid down in Article 101 TFEU. [490]

Similarly, in *Elf Aquitaine*,[491] the applicant tried to substantiate a misuse of powers on assertions rejected in the context of another complaint. It insisted that it was wrongly found liable and individually fined for the conduct of its subsidiary. The General Court repeated that the two companies formed a single undertaking for the purposes of EU competition law and that the Commission was entitled to impose a larger penalty on the parent in view of its also larger turnover.

[488] Case C-331/88 *FEDESA and Others* [1990] ECR I-4023, para 24; Joined Cases C-186 and 188/02 P *Ramondin and Others v Commission* [2004] ECR I-10653, para 44; *EDP*, note 443, para 87. As long as the main aim is lawful, the act will not be quashed should it pursue improper secondary purposes.

[489] Case T-143/89 *Ferriere Nord v Commission* [1995] ECR II-917, paras 67-70.

[490] See also Case T-276/04 *Compagnie maritime belge SA v Commission* [2008] ECR II-1277, paras 138-141; Case T-271/03 *Deutsche Telekom AG v Commission* [2008] ECR II-477, paras 270-272.

[491] Case T-299/08 *Elf Aquitaine SA v Commission* [2011] ECR II-2149, paras 262-265.

More to the point, in *Qualcomm*, it was maintained that the disputed concentration was approved because of general policy considerations extraneous to competition law. The endorsing decision supposedly intended not to stall the public launch of the popular traffic telematics platform the acquired entity had just developed. The CJEU observed that the Commission did not deviate from consciously fulfilling its mission to secure undistorted competition within the EU.[492] That was why it had made binding the commitment of the undertakings involved to permit other providers of telematics services to enjoy indiscriminate access to the novel platform.

Apparently, the General Court gives due regard to pleas invoking a misuse of powers and offers convincing justification for each judgment. However, it has never upheld any such plea in the area of competition law since its establishment in 1989.[493]

A lax or deferential review is not the explanation. Miscellaneous factual or legal errors made by the administration may lead to annulment on other grounds, but not on a misuse of powers. The interested parties must not simply recycle arguments against the soundness of an adverse measure, like in *Ferriere Nord* and *Elf Aquitaine*.[494] They ought to concentrate on the illegal motives behind it, as it was attempted in *Qualcomm*. Frankly, it remains objectively difficult to gather evidence proving that the Commission as a collegiate body had something illicit in mind when it acted within the framework of the executive role assigned to it by the Treaties. The

[492] *Qualcomm*, note 356, paras 159-167. See also *EDP*, note 443, paras 86-98; *Endesa*, note 380, paras 258-259.

[493] For a successful plea of misuse of powers in other areas of the law, see Case T-106/92 *Frederiksen v Parliament* [1995] ECR-SC II-99, paras 46-60. See also Koen Lenaerts, Ignace Maselis and Kathleen Gutman, *EU Procedural Law* (OUP 2014) 385.

[494] See also Case T-162/10 *Niki Luftfahrt GmbH v Commission* EU:T:2015:283, paras 355-358.

rational presumption would be that the principal purpose it knowingly served was legitimate.

4.3. The Restrained Second-Instance Jurisdiction

In EU competition law, the second-instance jurisdiction is to an appreciable extent limited compared to the first-instance one. The current subchapter presents the reasons why and concentrates on the way the Court of Justice exercises its powers of review.

4.3.1. The characteristics of the appellate proceedings

Under Article 256(1)(b) TFEU, aggrieved entities are offered a restricted opportunity to have their competition case heard for a second and last time in front of an independent and impartial tribunal. Upon the notification of the first-instance judgment or order, any party, including the Commission, which has been unsuccessful in at least one of its submissions, may put forward an appeal within two months at the Court of Justice.[495]

An appeal shall be limited to points of law.[496] The Court of Justice shall examine grounds of lack of competence, breach of procedure and infringement of

[495] Article 256(1)(b) TFEU in conjunction with Protocol (No 3), note 357, Article 56. Other legal entities may bring an appeal only where the decision of the General Court directly affects them.

[496] Article 256(1)(b) TFEU in conjunction with Protocol (No 3), Article 58. See also Case C-185/95 P *Baustahlgewebe GmbH v Commission* [1998] ECR I-8417, paras 23-24; *PVC II* (CoJ), note 413, para 194; *Kone*, note 5, para 60; *Telefónica,* note 5, para 84.

Union law.[497] In this framework, it has no jurisdiction to establish the facts or assess the value which should be attached to the evidence.[498] By way of exception, factual findings are amenable to appellate control where the clear sense of the evidence has been distorted or their substantive inaccuracy is apparent from the documents in the case.[499]

The scope of the dispute cannot be widened on appeal. The appellant must seek the same form of order, in whole or in part, as that sought at first instance.[500] It may not ask for the entire annulment of the administrative measure if it merely requested a partial annulment at the General Court. Furthermore, an appeal is not allowed to have a different subject-matter from that of the initial action.[501] A plea in law concerning the Commission decision which was not submitted before the General Court may not be raised directly or indirectly for the first time before the Court of Justice.[502]

[497] Protocol (no3), Article 58.

[498] The legal criteria used for taking and assessing the evidence are nonetheless reviewable, see Case C-439/11 P *Ziegler SA v Commission* EU:C:2013:513, para 75; Case C-155/14 P *Evonik Degussa GmbH and AlzChem AG, formerly AlzChem Trostberg GmbH, formerly AlzChem Hart GmbH v Commission* EU:C:2016:446, paras 24-26; Case C-623/15 P *Toshiba Corp. v Commission* EU:C:2017:21, para 39.

[499] Case C-440/07 P *Commission v Schneider Electric SA* [2009] ECR I-6413, para 104; Case C-549/10 P *Tomra Systems ASA and Others v Commission* EU:C:2012:221, paras 25-26; Case C-286/13 P *Dole Food Company Inc. and Dole Fresh Fruit Europe v Commission* EU:C:2015:184, para 58. See also Case C-167/04 P *JCB Service v Commission* [2006] ECR I-8935, paras 103-110.

[500] Rules of Procedure of the CoJ, note 361, Article 170(1).

[501] ibid. See also Case C-617/13 P *Repsol Lubricantes y Especialidades, SA and Others v Commission* EU:C:2016:416, para 58.

[502] Case C-520/09 P *Arkema SA v Commission* [2011] ECR I-8901, para 64; Case C-521/09 P *Elf Aquitaine SA v Commission* [2011] ECR I-8947, para 35; Case C-84/13 *Electrabel SA v Commission* EU:C:2014:2040, paras 35-36.

The first-instance judgment or order will be set aside, in part or in whole, only where a detected infringement of EU law relates to the operative part of the ruling.[503] Otherwise, the incorrect grounds will be substituted with new, correct ones.[504] Should it choose to void the appealed ruling, the Court of Justice may either refer the case back to the General Court for a fresh evaluation or, where all the necessary elements are available before it, resolve the matter itself by upholding or quashing under Article 264 TFEU the act of the Commission.[505]

4.3.2. The actual appellate review

The Court of Justice constitutes the final and strict critic of the interpretation and application of EU law as well as of the validity of EU legislative acts.

To begin with a dispute revolving around the external legality of an act, in *Bertelsmann and Sony*, the General Court quashed the approval of a notified concentration on account of an inadequate statement of reasons. The Court of Justice disagreed. It accepted the arguments of the appellants pointing out that the reasons of the measure were clear enough to allow a third company to challenge the inferences of the Commission whereas the General Court had also understood them and debated their soundness. The appealed ruling was set aside.[506]

[503] Case C-49/92 P *Commission v Anic Partecipazioni SpA* [1999] ECR I-4125, para 120; Case C-308/04 P *SGL Carbon AG v Commission* [2006] ECR I-5977, para 98; Case C-413/08 *Lafarge SA v Commission* [2010] ECR I-5361, para 90.

[504] *Areva* (judgment), note 417, para 155; Case C-243/12 P *FLS Plast A/S v Commission* EU:C:2014:2006, paras 81-91; *Intel*, note 428, para 94; The Court of Justice cannot substitute the grounds of Commission decisions, see Chapter 4.1.3.

[505] Protocol (No 3), note 357, Article 61.

[506] *Bertelsmann and Sony*, note 96, paras 160 and 180-183.

Staying on the field of procedural legality, the appellant in *ARBED*[507] did not receive a statement of objections at the administrative procedure and it was not therefore made aware that it would be personally sanctioned for the conduct of its subsidiary. The Court of Justice held that the General Court was 'wrong' in maintaining that ARBED's rights of defence were not adversely affected. The contested judgment was voided together with the decision of the Commission.[508]

Proceeding to questions of substantive legality, in *SKW*, it was put forward that the General Court failed to take sufficient account of certain evidence regarding the exercise of decisive influence by one company to another. The Court of Justice explained that it was not competent to review the factual appraisals carried out at first instance and rejected the ground as inadmissible.[509] On the contrary, it intervened in *Commission v Keramag*, where an actual question of law was raised. The General Court had infringed the rules applicable to the appraisal of the evidence by holding that one leniency statement cannot corroborate another. The appealed ruling did not survive and the case was referred back to the first-instance judicial body.[510]

As to the validity of legislative provisions, the appellant in *Schindler* insisted that Article 23(2) of Regulation 1/2003 breaches the principle of legal certainty. In

[507] Case C-176/99 P *ARBED SA v Commission* [2003] ECR I-10687.

[508] ibid, paras 19-25. For other procedural irregularities detected by the Court of Justice, see Joined Cases C-322, 327 and 338/07 P *Papierfabrik August Koehler AG, Bolloré SA and Distribuidora Vizcaína de Papeles SL v Commission* [2009] ECR I-7191, paras 34-48; Case C-109/10 P *Solvay SA v Commission* [2011] ECR I-10329, paras 70-73; Case C-85/15 P *Feralpi Holding SpA v Commission* EU:C:2016:940, paras 45-48 and 58.

[509] *SKW*, note 432, paras 32-35. See also *Dalmine*, note 397, para 155; *Commission v Tetra Laval*, note 457, para 104; *PROAS*, note 399, paras 52-53.

[510] *Commission v Keramag*, note 406, paras 40-46 and 75. For other successful appeals of the Commission, see Case C-440/11 P *Commission v Stichting Stichting Administratiekantoor Portielje and Gosselin Group NV* EU:C:2013:514, paras 45-46, 66-68 and 73; Case C-441/11 P *Commission v Verhuizingen Coppens NV* EU:C:2012:778, paras 52-54 and 82.

rejecting the claim, the Court of Justice reiterated its elaborate settled case law on the subject, which had also been espoused at first-instance.[511]

It turns out that the Court of Justice makes the best out of its restrained powers. It scrutinizes all procedural (see *Bertelsmann and Sony* and *ARBED*) and substantive (see *Commission v Keramag* and *Schindler*) points in law submitted by every one of the opposing sides. Its judgments are adequately reasoned even when it rejects pleas, admissible (see *Schindler*) or not (see *SKW*). Moreover, it ensures, by nullifying acts contravening the EU legal order (see *Bertelsmann and Sony*, *ARBED* and *Commission v Keramag*), that mistakes in previous legislative, administrative or judicial proceedings shall not be left unremedied.

4.4. Summarizing the Standard of Judicial Review of the Non-Economic Facts and the Law

It is time to recapitulate and synthesize everything discussed so far on the standard of judicial review of the non-economic facts and the law in EU competition law, bearing in mind the requirements we came across in Chapter 3 for complying with Article 6(1) ECHR.

In the beginning, I demonstrated the presence of strong constitutional guarantees securing that the General Court and the Court of Justice are independent, impartial and established by law, prerequisites for the observance of the right to a fair trial of any litigant.

[511] *Schindler* (CoJ), note 5, paras 53-60. See also Chapter 4.2.3.4.

Secondly, it was shown that the CJEU is enabled to review competition decisions, no matter their form, which produce autonomous and binding legal effects. Every natural and legal person adversely affected by such decisions has the standing to bring a relevant action. Under Articles 256(1), 263(2) and 264 TFEU, the General Court can examine and quash the contested act on all factual and legal questions concerning either its substance or the procedure that led to its adoption. In this connection, any piece of lawfully obtained evidence can be admitted and be freely appraised irrespective of whether it had been introduced at the administrative phase. Thus, the assigned powers of review of the General Court meet the conditions set by the jurisprudence of the ECtHR. There are no such requirements for the Court of Justice.

Five restrictions on the jurisdiction of the CJEU were presented right after. It cannot amplify the scope and the content of the dispute as those have been delineated by the parties, carry out a de novo examination of the case, alter the factual and legal findings of the impugned act and issue directions to other EU institutions. Nevertheless, the ECtHR does not ask for any of the above powers for the provision of a sufficient review.

Fourthly, I selected the most telling examples from the case law and focused on the actual judicial control, which has led to the annulment of many competition decisions.

In principal, the General Court does not decline to consider the submissions before it and offer reasons for its rulings. It verifies the correctness of the contested facts beyond reasonable doubt, including any factual presumptions, by performing an unfettered and thorough evaluation of the evidence. In addition, it interprets the

procedural and substantive elements of Union law authoritatively and oversees intensively their proper application by the Commission. It also ascertains the consonance of EU legislative acts with international and EU primary law. Lastly, it checks autonomously whether the Commission has misused its powers.

Overall, the General Court exercises its inspection and annulment powers on any question of non-economic fact and law raised before it without showing any deference to the issuing authority. Its standard of review therefore complies in full with Article 6(1) ECHR.

The second-instance proceedings complement and double-check the work of the General Court. It was explained that the Court of Justice does not refrain from duly assessing the pleas that fall within its jurisdiction and from giving ample justification for its judgments. The Convention does not demand anything more from an appeal tribunal when a lower impartial and independent organ, such as the General Court, has already satisfied all the conditions the right to a fair trial imposes on the standard of judicial review.

5. The Limited Review of Complex Economic Assessments

We are now entering the most controversial area of the present thesis. The EU judicature excludes from the comprehensive review generally carried out in EU competition law certain technical appraisals to which it refers as 'complex economic assessments'. According to the case law, the control of those appraisals is 'limited'.[512] The current chapter delineates the theoretical content given by the CJEU to the limited standard of review of complex economic assessments, debates the reasons underpinning the existence of that standard, analyses the way it has been applied in each subsection of EU competition law and assesses its compatibility with Article 6(1) ECHR.

5.1. The Basic Principles Regarding the Review of Complex Economic Assessments

Before engaging in depth with the actual review of complex economic appraisals in EU competition law, I ought to clarify some parameters essential for structuring my overall analysis. At the beginning, I will try to define the meaning and the

[512] See for example Case C-7/95 P *John Deere Ltd v Commission* [1998] ECR I-3111, paras 34-35; Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, para 482; *AstraZeneca*, note 442, para 32; *Éditions Odile Jacob*, note 381, paras 137-138.

distinguishing features of 'complex economic assessments'. Secondly, I will present the evolving standard of review applicable to such assessments as that standard has been declared by the EU judicature. Thirdly, I will explain the major limitation on the judicial powers of review. Fourthly, I will discuss the legal reasons justifying the existence of the limitation. Fifthly, I will respond to the criticisms raised against the limitation.

5.1.1. Explaining the term 'complex economic assessments'

The case law has never elaborated on the meaning of the term 'complex economic assessments'. It has only specified that those assessments have to be carried out by the Commission in numerous areas of EU competition law including the definition of the relevant market,[513] the restrictive effects of an agreement under Article 101(1) TFEU,[514] the application of Article 101(3) TFEU,[515] the existence of a dominant position,[516] the finding of an abuse under Article 102 TFEU,[517] the acceptance of commitments by virtue of Article 9 of Regulation 1/2003,[518] the handling of

[513] Case T-151/05 *NVV and Others v Commission* [2009] ECR II-1219, para 53; Case T-446/05 *Amann & Söhne GmbH & Co. KG and Cousin Filterie SAS v Commission* [2010] ECR II-1255, para 54; Case T-111/08 *MasterCard, Inc. and Others v Commission* EU:T:2012:260, para 169.

[514] Joined Cases 142 and 156/84 *BAT and Reynolds v Commission* [1987] ECR 4487, paras 61-62; Case T-461/07 *Visa Europe Ltd and Visa International Service v Commission* [2011] ECR II-1729, para 70.

[515] Case T-86/95 *Compagnie générale maritime and Others v Commission* [2002] ECR II-1011, para 339; Case T-231/99 *Colin Joynson v Commission* [2002] ECR II-2085, para 36; Case T-168/01 *GlaxoSmithKline Services Unlimited v Commission* [2006] ECR II-2969, para 241.

[516] Case T-210/01 *General Electric Company v Commission* [2005] ECR II-5575, paras 60 and 121.

[517] *Microsoft*, note 512, para 85; Case T-301/04 *Clearstream Banking AG and Clearstream International SA v Commission* [2009] ECR II-3155, para 93; *AstraZeneca*, note 442, para 32.

[518] Case C-441/07 P *Commission v Alrosa Company Ltd* [2010] ECR I-5949, paras 66-67; *Morningstar*, note 180, para 41.

complaints for an alleged infringement[519] and the control of concentrations pursuant to the Merger Regulation.[520] Consequently, complex economic appraisals are indispensable in almost every substantive competition decision of the Commission, an aspect not making their delineation any easier.

To start with the basics, economics is the social science which studies the decisions of persons, businesses and countries on the production, distribution and consumption of goods and services. EU competition law is inter alia a means of protecting the interests of consumers and ensuring an efficient allocation of resources.[521] Complex economic assessments are analyses using scientific formulas, mostly the supply and demand model, in order to portray or estimate the choices of undertakings and individuals on the market and eventually determine the actual or potential impact of those choices on consumer welfare and resource allocation. Commercial practices that have led or are likely to lead to consumer harm or resource misallocation through increased prices, diminished innovation, reduced output, choice or quality can be caught by Articles 101 and 102 TFEU or the prohibitive provisions of the Merger Regulation.[522]

[519] Case T-204/03 *Haladjian Frères SA v Commission* [2006] ECR II-3779, para 30; *EMC Development*, note 374, para 60; Joined Cases T-108/07 and 354/08 *Diamanthandel A. Spira BVBA v Commission* EU:T:2013:367 (hereinafter *Spira*), para 185.

[520] *EDP*, note 443, para 151; Case T-177/04 *easyJet Airline Co. Ltd v Commission* [2006] ECR II-1931, para 44; *Sun Chemical*, note 179, para 60.

[521] Another goal of EU competition law is to protect 'the structure of the market and thus competition as such', see Joined Cases C-501, 515 and 519/06 P *GlaxoSmithKline Services and Others v Commission and Others* [2009] ECR I-9291, para 63; Case C-8/08 *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529, para 38; *Dole Food*, note 499, para 125.

[522] See Communication from the Commission–Notice–Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C101/97, paras 13 and 33; Commission-Guidance on abusive exclusionary conduct, note 470, para 19; Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/5, para 8.

More specifically, the Commission may need to prove a causal relationship between changes in the price and changes in the demand or supply of a given product. Depending on the extent of the price elasticity of demand or supply, it will draw inferences crucial for the application of EU competition law. For example, the Commission will examine whether a hypothetical Small but Significant Non-transitory Increase in the Price of a certain product would steer demand towards a different product (the SSNIP test).[523] If the answer is yes, it will be concluded that both products belong to the same relevant market for the purposes of Articles 101 and 102 TFEU.[524]

Apart from price, demand and supply, other economic variables such as revenues, costs and profits may also be pertinent. In an investigation for predatory pricing, the Commission will first calculate its preferred economic benchmark, namely the product's average avoidable cost (AAC).[525] If the market price is lower than AAC, the dominant undertaking will normally be presumed able to boost or consolidate the demand for its product, foreclose its actual or potential competitors and then reduce consumer welfare by raising its prices. The above conduct would be found contrary to Article 102 TFEU.

As to the adjective 'complex', in my opinion it emphasizes the specialized knowledge required for undertaking 'economic assessments' and singles them out from plain mathematical calculations that any average person can perform. Moreover,

[523] The Commission uses a price increase ranging from 5% to 10%, see Commission Notice on the definition of relevant market for the purposes of Community competition law [1997] OJ C372/5, paras 15-18.

[524] Without prejudice to the 'cellophane fallacy', viz. the situation in which a monopolist is already charging prices so high that a SSNIP will make customers stop buying that product altogether, see Case T-699/14 *Topps Europe Ltd v Commission* EU:T:2017:2, para 82.

[525] See Commission-Guidance on abusive exclusionary conduct, note 470, paras 63-64.

it theoretically allows the EU judicature more leeway in deciding whether to apply the comprehensive or the limited standard of review in a given economic matter. For instance, Igor Nikolic urges the Court to reduce the number of questions it places in the complex economic appraisal area[526] and Ian Forrester argues along the same line that 'difficult' economic appraisals should not be automatically deemed 'complex'.[527]

On the other hand, as Edith Loozen maintains, a distinction between simple and complex economic appraisals can neither be economically substantiated nor legally defined.[528] Notably, Article 33 of the defunct ECSC Treaty precluded the CJEU from reviewing 'conclusions (…), drawn from economic facts and circumstances'.[529] Hence, the first provision of what was later known as Union law to ever pay special attention to the judicial control of economic assessments did not discriminate between simple and complex ones. After all, both of them seek to establish 'an economically valid presumption of causality'.[530] This common element of theirs separates them from conventional factual assessments which aim to arrive at 'factual certainty'.[531] The latter is not contingent on the soundness of an easy or difficult scientific formula, but on the laws of logic and the probative value of the evidence in respect of which the Court exercises full and unrestrained review.

[526] Igor Nikolic, 'Full Judicial Review of Antitrust Cases after KME: A New Formula of Review?' (2012) 33 ECLR 583, 586.

[527] Ian S. Forrester 'A Bush in Need of Pruning: the Luxuriant Growth of Light Judicial Review' in Claus-Dieter Ehlermann and Mel Marquis (eds), *European Competition Law Annual 2009: Evaluation of Evidence and its Judicial Review in Competition Cases* (Hart Publishing 2011) 425-426.

[528] Edith Loozen, 'The Requisite Legal Standard for Economic Assessments in EU Competition Cases Unravelled through the Economic Approach' (2014) 39 EL Rev 91, 109.

[529] Treaty establishing the European Coal and Steel Community (Paris, 18 April 1951) <www.cvce.eu/content/publication/1997/10/13/11a21305-941e-49d7-a171-ed5be548cd58/publishable_en.pdf> accessed 02 October 2018.

[530] Loozen, note 528, 108.

[531] ibid, 109.

5.1.2. The evolving standard of review as declared by the CJEU

The wording of Article 33 of the ECSC Treaty was not reiterated in the subsequent versions of the EU Treaties. Even so, the EU judicature has been distinguishing as well as evolving the standard of review of complex economic assessments on its own motion.

It initiated the pattern in *Consten and Grundig*[532] where it was called to examine the Commission's refusal to grant an exemption under what is now Article 101(3) TFEU to an exclusive distribution agreement with absolute territorial protection. It pointed out that 'complex evaluations on economic matters' had to be performed and that

> a judicial review of those evaluations must take account of their nature by confining itself to an examination of the relevance of the facts and the legal consequences which the Commission deduces from them.[533]

The outlined model is very vague. One could say that it is very deferential as well. By only examining the 'relevance' of the facts, the CJEU seems reluctant to check whether those facts are false[534] or the deductions of the Commission contradicted by other, disregarded facts.[535]

The Court rephrased in *Remia*.[536] Having to deal with the permissible duration of a non-competition clause under Article 101(1) TFEU, it stated that it must

[532] Joined Cases 56 and 58/64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission* [1966] ECR 429.

[533] ibid, 347.

[534] E.g., the Commission estimated the undertaking's market share at 60% on the basis of erroneous data regarding the volume of sales.

[535] E.g., the Commission concluded that a 60% market share amounted to a dominant position under Article 102 TFEU without having considered the very low barriers to entry on the relevant market.

[536] Case 42/84 *Remia v Commission* [1985] ECR 2545.

> limit its review […] to verifying whether the relevant procedural rules have been complied with, whether the statement of reasons for the decision is adequate, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or a misuse of powers.[537]

In comparison with *Consten and Grundig*, the statement in *Remia* gives the impression of a stricter model of judicial control.[538] The EU judges are obliged to touch on the internal validity of complex economic assessments and censure any 'manifest errors'.

The aforementioned model was further clarified in the merger case of *Tetra Laval*. Faced with the Commission's assertion that the General Court had encroached on its administrative discretion in complex economic matters, the Court of Justice explained that EU courts should not 'refrain from reviewing the Commission's interpretation of information of an economic nature'. On the contrary, they have to

> establish whether the evidence relied on is factually accurate, reliable and consistent but also whether the evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it.[539]

This statement complements the corresponding one in *Remia* and they have been both quoted together in subsequent cases relating to Articles 101(3) or 102 TFEU.[540] The General Court emphasized the need for the scope of judicial control to cover every single element of the Commission's syllogism, starting from the accuracy and the

[537] ibid, para 34. See also Case T-65/96 *Kish Glass & Co. Ltd v Commission* [2000] ECR II-1885, para 64; Case T-65/98 *Van den Bergh Foods Ltd v Commission* [2003] ECR II-4653, para 80; *Petrolessence*, note 390, para 101.

[538] See Andriani Kalintiri, 'What's in a name? The marginal standard of review of "complex economic assessments" in EU competition enforcement' (2016) 53 CML Rev 1283, 1288.

[539] *Commission v Tetra Laval*, note 457, para 39. See also *KME*, note 24, para 94; *Kone*, note 5, para 28; *Telefónica*, note 5, para 54.

[540] See *Microsoft*, note 512, paras 87 and 89; *AstraZeneca*, note 442, paras 32-33; *MasterCard*, note 513, paras 82 and 201-202.

completeness of the evidence and finishing with the soundness of the conclusions derived from that evidence.

5.1.3. The specific limitation on the standard of review

The review of complex economic appraisals appears comprehensive so far. Yet, there is a major restriction in its depth.[541] The CJEU has declared that it cannot substitute its own economic assessment for that of the Commission.[542] The current section tries to decode the exact meaning and implications of that limitation.

France Télécom is a telling case.[543] The Commission established the existence of predatory pricing through the application of an economic test which examined whether the dominant undertaking would have recovered its full costs within a period of four years. France Télécom disagreed and put forward that the only reliable method for proving the predatory prices was the one of discounted cash flows which would have studied the rate of recovery of its full costs over a period of five years.[544] The CJEU replied that even if the applicant were to prove that its proposed method was appropriate for the case, this would be 'insufficient' to render unlawful the method actually chosen by the Commission in the absence of a manifest error of assessment.[545]

[541] See José Luís da Cruz Vilaça, 'The intensity of judicial review in complex economic matters—recent competition law judgments of the Court of Justice of the EU' (2018) 6 Journal of Antitrust Enforcement 173, 177.

[542] *GlaxoSmithKline* (GC), note 515, para 243; *Bertelsmann and Sony*, note 96, para 145; *Kone*, note 5, para 27; *CB* (CoJ), note 29, para 46.

[543] Case T-340/03 *France Télécom SA v Commission* [2007] ECR II-107.

[544] ibid, paras 123-128.

[545] ibid, para 153-156. See also Case T-92/13 *Koninklijke Philips Electronics NV v Commission* EU:T:2015:605, paras 200-201, where the General Court rejected as ineffective the argument that there was 'a better option' for calculating the gravity of the infringement because the applicant did not seek to contest the legality of the method chosen by the Commission.

Absolute truth does not exist in economics. There are usually many different appropriate paths for resolving a given problem and they may very well generate diverging outcomes.[546] Although the EU judicature is empowered to check whether the path eventually chosen by the Commission is acceptable pursuant to the rules of economic discipline and whether it has been followed correctly, it is precluded from overruling it on grounds of expediency.[547] It shall not compare the pros and cons of each valid method advocated by the parties with the purpose of deciding itself on which one is the most suitable for the matter at issue.

Alrosa is equally elucidating with *France Télécom*. The Commission rejected the joint commitments offered by the dominant undertaking and a major competitor, promising a substantial reduction of their transactions, as inappropriate to address its concerns. It subsequently made binding the individual commitments of the dominant undertaking obliging it to cease the above dealings altogether. The General Court detected a breach of the principle of proportionality. In its opinion, 'other, less onerous solutions' such as the rejected joint commitments were capable of eliminating the competition problems identified.[548] Upon appeal, the Court of Justice set the first-instance ruling aside. It reprimanded the General Court for annulling the administrative measure without having found that the Commission's conclusion with regard to the joint commitments was obviously unfounded.[549] As a result,

> the General Court put forward its own assessment of complex economic circumstances and thus substituted its own assessment for that of the

[546] For example, there are four economically valid methods for calculating the depreciation of a company's assets, see <https://www.investopedia.com/ask/answers/021815/what-are-different-ways-calculate-depreciation.asp> accessed 02 October 2018.

[547] See *MyTravel*, note 30, para 83; Kalintiri, note 538, 1310-1311.

[548] *Alrosa*, note 180, para 126.

[549] *Commission v Alrosa*, note 518, paras 63-66.

> Commission, thereby encroaching on the discretion enjoyed by the Commission instead of reviewing the lawfulness of its assessment.[550]

When the economic analysis of the Commission is reasonable in the light of the totality of the available data, the EU judicature is compelled to succumb to that analysis and refrain from giving precedence to its own preferable evaluation of the situation.[551] The 'manifest error' standard of review of complex economic assessments does not therefore entail that flaws of small magnitude will escape annulment, but that a mere difference of opinion between the reviewing body and the decision-maker shall not amount to an error on the part of the latter.

To cut a long story short, the CJEU is unable to replace the economic method of the Commission when that is scientifically pertinent to the complex situation and to set aside the conclusions of the Commission when those are substantiated by reliable and complete evidence. I do not blame Renato Nazzini for characterizing this judicial control as 'deferential'.[552]

However, we should keep in mind that the deference to the Commission is strictly circumscribed. Firstly, the CJEU is competent to define 'what' needs to be proven in a complex economic assessment. It can for example rule that pricing will be deemed predatory under Article 102 TFEU only if the dominant firm sells below its average variable costs. The Commission merely has the discretion to decide 'how' it will establish 'what' needs to be proven. It can for instance choose the discounted cash flow over another acceptable method to estimate whether the dominant entity would be able to recover its average variable costs through time. Secondly, the EU

[550] ibid, para 67. See also *Morningstar*, note 180, para 41.

[551] See *Bertelsmann and Sony*, note 96, Opinion of AG Kokott, para 240; *Commission v Alrosa*, note 518, Opinion of AG Kokott, para 84; Case E-15/10 *Posten Norge v EFTA Surveillace Authority* (EFTA Court, 17 April 2012), para 98.

[552] Nazzini, 'Judicial Review after KME', note 457, 499.

judicature has the authority to draw the sometimes delicate line between an error and a divergence of opinion.[553] In this manner, it remains 'master of its tasks' by reserving the last word over the legality of any complex economic decision.[554]

Bo Vesterdorf suggests that the review of inferences derived from primary facts ought to be less limited than the review of inferences derived from 'pure economic assessments'.[555] I believe that it is practically impossible to distinguish between the two.[556] Even a simple increase in the price of a product may necessitate complex analysis so that it can be attributed to one or the other factor as for example a general shortage of raw materials or a rise in labor costs or a strategy of excessive pricing by the dominant undertaking.

Finally, the judicial inability to supersede economically sound administrative decisions simultaneously constitutes the content of the notorious 'margin of discretion' or 'margin of appreciation' enjoyed by the Commission.[557] On the one hand, David Bailey is probably right in saying that the above terms have been construed differently from each other in national jurisdictions.[558] On the other hand, in relation to the scope of review of complex economic assessments in EU competition law, it is definitely not a 'misunderstanding' that the two concepts have

[553] See Malcolm Nicholson, Sarah Cardell and Bronagh McKenna, 'Scope of Review of Merger Decisions under Community Law' (2005) 1 European Competition Journal 123, 136.

[554] See Case C-83/98 P *France v Landbroke Racing Ltd and Commission* [2000] ECR I-3271, Opinion of AG Cosmas, fn 4.

[555] Vesterdorf, 'Standard of Proof in Merger Cases', note 457, 22.

[556] See the similar position of Nicholson, Cardell and McKenna, note 553, 145-146.

[557] Fritzsche, note 300, 365. The term 'margin of assessment' was used in *Bertelsmann and Sony*, note 96, para 69; *AstraZeneca*, note 442, para 33, and the term 'power of appraisal' in Case T-22/97 *Kesko Oy v Commission* [1999] ECR II-3775, para 142; Case T-342/07 *Ryanair Holdings plc v Commission* [2010] ECR II-3457, paras 119, 170, 178 and 180.

[558] David Bailey, 'Scope of judicial review under Article 81 EC' (2004) 41 CML Rev 1327, 1337-1339.

been used interchangeably in an identical context by the CJEU.[559] Hence, I must assume that the case law has ascribed to them an identical meaning as well.

5.1.4. Justifying the limitation on the standard of review

The Lisbon Treaties do not contain any straightforward provision obliging the EU judicature to refrain from substituting the complex economic assessments of the Commission.[560] For the sake of legal clarity, I need to explain the reasons justifying this limitation on the standard of judicial review. The first reason pertains to the principle of institutional balance and the second to the technical nature of administrative decision-making in EU competition law.[561]

The principle of institutional balance is not explicitly mentioned in the Treaties.[562] It stems from Article 13(2) TEU which provides that 'each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them'.[563] An institution is therefore prohibited from overstepping the role it has been allocated in the EU legal order by encroaching on the role vested to another institution.[564] Jean-

[559] The judgments in *Microsoft*, note 512, para 89; *Clearstream*, note 517, para 95; *Visa*, note 514, para 70, all refer to the 'margin of appreciation' of the Commission in economic matters. The judgments in *KME*, note 24, para 94, *Otis*, note 25, para 59; *Kone*, note 5, para 28, all use the term 'margin of discretion' instead in the same exact context. See also Fritzsche, note 300, 364.

[560] See Firat Cengiz, 'Judicial Review and the Rule of Law in the EU Competition Law Regime after *Alrosa*' (2011) 7 European Competition Journal 127, 140.

[561] See Maciej Bernatt, 'McWane and judicial review of Federeal Trade Commission decisions: any inspirations for EU competition law?' (2017) 38 ECLR 288.

[562] Merijn Chamon, 'The Institutional Balance, an Ill-Fated Principle of EU Law?' (2015) 21 European Public Law 371.

[563] Case C-409/13 *Council v Commission* EU:C:2015:217, para 64; Case C-425/13 *Commission v Council* EU:C:2015:483, para 69; Case C-660/13 *Council v Commission* EU:C:2016:616, para 32.

[564] See Case 9/56 *Meroni & Co., Industrie Metallurgiche, SpA v High Authority* [1958] ECR 133, 152; Case C-70/88 *Parliament v Council* [1990] ECR I-2041, paras 21-23; Case C-133/06 *Parliament v Council* [2008] ECR I-3189, para 57.

Paul Jacqué observes that the CJEU regards the principle of institutional balance as a substitute for the principle of separation of powers which necessitates a clear separation between the legislature, the executive and the judiciary.[565] As Alexander Fritzsche specifies nevertheless, institutional balance does not primarily aim at protecting individuals from the abuse of State power, but at ensuring the adequate performance of the tasks conferred to the EU by the Member States.[566]

The Commission is entrusted under Articles 17 TEU and 105(1) TFEU with ensuring the application of Articles 101 and 102 TFEU whereas the CJEU is competent by virtue of Articles 19 TEU and 263 TFEU to check that the Commission has observed the law. In this connection, the Court of Justice has stated that the Commission is 'institutionally responsible' for undertaking complex economic assessments.[567] It can for example select its preferred economic method for establishing a predatory pricing. The above choice is a policy-making one since it aims to protect consumer welfare in the best possible way through the application of Article 102 TFEU. Although the EU judges must review the legality of that choice, viz. its procedural propriety, its economic validity and the existence of a misuse of powers, they are not allowed to discard it in the absence of a legal error. That would go beyond the judicial function assigned to them by the Treaties to the detriment of the executive powers of the Commission and thus of the EU's institutional balance.[568]

[565] Jean-Paul Jacqué, 'The Principle of Institutional Balance' (2004) 41 CML Rev 383, 384.

[566] Fritzsche, note 300, 385. See also Case C-282/90 *Industrie- en Handelsonderneming Vreugdenhil BV v Commission* [1992] ECR I-1937, paras 20-22; Case C-221/10 P *Artegodan GmbH v Commission* EU:C:2012:216, para 81.

[567] *CB*, note 29, para 46.

[568] See also *Italian Flat Glass*, note 416, para 319; *Commission v Tetra Laval*, note 457, Opinion of AG Tizzano, para 89.

The superior technical expertise of the Commission constitutes the second justification for the limitation on the standard of judicial review. Judges are specialized in the legal science. They do not normally have a strong background in economics and the concomitant expert knowledge to adequately deal with complex scientific issues. On the contrary, the Commission has at its disposal officials specialized in economics including the esteemed Chief Competition Economist and his staff.[569] In this light, the CJEU recognizes that the Commission is better placed to handle complex economic matters and make the necessary methodological choices in each case.[570]

5.1.5. Questioning the limitation on the standard of review

The privileged treatment of complex economic assessments has caused intense criticism in the academic literature by commentators who question the correctness of the stance of the EU judicature. The following paragraphs will present the relevant objections and will try to refute them.

Renato Nazzini suggests that the limited review of complex economic assessments is 'unconstitutional' because the principle of effective judicial protection contradicts and outweighs the principle of institutional balance.[571] The content of the principle of effective judicial protection and of the similar right in Article 47(2) of the Charter is defined by the right to a fair trial of Article 6(1) ECHR and the Strasbourg jurisprudence.[572] In *Menarini*, the ECtHR accepted unreservedly that the inability of a

[569] Fritzsche, note 300, 397.

[570] ibid, 392, 397 and 401; Nazzini, 'Administrative enforcement, judicial review and fundamental rights', note 290, 994 and 996-997.

[571] Nazzini, note 290, 998 and 1005.

[572] See Article 6(3) TEU; Article 52(3) of the Charter; Chapter 1.1.2.

tribunal to substitute the technical assessments of the administration in the area of competition law does not breach Article 6(1) ECHR.[573] The CJEU is allowed, but not obliged to afford greater protection than the ECtHR to Charter rights corresponding to Convention ones.[574] It turns out that the principle of effective judicial protection does not impose a comprehensive review of complex economic assessments and thereby it does not collide with the principle of institutional balance.

Next, Heike Schweitzer asserts that EU judges should not restrain their control by reason that they can acquire economic expertise 'through the repeated handling of complex cases'.[575] There are some problems with this position. Firstly, how would the inexperienced members of the Court be treated until they 'advance' in economics? Depriving them of their right to vote in complex cases would be contrary to EU law.[576] Would they be allowed to vote anyway without having the necessary knowledge? And if they were to be assigned in Chambers not responsible for such cases, they would not be able to gain expertise. Secondly, how would one objectively determine the number of complex cases needed for a judge to become adept at economics? What if he or she is a slow learner?

And should we adjust Schweitzer's position and require judges to possess specialized knowledge before handling any cases, Marc Jaeger correctly argues that this would arbitrarily add an extra condition to the ones stipulated in Article 254 TFEU for appointment to judicial office and would impinge on the 'generalist nature'

[573] See Chapter 3.3.1.

[574] See Article 52(3) of the Charter.

[575] Schweitzer, note 181, 510.

[576] Rules of Procedure of the GC, note 361, Article 21(4).

of the General Court.[577] EU judges ought to be highly qualified in law and they cannot be asked to become specialists in every single field they have to deal with. Should they also specialize in biology or in geology to rule on environmental cases or in medicine to rule on public health cases?

Lastly, Advocate General Jacobs has indicated that the CJEU can overcome its lack of expertise in technical questions by commissioning experts' reports.[578] The Court would need to order a report, appoint a suitable expert, wait for him to finish his task and assess his findings together with the submissions of the parties in order to reach its own conclusion.[579] This course of action would increase significantly the duration of the proceedings and would probably violate the right of the parties to have a hearing 'within a reasonable time' pursuant to Article 6(1) of the ECHR and Article 47(2) of the Charter. In *Wood Pulp* for example, the two expert's economic reports requested by the Court were concluded after a total of twenty-two months whereas the judgment was delivered eight years after the submission of the application.[580] And even if we disregard the time factor, the principle of institutional balance would still be infringed in case the CJEU were to replace a legally impeccable policy-making assessment of the Commission.

[577] Marc Jaeger, 'The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of the Marginal Review?' (2011) 2 JECLAP 295, 311.

[578] Case C-269/90 *Technische Universität München v Hauptzollamt München-Mitte* [1991] ECR I-5469, Opinion of AG Jacobs, para 13. See also Schweitzer, note 181, 510.

[579] '[T]he findings of economic experts cannot take the place of legal assessment and adjudication', see *Rhône-Poulenc*, note 414, Opinion of AG Vesterdorf, 957.

[580] Joined Cases C-89, 104, 114, 116, 117, 125 to 129/85 *A. Ahlström Osakeyhtiö and others v Commission* [1993] ECR I-1307 (known as *Wood Pulp*), paras 31-32. See also Nicholas Forwood, 'The Commission's More Economic Approach: Implications for the Role of the EU Courts, the Treatment of Economic Evidence and the Scope of Judicial Review' in Claus-Dieter Ehlermann and Mel Marquis (eds), *European Competition Law Annual 2009: Evaluation of Evidence and its Judicial Review in Competition Cases* (Hart Publishing 2011), 265.

5.2. The Review of Complex Economic Assessments in Each Subsection of EU Competition Law

We have become familiar with the standard of review of complex economic assessments as it has been portrayed by the EU judges. Notwithstanding my faith in the Court's words, I have to figure out whether that standard is also applied in practice. Hence, I will focus on whether the CJEU effectively examines pleas challenging: (a) the reliability, accuracy and consistency of the evidence relied on by the Commission (b) the relevance and thoroughness of the information used in the administrative analysis, and (c) the validity of the Commission's conclusions in view of the given evidentiary position. For the sake of completeness, I will peruse the judicial control in each of the major segments of EU competition law. In the end, I will use all the analysed judgments so as to draw some general inferences.

5.2.1. Review within the application of Articles 101(1) and 102 TFEU

The application of the two fundamental provisions of EU competition law necessitates the carrying out of multiple complex economic assessments. The Commission is called to delve into interactions between costs, prices, supply and demand so as to define the relevant market, possibly establish the existence of a dominant position, appraise the capability of the conduct in question to appreciably affect trade between Member States and decide whether that conduct has a restrictive object or effect for competition within the internal market. The question that obviously needs to be answered in the current section is if the CJEU effectively controls such appraisals.

5.2.1.1. An effective judicial control

At the outset, I will present four judgments which prove that the EU judicature generally undertakes a rigorous review of any aspect related to complex economic assessments in the area of infringement decisions.

In *Mitsubishi II*, the General Court criticized the reliability, accuracy and consistency of two pieces of evidence adduced by the applicant which aimed to refute the findings made by the Commission.[581] Having recourse to an economic and a technical expert's report, Mitsubishi intended to demonstrate that its agreement with the European producers of gas insulated switchgear not to bid in each other's territory was not capable of affecting trade between Member States within the meaning of Article 101(1) TFEU due to the existence of considerable economic and technical barriers to entry for the European market.[582] Nevertheless, the judgment spotted several shortcomings in both pieces of evidence.

Firstly, the economic report included some irrelevant manufacturing costs and obscured the lower difference between the costs of Japanese and European producers at the final phase of the violation. Secondly, the independence of the author of the technical report was called into question by his cooperation with the applicant in the past whilst his estimation on the potential cost for manufacturing products for the European market lied outside his area of expertise. Thirdly, the probative value of the two reports as regards the supposed barriers to entry was diminished by the fact that Japanese producers succeeded in making sporadic sales in the European Economic

[581] Case T-409/12 *Mitsubishi Electric Corp. v Commission* EU:T:2016:17 (hereinafter *Mitsubishi II*), paras 161-182.

[582] See also the review of the similar pleas in Joined Cases T-259 to 264 and 271/02 *Raiffeisen Zentralbank Österreich AG v Commission* [2006] ECR II-5169, paras 168-186; Case T-199/08 *Ziegler SA v Commission* [2011] ECR II-537, paras 51-74.

Area (EEA) and more frequent sales in the rest of Europe during the infringement period.

In *Deutsche Telekom*, the EU judges ensured that the method used by the Commission took into account all the relevant economic variables and left out all the irrelevant ones for the purposes of proving that the applicant implemented a margin squeeze in violation of Article 102 TFEU.[583] Using as a benchmark the costs and revenues of the dominant telecommunications operator in Germany, the Commission inferred that this firm would have been unable to operate in the retail internet market without a loss should it also had to pay the wholesale network access price it was charging its competitors. The Court endorsed the foregoing 'as efficient competitor' (AEC) test both from a legal and an economic point of view after replying to the arguments raised against it.

The judgment explained that: (a) the principle of legal certainty would be violated if the lawfulness of the pricing practices of a dominant undertaking depended on the particular cost structure of competing undertakings and not on its own, (b) the revenues of the applicant from non-internet services were correctly excluded from the AEC test because that would allow it to distort competition by forcing its rivals to raise their call charges in order to offset losses from their internet services, and (c) the one-off charge paid by other telecommunications companies to Deutsche Telekom every time one of their clients discontinued her internet subscription was rightly

[583] See also the review of the completeness of the Commission's analysis in *AstraZeneca*, note 442, paras 147-152; Case T-336/07 *Telefónica, SA and Telefónica de España, SA v Commission* EU:T:2012:172 (hereinafter *Telefónica I*), paras 176-211.

included in the calculation since it formed part of the total cost of the wholesale network access.[584]

In contrast to *Deutsche Telekom*, the Court accepted in *Italian Flat Glass* that the Commission failed to consider certain crucial circumstances in establishing the impugned collective dominant position between three Italian manufacturers of flat glass.[585] The decision did not pay attention to the different types of flat glass produced by the applicant undertakings, to the competitive pressure exerted by non-Italian products and to the countervailing economic power of the sole purchaser in the automotive flat glass sector. As a result of these omissions, the infringement of Article 102 TFEU attributed to the three Italian manufacturers was quashed.

Finally, in *Amann & Söhne*, the EU judicature checked and upheld the economic validity of the conclusions of the Commission according to which there existed two distinct product and geographic markets on this Article 101(1) TFEU case, one for automotive thread in the whole European Economic Area (EEA) and one for industrial thread in certain regions of the EEA.[586]

The Court confirmed that there was no demand-side substitutability between the two products at hand. Demand for automotive thread originated from large and exacting customers that would not be willing to switch to a non-uniform and non-high standard product such as industrial thread. It was ruled that no supply-side substitutability existed either. Suppliers of industrial thread would not be able to respond to small but permanent price changes by swiftly shifting their production to

[584] *Deutsche Telekom*, note 490, paras 183-213.

[585] *Italian Flat Glass*, note 416, paras 360-368.

[586] See also the review of the validity of the Commission's conclusions in *AstraZeneca*, note 442, paras 61-107 and 147-222; *Telefónica I*, note 583, paras 114-144; *Slovenská pošta*, note 356, paras 115-193.

automotive thread on account of the significant costs and risks entailed for upgrading their machinery, increasing their capacity and distributing their output quickly across the entire EEA.[587]

These four judgments do not merely show that the General Court ascertains the quality of the evidence before it, the completeness of the Commission's economic analysis and the soundness of the conclusions derived from that analysis, but also that it does so in every complex economic assessment related to the application of Articles 101(1) and 102 TFEU. In *Amann & Söhne* it dealt with the definition of the relevant market, in *Italian Flat Glass* with the existence of a (collective) dominant position, in *Mitsubishi II* with the ability of a conduct to affect trade between Member States and in *Deutsche Telekom* with the restrictive impact of a certain practice for competition.

5.2.1.2. Exceptions from the rule

Every rule has its exceptions. Notwithstanding the thoroughness of the judicial control in the vast majority of complex economic cases involving an infringement of Article 101 or 102 TFEU, there have been two instances in which the General Court did not observe the requisite standard of review.

In *Groupement des cartes bancaires 'CB'*,[588] the Court failed to inspect whether the Commission took into account all the necessary information for appraising the complex economic situation and whether the evidence used in the impugned decision was capable of supporting the conclusion that the conduct in question contravened Article 101(1) TFEU. The judgment accepted that three different conditional levies, introduced by a grouping of French banks on its members

[587] *Amann & Söhne*, note 513, paras 60-67 and 69-80.

[588] Case T-491/07 *Groupement des cartes bancaires "CB" v Commission* EU:T:2012:633 (hereinafter *CB*).

for their card issuing activity,[589] had the object of restricting competition due to their wording without nonetheless explaining how that wording or the objectives or the context of the above measures revealed a sufficient degree of harm to competition to be rightfully characterized as restrictions by object within the meaning of Article 101(1) TFEU.[590]

In a similar vein, in *Intel*,[591] the General Court did not examine certain submissions raised against the validity of the findings of the Commission. Although the latter had applied the AEC test in order to establish the capacity of Intel's rebate scheme to foreclose competitors in the market for the purposes of Article 102 TFEU, the judgment took the view that the potential foreclosure effect was inherent in the rebate mechanism and did not grapple with the disputed legality of the economic method employed by the Commission.[592]

The foregoing rulings are definitely regrettable from the point of view of the right to a fair trial. The applicants had their claims summarily dismissed and as a result their case was not effectively heard by an independent and impartial tribunal within the meaning of Article 6(1) ECHR and Article 47(2) of the Charter. Nevertheless, I ought to acknowledge that the General Court did not reject those claims because it thought that it lacked jurisdiction over them, but because it wrongly reckoned that they had been adequately refuted just by the wording of the pricing measures in *CB* and by the nature of the rebate scheme in *Intel*.

[589] There was a levy when: (a) the acquisition activity of a bank (number of installed Automated Teller Machines and affiliated merchants) was less than half of its issuing activity (number of active cards) within the Grouping, (b) a new member in the Grouping issued a card, (c) a bank tripled its share in the issuing activity of the Grouping over a certain period of time.

[590] See also *CB* (CoJ), note 29, paras 65, 69 and 89-90.

[591] Case T-286/09 *Intel Corp. v Commission* EU:T:2014:547.

[592] ibid, paras 151 and 166. See also *Intel* (CoJ), note 428, paras 143-147.

Fortunately, we will see that the Court of Justice set aside the first-instance judgments in both cases. The grave legal errors committed by the General Court were thereby remedied. The two-tier EU system of fundamental rights protection fulfilled its mission and the right to a fair trial of the affected entities was eventually restored by an EU organ. At the same time, this development annihilated any grounds that Intel and CB could possibly have for resorting to the ECtHR.

5.2.2. Review within the application of Article 101(3) TFEU

Article 101(3) TFEU constitutes the last line of defence for undertakings and associations of undertakings which have been found to infringe Article 101(1) TFEU.[593] The Commission may declare Article 101(1) TFEU inapplicable as long as the parties can prove that their agreement, concerted practice or decision fulfils four cumulative conditions: (a) it improves the production or distribution of goods or promote technical or economic progress, (b) consumers receive a fair share of the resulting benefits, (c) the restrictions to competition are indispensable to the attainment of those benefits, (d) the parties are not afforded the possibility of eliminating competition in respect of a substantial part of the products in question.[594]

Should the four foregoing conditions be satisfied, the Commission is entrusted with balancing the pro and anti-competitive aspects of the conduct at hand so as to

[593] Under the defunct regime of EEC Council Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty [1962] OJ 13/87, Article 4, undertakings had to notify their agreements to the Commission and request a decision granting an individual exemption. Under Regulation 1/2003, undertakings have to decide on their own whether their agreements comply with EU competition law and can employ Article 101(3) TFEU only as a defence to a potential or actual infringement decision.

[594] See Article 101(3) TFEU in conjunction with Regulation 1/2003, note 45, Article 2; *Remia*, note 536, para 45; *GlaxoSmithKline* (CoJ), note 521, paras 82-83.

estimate their aggregate impact on consumer welfare and resource allocation.[595] In other words, in deciding whether to allow or refuse an exemption from Article 101(1) TFEU, it has the discretion to elect the choice that will better serve the general interest of the Union.[596] Consequently, the application of Article 101(3) TFEU is a particularly complex economic matter at the core of competition policy. This could make the EU judges reluctant to rigorously interfere with the components of the Commission's assessment, for reasons relating to the principle of institutional balance in the EU, and neglect their duty to safeguard the fundamental rights of the entities concerned. Fortunately, reality shows otherwise.

At the outset, in *European Night Services,* the General Court inspected the procedural propriety of a time-limited exemption. It was not dissuaded by the administrative discretion in the present area and annulled the act in view of a defective statement of reasons. The Commission did not explain why it exempted the rail service agreements at issue for only eight years in spite of the fact that the parties had undertaken financial commitments covering a period of twenty years for the purchase of their equipment.[597]

[595] See Case T-112/99 *Métropole télévision (M6), Suez-Lyonnaise des eaux, France Télécom and Télévision française 1 SA (TF1) v Commission* [2001] ECR II-2459, paras 74 and 107; *MasterCard*, note 513, para 80; Guidelines on the application of Article 81(3), note 522, paras 11, 33 and 92; Communication from the Commission–Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C11/01, para 20.

[596] See Joined Cases T-39 and 40/92 *Groupement des Cartes Bancaires "CB" and Europay International SA v Commission* [1994] ECR II-0049, para 109; *GlaxoSmithKline* (GC), note 515, para 244; Okeoghene Odudu, 'Article 81(3) Discretion and Direct Effect' (2002) 23 ECLR 17, 20-22. See, a contrario, Wouter P.J. Wils, 'The Modernization of the Enforcement of Articles 81 and 82 EC: A Legal and Economic Analysis of the Commission's Proposal for a New Council Regulation Replacing Regulation No.17 (2000) 24 FORDHAM INT'L L.J 1655, 1674-1676, who maintains that the Commission is obliged to grant the exemption if the four conditions laid down in Article 101(3) are satisfied.

[597] *European Night Services*, note 425, paras 230-235.

In *GlaxoSmithKline*, the General Court reprimanded the Commission for not sufficiently examining the factual arguments and the evidence pertinently adduced by the applicant as well as for not substantiating its conclusion to the requisite standard.[598] GlaxoSmithKline claimed that the agreement with its Spanish wholesalers to combat parallel trade for its pharmaceutical products would generate a gain in efficiency by allowing the investment of its increased revenues to the improvement of its previously reduced capacity for innovation. The Commission merely replied that extra profits would not automatically lead to higher investments in innovation and refused an exemption under Article 101(3) TFEU due to a lack of pro-competitive efficiencies.

The Commission was not permitted to get away with summarily denying a prima facie convincing request for an exemption and consequently its decision was voided.[599] Despite the administrative leeway in weighing up the competitive advantages and disadvantages of a given practice for the purposes of Article 101(3) TFEU, the EU judicature conveyed the message that it shall exercise its power to control whether the existence of those alleged advantages and disadvantages has been adequately established or refuted beforehand.

In *Lundbeck*, the CJEU reviewed all four conditions for the application of Article 101(3) TFEU to the agreements of a patent holder with generic manufacturers which payed them to delay the entry of their medicinal products on the market.[600] Firstly, there was no evidence attesting that innovation would be encouraged in the

[598] *GlaxoSmithKline* (GC), note 515, paras 262, 275-277, 294, 301-303 and 308.

[599] ibid, paras 316-317. The part of the decision ordering GlaxoSmithKline to bring its infringement of Article 101(1) TFEU to an end was also quashed. The infringement itself was upheld.

[600] *Lundbeck*, note 471, paras 708-721. See also Case T-17/93 *Matra Hachette SA v Commission* [1994] ECR II-0595, paras 104-111, 120-125, 135-140 and 150-157; *MasterCard*, note 513, paras 207-237; Case T-469/13 *Generics (UK) Ltd v Commission* EU:T:2016:454, paras 347-367.

pharmaceutical industry whereas litigation costs would not be avoided since legal proceedings against the generic undertakings would still be available. Secondly, the applicant did not explain how consumers would receive a fair share of the alleged benefits. Thirdly and fourthly, delaying the entry of the generics on the market was not indispensable because less restrictive settlement options between the parties were possible and in addition it eliminated all potential competition for the patented product. The judgment accepted the views of the Commission and upheld its decision not to apply Article 101(3) TFEU.

Irrespective of the outcome of the case, the General Court offered specific reasons for dismissing the submissions of the applicant on the benefits of the patent agreements. Simultaneously, it made clear that the consistency of the Commission's economic analysis on the fulfilment of each one of the four conditions required for an exemption is not immune to judicial scrutiny.

The EU judicature is unable to substitute the complex economic appraisals of the Commission as regards the application of Article 101(3) TFEU.[601] It cannot choose a different economic method for evaluating the situation or re-balance pursuant to its own views the pro and anti-competitive effects of a given practice. Thus, its standard of review has not evolved from limited to comprehensive as Claus-Dieter Ehlermann and Isabela Atanasiu had predicted in 2002.[602] Nevertheless, that did not prevent the CJEU from fully reviewing the validity of the challenged decision in *Lundbeck*, let alone censuring procedural and substantive errors in *European Night Services* and *GlaxoSmithKline* respectively. These three judgments evince that the

[601] See *GlaxoSmithKline* (GC), note 515, para 243.

[602] Claus-Dieter Ehlermann and Isabela Atanasiu, 'The Modernisation of EC Antitrust Law: Consequences for the Future Role and Function of the EC Courts' (2002) 23 ECLR 72, 72-73. See also Bailey, 'Scope of Judicial Review', note 558, 1355.

judicial control extends to any factual or legal element underpinning a discretionary appraisal of the Commission and therefore suffices to protect the rights of undertakings seeking to benefit from Article 101(3) TFEU.

5.2.3. Review within the adoption of antitrust commitments decisions

In the framework of Article 9 of Regulation 1/2003, the Commission has to perform complex economic appraisals so as to decide whether the commitments offered by the undertakings concerned suffice to address the competition problems it has highlighted in its preliminary assessment. The EU judges are again obliged to deal with the reliability, thoroughness and reasonableness of the disputed economic analysis.[603] They must focus on whether the Commission made a manifest error of appraisal by: (a) accepting commitments not adequate to meets its concerns, or (b) accepting certain commitments after having rejected previous, less onerous commitments also adequate to meet its concerns.[604]

Apparently, there is a special limitation on the judicial control stemming from the voluntary and non-punitive nature of the procedure envisaged by Article 9 of Regulation 1/2003. The CJEU cannot evaluate whether less onerous commitments than the ones actually offered, either rejected or approved, were available to address the issues identified by the Commission. Such evaluation would be tantamount to substituting the assessment of the decision-maker in the absence of an illegality and it would overturn the entire rationale of the antitrust commitments procedure. The

[603] *Morningstar*, note 180, para 42.

[604] *Commission v Alrosa*, note 518, paras 41 and 63; *Morningstar*, paras 58 and 86-87.

Commission's task therein is to appraise the appropriateness of the solutions submitted to it and not to come up with better solutions itself.[605]

As to the rights of the undertakings concerned, they are free to propose less strict commitments at the administrative stage or even refrain from formulating commitments. The Court can sufficiently protect the undertakings concerned in both situations with its standard of review. Firstly, it has jurisdiction to quash the accepted commitments if other adequate and less severe offered commitments were erroneously dismissed by the Commission. Secondly, it can inspect the full legality of a decision finding an infringement of Article 101(1) or 102 TFEU should the Commission respond to the lack of any suggested commitments in this manner.

Third parties seeking more harsh commitments than the ones eventually imposed by the Commission are not adversely affected by the aforementioned limitation on the judicial powers of control. The same does not apply with regard to third parties who would prefer less harsh solutions. However, we should keep in mind that a commitment is essentially a self-restriction on the contractual freedom of the undertaking proposing it. The scope of the right to a fair trial of third entities does not extend to the point of forcing a tribunal to replace the conscious and lawful choice of their trading counterparty.

The jurisprudence on the present topic is very small given the voluntary nature of the commitments procedure and the fact that it was introduced only in 2003. Two first-instance judgments have been delivered one of which, *Alrosa*, was set aside by the Court of Justice because the General Court substituted the opinion of the

[605] *Commission v Alrosa*, para 61.

Commission.[606] In the remaining judgment, in *Morningstar*, the General Court dismissed the action of a third party after carefully checking whether the Commission had made a manifest error of assessment in endorsing commitments insufficient to alleviate its concerns.[607] Nevertheless, it would be unsound to draw general conclusions for the actual standard of review from a single upheld ruling.

5.2.4. Review within the handling of complaints

The Commission cannot fully and instantaneously investigate every complaint about suspected infringements because the resources at its disposal are limited.[608] Within its task assigned by the Treaties of defining and implementing EU competition policy, it enjoys the discretion to prioritize certain complaints over others and to refrain from further pursuing cases with inadequate EU interest.[609] In this connection, it performs complex economic assessments so as to weigh up the significance of the violation for the functioning of the internal market against the probability of proving it and the extent of the investigation required.[610] From its own side, the EU judicature is obliged to safeguard the complainant's right to a fair trial by effectively reviewing the exercise of administrative discretion. Indeed, it lives up to the expectation.

In *CEAHR*, the General Court annulled the rejection of a complaint after finding out that an aspect relevant to the economic importance of the alleged

[606] See Chapter 5.1.3.

[607] *Morningstar*, note 180, paras 47-75.

[608] Such complaints are submitted under Regulation 1/2003, note 45, Article 7(2).

[609] Case T-427/08 *Confédération européenne des associations d'horlogers-réparateurs (CEAHR) v Commission* [2010] ECR II-5865, paras 26-27; *Spira*, note 519, para 97; Case T-342/11 *Confederación Española de Empresarios de Estaciones de Servicio (CEEES) and Asociación de Gestores de Estaciones de Servicio v Commission* EU:T:2014:60, para 59. See also Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty [2004] OJ C101/65, points 27-28.

[610] *CEAHR*, para 158; *Spira*, para 184; *CEES*, para 60.

infringements was not considered by the Commission and that the administrative conclusions on the definition of the relevant market were not supported by the available evidence.[611]

In particular, the Commission disregarded the fact that at least five Member States were being affected by the violations contained in the complaint pursuant to which several manufacturers of luxury watches refused to supply spare parts to independent watch repairers.[612] In addition, the Commission committed a manifest error in holding that the markets for luxury watches and their spare parts constituted a single unified market. According to the judgment, a moderate price increase in the spare parts of one producer would not shift demand to watches of other producers since the overall cost of repair services was too low to influence consumer choice on the much more expensive primary market and the foregoing price increase would not be avoided by selling the unrepaired and thus devalued watch to the second-hand market.[613]

In *Scippacercola and Terezakis*,[614] the Court verified the evidence relied on by the Commission and that adduced by the applicants and spotted inaccuracies in the latter. It went on to uphold the administrative decision which had dismissed the complaint in view of the unlikelihood of establishing the supposed breach of Article 102 TFEU.

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[611] *CEAHR*, paras 177-178. See also the annulled Commission decisions in Case T-77/95 *Union française de l'express (Ufex), DHL International, Service CRIE and May Courier v Commission* [2000] ECR II-2167, paras 52-55; Case T-89/98 *National Association of Licensed Opencast Operators (NALOO) v Commission* [2001] ECR II-0515, paras 103-124.

[612] *CEAHR*, paras 30-33.

[613] ibid, paras 91-107.

[614] Case T-306/05 *Isabella Scippacercola and Ioannis Terezakis v Commission* [2008] ECR II-0004.

In more detail, the economic figures underpinning Ms Scippacercola's and Mr Terezakis' claim did not include certain costs relating to the security and parking services of Athens International Airport whilst they grossly understated the total cost of construction of the airport.[615] Consequently, it could not be shown that the difference between the charges and the costs concerning the services provided by the airport to its passengers amounted to excessive pricing.

The two above judgments evince that the EU judicature does not hesitate to look at the evidence produced by both sides and engage in scientific analysis so as to adequately respond to pleas disputing the legality of complex economic assessments in the area of complaints. In *CEAHR*, it contemplated the interactions between the price and the demand of both products at issue whereas in *Scippacercola and Terezakis*, it evaluated the profit margin of the dominant entity after determining which costs were relevant to that task. In general, the Court carries out an adequate review covering every component of the Commission's economic reasoning.

Although the administrative discretion in the handling of complaints is apparently far from unlimited,[616] the judgment in *Si.mobil* declined to examine whether criteria other than those lawfully applied by the Commission should have led to a further investigation of the reported margin squeeze and predatory pricing.[617]

Let us suppose that the Commission fulfilled its obligations to correctly state the facts and to peruse all the pertinent circumstances before dismissing a complaint due to a lack of EU interest. It gave priority to one particular criterion, namely the

[615] ibid, paras 114-118 and 125. See also *Topps*, note 524, paras 88 and 149-152.

[616] See Case C-119/97 P *Union française de l'express (Ufex), formerly Syndicat français de l'express international (SFEI), DHL International and Service CRIE v Commission* [1999] ECR I-1341**,** para 89; Case C-56/12 P *European Federation of Ink and Ink Cartridge Manufacturers (EFIM) v Commission* EU:C:2013:575, para 58.

[617] *Si.mobil*, note 374, paras 87-89.

insignificance of the alleged violation for the internal market. If the EU judges were to ascribe more weight to another criterion, for instance the few resources needed for a full investigation of the case, they would essentially substitute the opinion of the Commission on EU interest and would thereby encroach on its executive role and its discretion in EU competition law.[618] The CJEU is therefore justified in not willing to intervene in the final balancing exercise undertaken in the area of complaints because that would go beyond its mandate within the EU legal order.[619] After all, the effect of the right to a fair trial does not go as far as neutralizing the principle of institutional balance and compelling EU courts to set enforcement priorities in competition law.

5.2.5. Review within the administrative control of concentrations

Unlike antitrust enforcement, merger control requires the performance of prospective complex economic assessments. The goal is to determine ex ante whether a proposed concentration would significantly impede effective competition in the internal market, in particular as a result of the creation or strengthening of a dominant position. This idiosyncratic aspect engenders uncertainty and thus makes the detection of definite errors more difficult for the EU judicature. Nevertheless, the latter is obliged to overcome the hurdle and review effectively both the procedural and the substantive legality of merger decisions.

[618] See also Case T-273/09 *Associazione "Giùlemanidallajuve" v Commission* EU:T:2012:129, para 36; *Spira*, note 519, para 185; Case T-751/15 *Contact Software GmbH v Commission* EU:T:2017:602, para 31

[619] A similar position is espoused by Alexandra Mikroulea, 'Rejection of complaint, lack of Community interest, obligation of motivation: how does it fit all together?' (2011) 2 JECLAP 241, 243.

5.2.5.1. The need for an effective review of prospective assessments

In the process of declaring a concentration compatible or incompatible with the internal market, the Commission has to 'envisage various chains of cause and effect with a view of ascertaining which of them are the most likely'.[620] Such predictions are not 'a precise science'.[621] How can one prove that an outcome is more probable than another when even distinguished economists so often fail in their forecasts?[622] Could it be that merger control is unavoidably a matter of perspective? Should the EU judicature therefore defer to any complex economic assessment undertaken by the Commission and confine itself to an entirely marginal review of the administrative decision?

Shying away from examining the scientific validity of an appraisal by reason that it concerns the future would be absurd and in breach of the right to a fair trial. The Commission would be conceded excessive latitude in approving or prohibiting transactions and concurrently undertakings would be deprived of any practical means for protecting their interests before an independent and impartial tribunal established by law. Submitting a complaint ex post alleging an infringement of Article 102 TFEU by the merged entity would be an option for affected third parties, but in that situation competition and competitors would have already been injured.

Furthermore, there exist some widely accepted principles in economics, such as the laws of demand and supply, which are relevant in any evaluation of past,

[620] *Commission v Tetra Laval*, note 457, para 43; *Bertelsmann and Sony*, note 96, para 47; Case T-175/12 *Deutsche Börse AG v Commission* EU:T:2015:148, para 62.

[621] Vesterdorf, 'Standard of Proof in Merger Cases', note 457, 17.

[622] See for example the prediction of Nobel laureate in economics Paul Krugman who said in May 2012 that Greece would have to exit the Eurozone within twelve months, <www.independent.co.uk/news/world/politics/interview-with-economist-paul-krugman-greece-will-leave-eurozone-within-12-months-7804753.html> accessed 02 October 2018.

present or future events.[623] What the EU judges must do is ensure that the Commission has correctly applied the foregoing principles and has used cogent technical evidence in its attempt to establish a 51% chance for the given chain of cause and effect. For instance, arguing that a shortage of supply will lead to a decrease in prices would be unacceptable under economic theory whereas estimating consumer choices without relying on quantitative data would not meet the requisite standard of proof.

Lastly, as Advocate General Kokott has stated, if the factual and evidential position allows different well-founded economic assessments, the Commission will be free to choose its preferred one.[624] This judicial restraint might be exercised more frequently in concentrations than in other competition law cases due to the greater degree of uncertainty entailed by prospective assessments.

5.2.5.2. Review of procedural legality

It is time to focus on the actual jurisprudence regarding the review of economic matters in the area of mergers and acquisitions. I will begin with two judgments that dealt with procedural legality.

In *UPS*, a decision prohibiting a concentration was voided on account of a breach of the rights of the defence. The applicant was not offered access to the final econometric model chosen by the Commission for the purpose of appreciating the

[623] Some of those principles are mentioned in the Guidelines on horizontal mergers, note 522, points 28, 31, 32, 70 etc.

[624] *Bertelsmann and Sony*, note 96, Opinion of AG Kokott, para 240; *Commission v Alrosa*, note 518, Opinion of AG Kokott, para 84.

impact of the proposed acquisition on prices in the European market for express small package delivery.[625]

Likewise, the General Court annulled the approval of a concentration between two cable television operators in *KPN*. The act failed to state reasons for not analysing the possible vertical anti-competitive effects of the transaction and more specifically the risk of foreclosure of wholesale access by the merged entity to its competitors on the downstream market for premium pay TV sports channels.[626]

UPS and *KPN* confirm the high and unwavering intensity of judicial review in the field of procedural legality. The EU judicature does not recognize any margin of administrative discretion in the application of procedural rules irrespective of whether they relate to the carrying out of complex economic assessments in merger cases.[627]

5.2.5.3. Review of substantive legality

The following lines will try to figure out whether there is an effective judicial review of the substantive legality of complex economic assessments in merger control. They will look closely at the way in which the EU judicature engages with the rules of the legal, but also of the economic discipline.

At the outset, the CJEU interprets without any deference to the Commission the full content of the legal concepts applicable to each case even if they are inextricably linked to economics.[628] As to the notion of 'collective dominance' for

[625] *UPS*, note 378, paras 215-221. See also Case T-310/01 *Schneider Electric SA v Commission* [2002] ECR II-4071 (hereinafter *Schneider I*), paras 437-463.

[626] *KPN*, note 389, paras 54-75. See also Case T-251/00 *Lagardère SCA and Canal+ SA v Commission* [2002] ECR II-4825, paras 155-160.

[627] See also Matteo F. Bay and Javier Ruiz Calzado, '*Tetra Laval II*: the Coming of Age of the Judicial Review of Merger Decisions' (2005) 28 World Competition 433, 434.

[628] Nicholson, Cardell and McKenna, note 553, 140. See also Kalintiri, note 538, 1314-1315.

example, the Court laid down the conditions necessary for its establishment in *Airtours* notwithstanding that the Commission had refrained from doing so itself.[629]

Next, the pertinent jurisprudence demonstrates that the General Court strenuously inspects the soundness of the Commission's analysis of complex economic situations.

A more elaborate reference ought to be made to the ruling in *Airtours*. The General Court quashed a prohibition decision according to which the proposed transaction would create a collective dominant position between the three remaining large tour operators in the UK market for short-haul package holidays. It had stated earlier in its judgment that it must 'adjudicate on the merits of the Commission's findings concerning the effects of the concentration on competition'.[630] It kept its word. Its zeal was so high that one could assume that it actually substituted its own conclusions for the ones of the Commission. However, the truth is that it was careful to expose and substantiate in a comprehensible manner the existence of numerous oversights and errors relating to the thoroughness, consistency and reasonableness of the Commission's assessment of the complex economic situation.[631]

To start with, the General Court held that the Commission failed to take into account three crucial factors. It did not pay attention to the volatility of the market

[629] Case T-342/99 *Airtours plc v Commission* [2002] ECR II-2585, para 62. See also *Gencor*, note 401, para 276.

[630] *Airtours*, para 53. See, a contrario, *Commission v Tetra Laval*, note 457, Opinion of AG Tizzano, para 89, who argues that the EU judicature must not 'enter into the merits of the Commission's complex economic assessments'. In *Airtours*, the Court used the phrase 'adjudicate on the merits' in a different way from AG Tizzano. The Court did not signify that it would substitute the complex economic assessments of the Commission, but that it would review their substantive validity.

[631] *Airtours*, paras 107-108, 118, 120, 147, 180-182, 200, 207, 251, 260, 283 and 291. See Joined Cases C-68/94 and 30/95 *French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC) v Commission* [1998] ECR I-1375 (known as *Kali und Salz*), paras 225-250.

shares of tour operators, which attested to the competitiveness of the market,[632] the tendency for considerable demand growth for the services in question, which was capable of stimulating competition between the providers in the future,[633] and the lack of barriers of market entry, which could permit potential competitors to swiftly jeopardize the results expected from a joint anti-competitive practice.[634]

Moreover, pursuant to the Court, the evidence did not support the conclusions of the Commission to the requisite legal standard. Economic theory was at variance with the claim that demand fluctuations were conducive to collective dominance.[635] Next, the difficulty in detecting deviations from the common policy, the unpredictability of demand and the economic loss entailed disproved the supposed ability of the members of the dominant oligopoly to retaliate effectively against departures from the joint strategy.[636] Lastly, the Commission erred in underestimating the power of smaller tour operators and consumers to counteract the formation of a collective dominant position.[637] Smaller tour operators could increase their capacity to take advantage of a potential undersupply whereas consumers were price-sensitive and willing to switch to long-haul holidays in the event of a price convergence with short-haul holidays.

Airtours is not an isolated example of annulment for substantive reasons. The General Court quashed the prohibition decisions in *Schneider* and *Tetra Laval* as

[632] *Airtours*, paras 111-120.

[633] ibid, paras 131-133.

[634] ibid, paras 262-269.

[635] ibid, paras 134-147.

[636] ibid, paras 183-207.

[637] ibid, paras 229-261 and 270-277.

well.[638] In the former case, it found serious errors, omissions and inconsistencies in the Commission's appraisal of the impact of the notified concentration on several national markets.[639] In the latter case, it spotted manifest errors of assessment regarding the horizontal, vertical and conglomerate effects of the transaction in the whole EU.[640]

Its crushing same year defeats in *Airtours*, *Schneider* and *Tetra Laval* prompted the Commission to propose and implement radical legislative, structural and operational changes with the aim of strengthening the cogency and transparency of economic analysis in EU merger control.[641] From the impugned concentration decisions that have been adopted post the completion of the changes in February 2004, one has been annulled partially and none entirely due to substantive defects of an economic nature.[642] So has the Commission truly become more competent or has the EU judicature irresistibly become more complacent?

Ryanair definitely excludes the second option. The acquisition of Aer Lingus by the applicant had been blocked because it would create an entity dominant in

[638] See also *Kali und Salz*, note 631, paras 225-259; Case T-114/02 *Babyliss SA v Commission* [2003] ECR II-1279, paras 353-411.

[639] *Schneider I*, note 625, para 404. These defects would have led to a partial annulment of the decision if it had not been also vitiated by an infringement of the rights of the defence.

[640] Case T-5/02 *Tetra Laval BV v Commission* [2002] ECR II-4381, paras 132, 140, 283, 308, 336.

[641] A renewed Merger Regulation, a detailed set of guidelines on the assessment of horizontal mergers, a Chief Competition Economist position and a peer review 'Panel' for Phase II investigations were introduced, see Mario Monti, 'Merger control in the European Union: a radical reform' (Speech at the European Commission/IBA Conference on EU Merger Control, Brussels, 7 November 2002) <http://europa.eu/rapid/press-release_SPEECH-02-545_en.htm?locale=el> accessed 02 October 2018; Stephen A. Ryan, 'Reform of the EU Merger Control System- a comprehensive package of proposals' (2003) 2003-1 Competition Policy Newsletter, 9.

[642] Out of 13 adjudicated and closed merger cases, the only partial annulment for substantive reasons occurred in *Deutsche Lufthansa*, note 381, where the Commission had refused to waive certain commitments imposed by a previous approval decision.

thirty-five overlapping routes. The General Court rejected the action only after reviewing the propriety of every aspect of the Commission's economic analysis.[643]

Firstly, it confirmed the reliability of a piece of evidence signifying that customers viewed the merging parties as very close competitors.[644] The passenger survey at issue asked a direct question, contained more than 2,500 responses and its data were weighted by route.

Secondly, it was ruled that the Commission took into account all the relevant factors for evaluating the complex economic situation.[645] It did not rely exclusively on the market shares of Ryanair and Aer Lingus, but also on the impact of the proposed concentration on competition in each overlapping route as well as on the reaction expected from customers and competitors.

Thirdly, the Court found that the conclusions of the Commission were plausible in the light of the adduced evidence.[646] The close competitive relationship between the firms involved in the transaction was evinced by the proximity of their costs and prices and by an econometric model denoting that Aer Lingus charged fares lower than its regular ones on the routes where Ryanair was present.[647] In addition, the lack of significant competitive pressure for the entity resulting from the concentration was corroborated by the very small number of seats offered from charter airlines to end customers and by the considerable barriers to entry, including

[643] See also Anne C. Witt, 'From *Airtours* to *Ryanair*: Is the more economic approach to EU merger law really about more economics?' (2012) 49 CML Rev 217, 229-230.

[644] *Ryanair*, note 557, paras 207-211.

[645] ibid, para 42. See also *Deutsche Börse*, note 620, paras 210-212 and 227-233.

[646] See also the intensive review of the Commission's conclusions in *Cisco Systems*, note 96, paras 87-95 and 115-137; *Deutsche Börse*, paras 71-128 and 149-156.

[647] *Ryanair*, note 557, paras 76-87 and 146-164.

the high marketing costs required to build a well-known brand.[648] Overall, the Commission was justified in finding that the chilling of competition between the merging parties coupled with the absence of a countervailing market force would have negative repercussions on prices, quality and choice and would therefore cause unacceptable consumer harm.[649]

It transpires that the EU judges diligently evaluate whether the evidence relied on by the Commission is accurate and reliable, as was the case with the econometric model and the market survey in *Ryanair*, whether it contains all the information which must be taken into account, such as the disregarded demand growth and low barriers to entry in *Airtours*, and whether the inferences drawn from that evidence are valid under the rules of economics, for example the refuted lack of buyer power in *Airtours* and the upheld close competitive relationship between the merging entities in *Ryanair*. If it spots any defects, the CJEU will not hesitate to void the challenged act as *Airtours*, *Schneider* and *Tetra Laval* demonstrate. It is therefore clear, both before and after the radical reform of the Commission's economic approach, that the standard of judicial review of complex economic assessments has been thorough and intensive enough to provide a fair trial to applicant undertakings in merger disputes.

5.2.6. The overall picture

If we combine the separate segments of EU competition law together, we can draw two important inferences about the review of complex economic assessments in general. The first one is that the General Court remains true to its word and applies in

[648] ibid, paras 198-201 and 276-281.

[649] ibid, paras 222-227.

practice the standard of control it has declared in theory. The second one is that the intensity of the control fluctuates depending on the nature of the given assessment.

To start with the first of the above inferences, the EU judicature examines unproblematically the procedural propriety of the Commission's economic analysis. We saw that it annulled decisions due to an infringement of the rights of the defence in *UPS* (merger case) and due to a defective statement of reasons in *European Night Services* (Article 101(3) TFEU case) and in *KPN* (merger case).

Moreover, irrespective of the subsection of EU competition law at issue, the Court strenuously inspects the reliability, accuracy and consistency of the evidence presented by the parties, the completeness of the Commission's evaluation and the reasonableness of the latter's conclusions in view of the available evidence.

Although the CJEU confirmed the credibility of a survey relied on by the Commission in *Ryanair* (merger case), it detected inaccuracies and inconsistencies in the experts' reports and the economic figures adduced by the applicants in *Mitsubishi II* (Article 101 TFEU case) and in *Scippacercola and Terezakis* (complaint case). Next, it confirmed that all the relevant factors were taken into account in *Deutsche Telekom* (Article 102 TFEU case) and in *Ryanair*, whereas it held that a thorough analysis was not performed and voided the administrative measures in *Italian Flat Glass* (Article 102 TFEU case), in *CEAHR* (complaint case) and in *Airtours* (merger case). Lastly, the Court scrutinized and upheld the soundness of the conclusions of the Commission in *Amann & Söhne* (Article 101 TFEU case), in *Lundbeck* (Article 101(3) TFEU case) and in *Ryanair*, but spotted economic errors and quashed the administrative findings in *GlaxoSmithKline* (Article 101(3) TFEU case), in *CEAHR*, in *Airtours*, in *Tetra Laval* (merger case) and in *Schneider* (merger case).

On the other hand, the General Court did not adequately consider the arguments of the applicants against the conclusions of the Commission in *CB* (Article 101 TFEU case) and in *Intel* (Article 102 TFEU case). These are rare exceptions from the rule caused by a reckless interpretation of the law and they cannot neutralize the aforementioned twelve judgments which attest to the effectiveness of the judicial review in relation to the substantive legality of complex economic assessments.

Moving on, there are certain discrepancies between the judicial control of complex economic assessments in different departments of EU competition law.

In the area of commitments, the CJEU must check the proportionality of the Commission's decisions by looking at the commitments previously rejected at the administrative stage and not by evaluating unrestrictedly the complex economic situation, as it is able to do in infringement decisions. This limitation on the depth of the review is justified by the voluntary and non-punitive nature of the commitments procedure.

In addition, the EU judges tend to concede a slightly larger degree of latitude to the Commission in the handling of complaints. As we saw in *Si.mobil*, they allowed it to give emphasis on the criterion it deemed appropriate for rejecting the submitted complaint. The same did not occur in *Airtours*, where the prohibition of the notified concentration was annulled because inter alia the decision 'underestimated' certain factors.

The handling of complains requires the Commission to balance diverging policy interests as for example whether to devote its finite resources to investigating an alleged concerted practice in Scandinavia or an alleged refusal to supply in Benelux. The concept of an 'error' becomes more circumscribed in such situations. If

the Court were to find that the Commission 'erred' by overestimating or underestimating the one or the other element, it would restrict excessively the Commission's leeway and would essentially prevent it from exercising its executive function under the Treaties. This does not apply in infringement or merger cases because the policy-making aspects are less potent, the rights of the affected undertakings more radiant and the administrative discretion more limited.

5.3. The Role of the Court of Justice

The Court of Justice adjudicates on appeals by entities which were partially or entirely unsuccessful before the General Court.[650] Within this framework, I will display the powers of review of the EU's appellate tribunal with respect to complex economic assessments and the way those powers are exercised.

5.3.1. The powers of review on appeal

The appellate jurisdiction in EU competition law is limited to points of law. In the area of complex economic assessments, the Court of Justice is precluded from reviewing factual matters such as the reliability, accuracy and completeness of the available evidence and the soundness of the conclusions drawn from that evidence.[651] Nevertheless, it is empowered to interpret authoritatively the relevant provisions of EU law, determine the full content of the legal concepts or criteria apposite to the

[650] See Chapter 4.3.

[651] See for example Case C-280/08 P *Deutsche Telekom AG v Commission* [2010] ECR I-9555, para 93; Case C-457/10 P *AstraZeneca AB and AstraZeneca plc v Commission* EU:C:2012:770, para 185; *Telefónica*, note 5, paras 72 and 83-89.

economic situation at hand and check whether those provisions, concepts and criteria have been applied in a legally correct manner by the Commission or the General Court.

It should be stressed that, in contrast to the General Court, the Court of Justice has not enunciated a particular standard of review differentiating complex economic assessments from other factual appraisals. The appellate control is not therefore deferential. It must cover every legal question with the upmost intensity and may even lead to a substitution of the Commission's legal appraisal.

5.3.2. The exercise of the appellate powers of review

The three following judgments demonstrate that the Court of Justice examines unrestrainedly all the legal issues put forward by the litigants.

To begin with *CB*, the appellant maintained that the General Court erred in law and failed to exercise its powers of review in holding that the measures at issue had as their 'object' the restriction of competition within the meaning of Article 101(1) TFEU. The Court of Justice stated the confirmation of the restrictive object of a given conduct requires an assessment of its content, of its objectives and of its legal and economic context which must reveal a sufficient degree of harm to competition.[652] However, the General Court, by simply reproducing the contents of the administrative decision, disregarded the above criteria and as a result it did not sufficiently consider the relevant submissions of CB. According to the Court of Justice, Article 101(1) TFEU was misinterpreted and misapplied whereas the standard

[652] *CB* (CoJ), note 29, paras 44 and 53.

of review applicable to complex economic assessments was not observed.[653] The first-instance judgment was set aside and the case was returned to the General Court.

In a similar vein, in *Intel*, the appellant challenged the thoroughness of the judicial control undertaken at first instance. The Court of Justice stressed that the correct interpretation of Article 102 TFEU compels the General Court to deal with all of an applicant's arguments contesting the capability of a pricing practice to exclude competitors at least as efficient as the dominant undertaking from the market.[654] Given that the Commission had employed the AEC test in order to establish the foreclosure effects of Intel's rebate scheme in the specific economic and legal context in which it was implemented, the General Court committed an error of law by not addressing the criticisms raised against that test.[655] The Court of Justice set the appealed ruling aside and referred the case back for a fresh adjudication.

In *Commission v Tetra Laval*, it was asserted that the General Court imposed a very high standard of proof on the Commission and carried out an unrestrained review which were both incompatible with the wide administrative discretion in the assessment of complex economic matters. The Court of Justice outlined the requisite standards of proof and review in merger control.[656] Pursuant to those, the General Court was not precluded from requiring 'convincing' evidence for the establishment of the anti-competitive effects of a concentration or from quashing the conclusions of

[653] ibid, paras 56, 69, 71 and 89-94.

[654] *Intel*, note 428, paras 136-141. See also *Deutsche Telekom*, note 651, paras 170-185; *Telefónica*, note 5, paras 123-125.

[655] *Intel*, paras 142-147; Pablo Ibáñez Colomo, 'The Future of Article 102 TFEU after Intel' (2018) 9 JECLAP 293, 296.

[656] *Commission v Tetra Laval*, note 457, paras 39 and 43-44.

the Commission after explaining that they were based on 'incomplete' and 'inconsistent' data.[657] The appellant's line of argument was rejected.

In response to the pleas formulated before it, the Court of Justice deciphered the concept 'restriction by object' in *CB*, determined the impact of Article 102 TFEU on the handling of exclusionary practices in *Intel* and defined the standards of proof and review applicable to merger cases in *Commission v Tetra Laval*. Thereafter, it did not shy away from discarding the views of the General Court in the first two judgments, thereby vindicating the appellant entities, and the assertions of the Commission in the third judgment, thereby benefiting the defendant company. It turns out that the Court of Justice does not shy away from exercising its interpretive and annulment authorities in relation to complex economic assessments when the circumstances so require. This suffices to afford the parties an effective appellate control capable of safeguarding their right to a fair trial.

5.4. Summarizing the Standard of Judicial Review of Complex Economic Assessments

Complex economic assessments are evaluations performed by the Commission which employ methods pertaining to the economic discipline in order to establish a causal relationship between a market conduct and a decrease in consumer welfare for the purposes of EU competition law. The standard of review of those assessments is by

[657] ibid, paras 45-51.

way of exception ‘limited’ and not ‘comprehensive’ as is the case with any other question of fact or law raised before the CJEU.

On the one hand, apart from submissions relating to procedural legality and to a misuse of powers, the EU judicature must also check whether the evidence relied on by the Commission is factually accurate, reliable and consistent, whether it contains all the relevant information for appraising the complex economic situation and whether it is capable of supporting the conclusions drawn from it to the requisite legal standard. On the other hand, the CJEU is precluded from substituting its own economic appraisal for the one of the Commission. It cannot overrule the preferred method and the concomitant analysis of the Commission in the absence of a manifest error of assessment.

The foregoing limitation on the judicial powers originates from the principle of institutional balance and the superior technical expertise of the Commission. Under the Lisbon Treaties, the Commission is the institution responsible to ensure the application of EU competition law and to make the necessary policy-making methodological choices whereas the CJEU is entrusted with ascertaining the legality and not the expediency of those choices. Furthermore, the Commission has at its disposal officials specialized in economics and it is therefore better placed to handle scientific issues than judges who usually do not have any training in economics.

With only a few exceptions, the General Court applies in practice the standard of review it has declared in theory as concerns both procedural and substantive pleas. It does so in every segment of EU competition law necessitating complex economic evaluation such as the application of Articles 101(1) and 102 TFEU, the application of Article 101(3) TFEU, the handling of complaints and the control of concentrations.

The case law on the adoption of antitrust commitments is very small and thus inconsequential. Despite all of the above, there are certain fluctuations in the intensity of the review contingent on the nature of each assessment.

Article 6(1) ECHR, as interpreted by the ECtHR, does not impose a judicial power of substitution for technical evaluations. It solely demands tribunals to verify, depending on the complaints put forward before them, whether the lower body has (a) provided adequate reasons, (b) used accurate, credible and complete evidence, (c) reached reasonable conclusions, and (d) refrained from misusing its powers. The present chapter, in combination with the previous one, have demonstrated that the General Court exercises its inspection and annulment capacities for every one of those four questions. Consequently, its standard of review is compatible with the right to a fair trial.

From its own side, the Court of Justice may not have jurisdiction to deal with the economic evidence, but it considers in detail any raised argument challenging the interpretation and the application of the law by the Commission and the General Court. Notably, it has remedied the insufficient first-instance review in a couple of cases. According to the ECtHR, when another tribunal has already afforded a full fair trial in the given case, appellate tribunals are merely obliged to apply their assigned powers of review, whichever those are. It turns out that the Court of Justice abides by Article 6(1) ECHR.

6. The Unlimited Review of Penalties

Pecuniary sanctions constitute the harshest means that the Commission has at its arsenal for addressing breaches of EU competition law. The bright side for delinquent undertakings is that the CJEU enjoys 'unlimited jurisdiction' with respect to penalties in EU competition law. It may cancel, reduce or increase the amount of fines and periodic penalty payments even without annulling the entire contested act.[658] It has therefore been granted an amending capacity it does not possess for any other part of an administrative decision. With great power comes great responsibility. The present chapter defines the full content of unlimited jurisdiction and assesses whether and how the EU judicature exercises that jurisdiction when it reviews various pleas put forward by penalized undertakings. Statistical data are also adduced with the aim of corroborating the derived conclusions.

6.1. The Setting of Fines and the Limits of Unlimited Jurisdiction

At the outset, it is essential that we look at the methodology pursuant to which the penalties for breaking EU competition law are set at the administrative stage so that

[658] *PVC II*, note 413, para 692; Case C-534/07 P *William Prym GmbH & Co. KG and Prym Consumer GmbH & Co. KG v Commission* [2009] ECR I-7145, para 86; Case C-523/15 P *Westfälische Drahtindustrie GmbH and Others v Commission* EU:C:2016:541, para 32.

we will be able to comprehend the matters that the CJEU is subsequently asked to review. Next, I will try to delineate the scope of 'unlimited jurisdiction' given that the above term is not as self-explanatory as it might seem.

6.1.1. The fixing of competition fines by the Commission

Regulation 1/2003 and the Merger Regulation enable the Commission to impose fines and periodic penalty payments. Periodic penalty payments constitute complementary sanctions, they can be employed only in the event of disobeying a Commission decision and they are seldom impugned before the General Court.[659] The current section focuses on fines and especially the ones for violations of Articles 101 and 102 TFEU which are by far the most commonly adopted in EU competition law.

6.1.1.1. The general fining provisions of Regulation 1/2003

Regulation 1/2003, in its Article 23,[660] sets two conditions for fixing the amount of fines for infringements of Article 101 or Article 102 TFEU or commitments decisions: (a) regard shall be had to both the gravity and the duration of the infringement, and (b) the fine must not exceed 10% of the undertaking's total turnover in the preceding business year.[661] It should also be mentioned that the Commission is prohibited from adopting pecuniary sanctions five or more years after

[659] Only two substantive decisions imposing periodic penalty payments have been impugned before the General Court: *MasterCard,* note 513; Case T-167/08 *Microsoft Corp. v Commission* EU:T:2012:323.

[660] Article 23 of Regulation 1/2003, note 45, replaced Article 15 of Regulation No 17 of 6 February 1962, note 593.

[661] The Commission can impose fines of up to 1% of their annual turnover on undertakings not complying with a Commission decision requesting information or ordering an inspection.

the end of the violation unless the limitation period has been interrupted by an act of investigation or prosecution, or suspended by pending proceedings at the CJEU.[662]

It transpires that EU law does not regulate how the gravity and the duration of an antitrust infringement shall affect the level of the fine. Moreover, 'gravity' is not a mathematical variable. Its appraisal relies on a value judgment. The Commission is thereby left with a very large leeway, notwithstanding the existence of the legal maximum of 10% of turnover. As Damien Geradin and David Henry argue, this had caused vagueness and nebulousness in the determination of fines.[663]

6.1.1.2. The specification provided by the Commission Guidelines

For the sake of transparency and legal certainty, the Commission published guidelines on its method for setting fines in 1998[664] which were replaced by new ones in 2006.[665] They prescribe the specific criteria that should be used for gauging the gravity of a violation of Article 101 or Article 102 TFEU and include a mathematical formula factoring the gravity and the duration of the violation in the level of the penalty.

[662] Regulation 1/2003, Article 25(1)(b), 25(3), 25(5) and 25(6). Every valid interruption starts time running afresh. Excluding any suspensions, the total limitation period cannot last for more than ten years. The limitation period for violations of provisions concerning requests of information or the conduct of inspections is three years.

[663] Damien Geradin and David Henry, "The EC fining policy for violations of competition: An empirical review of the Commission decisional practice and the Community courts' judgments" (2005) Global Competition Law Centre Working Paper 2/05, 7 <papers.ssrn.com/sol3/papers.cfm?abstract_id=671794&rec=1&srcabs=1788141&alg=1&pos=10> accessed 02 October 2018.

[664] 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 [1998] OJ C9/3 (hereinafter 1998 Fining Guidelines).

[665] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 [2006] OJ C210/2 (hereinafter 2006 Fining Guidelines).

Pursuant to the Guidelines currently in force, the Commission will begin by fixing the 'basic amount' of the fine.[666] It will take into account a proportion of up to 30% of the value of the undertaking's sales affected by the infringement, normally in its last full business year of participation, and will multiply it by the total number of years of participation in the infringement.[667] For horizontal cartels and other serious offences, it will add to the above total an 'entry fee' of between 15% and 25% of the value of the undertaking's relevant sales.

Next, the 'basic amount' of the fine may be adjusted on various grounds.[668] The existence of aggravating or mitigating circumstances is one of them. In addition, the penalty can be increased to enhance its deterrent effect. The 10% ceiling of turnover provided in Regulation 1/2003 shall be subsequently applied on the fine. Further reductions may still be made after this point. By virtue of the Settlement Notice, a 10% fixed fine decrease shall be awarded to parties in settlement decisions.[669] The Leniency Notice also comes into play and eligible undertakings will be granted specific reductions commensurate with the extent and value of their cooperation with the Commission.[670] In exceptional cases, the amount of the overall fine can be diminished if it would irretrievably damage the economic viability of the penalized undertaking.

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[666] 2006 Fining Guidelines, points 12-26. See also Éric Barbier de La Serre and Eileen Lagathu, 'The Law on Fines Imposed in EU Competition Proceedings: Fifty Shades of Undertakings' (2015) 6 JECLAP 530, 531-537.

[667] Periods of six months or less will be counted as half a year and periods of longer than six months will be counted as a full year.

[668] 2006 Fining Guidelines, note 665, points 27-35.

[669] Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases [2008] OJ C167/1.

[670] Commission Notice on Immunity from fines and reduction of fines in cartel cases [2006] OJ C298/17 (hereinafter the Leniency Notice). Same as the Guidelines, the Leniency Notice is a soft law instrument.

On the one hand, the Guidelines constitute a self-limitation on the broad discretion permitted to the Commission by Regulation 1/2003. Although they do not have the status of law, the Commission is allowed to depart from them solely by giving reasons compatible with the principle of equal treatment.[671] At the same time, those administrative rules of practice offer tangible context in the judicial review of fines. The CJEU must necessarily check whether they have been correctly applied and if not, it will step in and vary the pecuniary sanction.

On the other hand, even within the framework of the Guidelines, the Commission retains considerable flexibility. Undertakings are thus impeded from reckoning in advance whether it would be to their financial benefit to engage in anticompetitive conduct.[672] The CJEU admits that absolute predictability is not desirable in the antitrust field.[673] It has not for example objected to the Commission taking into account 2% of the value of sales in one infringement[674] and 25% in another[675] or to the application of a deterrence multiplier only on certain penalties.[676] Nevertheless, as it will later become clear, the lawful fixing of a fine is not contingent solely on the observance of the outer limits of the Guidelines.

[671] Joined Cases C-189, 202, 205 to 208 and 213/02 P *Dansk Rørindustri and Others v Commission* [2005] ECR I-5425, para 211; Case C-397/03 P *Archer Daniels Midland Co and Archer Daniels Midland Ingredients Ltd v Commission* [2006] ECR 4429, para 91; *Goldfish*, note 22, para 133. See also 2006 Fining Guidelines, note 665, point 37.

[672] See *Ziegler*, note 498, Opinion of AG Kokott, para 120.

[673] Case T-69/04 *Schunk GmbH and Schunk Kohlenstoff-Technik GmbH v Commission* [2008] ECR II-2567, para 45; *Sasol*, note 153, para 207. See also Lukas Solek, 'Administrative and Judicial Discretion in Setting Fines (2015) 38 World Competition 547, 548.

[674] *Portugal Telecom*, note 455, paras 55 and 293; *Telefónica II*, note 399, paras 55 and 367.

[675] Case T-146/09 RENV *Parker Hannifin Manufacturing Srl, formerly Parker ITR Srl and Parker-Hannifin Corp v Commission* EU:T:2016:411, paras 149 and 183; Joined Cases T-147 and 148/09 *Trelleborg Industrie SAS and Trelleborg AB v Commission* EU:T:2013:259, paras 22 and 118.

[676] E.g., Case T-404/12 *Toshiba Corp. v Commission* EU:T:2016:18 (hereinafter *Toshiba II*), paras 17 and 89-91; *Mitsubishi II*, note 581, paras 17 and 183-196.

6.1.1.3. Fines pursuant to the Merger Regulation

The Commission may impose penalties on undertakings which implement a concentration in violation of the provisions of the Merger Regulation or the decisions issued under the Merger Regulation.[677] In fixing the amount of the fine, regard shall be had to the nature,[678] gravity and duration of the infringement. The fine cannot exceed 10% of the aggregate turnover of the undertaking concerned. The applicable limitation periods are similar to the ones in Regulation 1/2003.[679]

The Commission has not published any guidelines for setting fines under the Merger Regulation. It rarely imposes such fines[680] and so far the CJEU has had to review only two of them.[681]

6.1.2. The boundaries of unlimited jurisdiction

Article 261 TFEU[682] in conjunction with Article 31 of Regulation 1/2003[683] and Article 16 of the Merger Regulation[684] have granted the CJEU unlimited jurisdiction

[677] Merger Regulation, note 46, Article 14(2) and 14(3). The Commission can also impose a fine up to 1% of the aggregate turnover of the undertaking concerned for a procedural offence, see Merger Regulation, Article 14(1).

[678] The nature of the infringement refers to its seriousness and cannot be entirely distinguished from its gravity, see Case T-704/14 *Marine Harvest ASA v Commission* EU:T:2017:753, para 480.

[679] Regulation (EEC) No 2988/74 of the Council of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition [1974] OJ L319/1, Articles 1-3; Case T-332/09 *Electrabel v Commission* EU:T:2012:672, paras 201-216.

[680] Only twelve fines have been imposed for procedural and substantive violations since 1990, see the statistics published by the Commission in <http://ec.europa.eu/competition/mergers/statistics.pdf> accessed 02 October 2018.

[681] *Electrabel*, note 679; *Marine Harvest*, note 678.

[682] Article 261 TFEU provides that EU regulations 'may give the Court of Justice of the European Union unlimited jurisdiction with regard to the penalties provided in such regulations'.

[683] Article 31 of Regulation 1/2003 reads as follows: 'The Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty imposed'.

in EU competition law. The Court can vary the amount of pecuniary sanctions adopted by the Commission downwards or even upwards.[685] Nevertheless, unlimited jurisdiction does not entail a virtual omnipotence of the EU judiciary. Certain strings are attached.

To start with a procedural restraint, Article 261 TFEU does not constitute an autonomous legal remedy. It simply enlarges the judicial powers in the context of actions for annulment under Article 263 TFEU.[686] Hence, it does not allow the CJEU to bypass the admissibility criteria laid down in the latter provision.

In *FNICGV*, the applicant argued that it was contesting its fine on the legal basis of Article 261 TFEU. The attempt to overcome Article 263 TFEU and its stipulated time-limit did not succeed. The General Court rejected the application as time-barred and declared that every action asking it to exercise its unlimited jurisdiction necessarily comprises a request for the partial or complete annulment of the decision imposing the penalty.[687]

Secondly, the judicial stage remains inter partes in relation to pecuniary sanctions as well. The EU judicature may use its unlimited jurisdiction only where

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[684] Article 16 of the Merger Regulations reads as follows: 'The Court of Justice shall have unlimited jurisdiction within the meaning of Article 229 of the Treaty to review decisions whereby the Commission has fixed a fine or periodic penalty payment; it may cancel, reduce or increase the fine or periodic penalty payment imposed'.

[685] Reformatio in peius is permitted in EU competition law, see Joined Cases T-236, 239, 244 to 246, 251 and 252/01 *Tokai Carbon Co. Ltd and Others v Commission* [2004] ECR II-1181 (hereinafter *Tokai Carbon I*), paras 112 and 418; Joined Cases T-101 and 111/05 *BASF AG and UCB SA v Commission* [2007] ECR II-4949, paras 222-223.

[686] *FNICGV*, note 392, para 25; *Schunk and Schunk*, note 673, para 246; *Fuji Electric*, note 437, para 207. See also Lenaerts, Maselis and Gutman, note 493, 624.

[687] *FNICGV*, paras 25-26. See also *Fuji Electric*, para 2007; Case T-486/11 *Orange Polska S.A. v Commission* EU:T:2015:1002, para 66.

the question of the amount of the penalty has been raised before it.[688] In addition, even if a particular penalty has been questioned, the Court cannot formulate and substantiate pleas justifying an adjustment of its own motion.[689] Without prejudice to matters of public policy, the relevant burden falls on the litigants.[690]

In *Commission v Siemens Österreich and Others*,[691] the General Court rendered the companies SEHV and Magrini jointly and severally liable for the fine of another company not involved in the proceedings. Upon SEHV's and Magrini's appeal, the Court of Justice held that the General Court ruled ultra petita because it exercised its unlimited jurisdiction on a fine not challenged by any of the parties to the case.[692] The applicant in *Tomkins*[693] disputed the amount of its penalty, but not specifically the enclosed multiplier for deterrence. Tomkins' subsidiary, liable for the same conduct and penalty, had brought a separate action which resulted in the reduction of its identical multiplier for deterrence. The General Court decided that it was unable to take the latter outcome into account as this would go 'beyond the bounds of the dispute as defined by the parties'.[694]

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[688] Case C-3/06 P *Group Danone v Commission* [2007] ECR I-1331, para 62; Case C-679/11 P *Alliance One International Inc. v Commission* EU:C:2013:606, para 105; *Westfälische Drahtindustrie*, note 658, para 34.

[689] *KME*, note 24, para 56; *Chalkor*, note 25, para 64; Case C-469/15 P *FSL Holdings and Others v Commission* EU:C:2017:308, para 80.

[690] It is not entirely impossible that an upheld plea ends up in a fine increase, contrary to what was intended by the applicant. In *BASF and UCB*, note 685, the General Court annulled the finding of a single and continuous infringement. It then ruled that the first of the two actual infringements was time-barred. As a result, BASF was deprived of the fine reduction it received exclusively for its cooperation on the first infringement.

[691] Joined Cases C-231 to 233/11 P *Commission v Siemens AG Österreich and Others and Siemens Transmission & Distribution Ltd and Others v Commission* EU:C:2014:256.

[692] ibid, paras 126-131. See also *Aalberts Industries*, note 406, para 125.

[693] Case T-382/06 *Tomkins plc v Commission* [2011] ECR II-1157.

[694] ibid, paras 56-58. However, the outcome of actions with the same object (for instance both companies disputed the duration of their infringement) can be taken into account ex officio where the liability of the parent company derived exclusively from that of its subsidiary, see Case C-286/11 *Commission v Tomkins plc* EU:C:2013:29, para 49.

Thirdly, unlimited jurisdiction is strictly limited to the determination of the amount of the penalty.[695] We have already seen that the General Court declined jurisdiction to substitute the annulled violation with one based on the same facts in *Soliver* and that it was reprimanded by the Court of Justice for not doing the same in *Galp*.[696] I therefore have to disagree with the position, formulated but not definitively embraced by Alexander Arabadjiev, that the substantial finding of an infringement is subject to unlimited review.[697] With the exception of the fine, all the constituent elements of an impugned decision such as its factual basis or legal conclusions are governed solely by Articles 263 and 264 TFEU. They cannot be assessed de novo, modified or replaced regardless of their potential links to the penalty.

Fourthly, Article 261 TFEU refers exclusively to penalties that have already been imposed. Under the current division of powers in the EU, the Court is unable to adopt 'a new, legally distinct fine'.[698] It shall not penalize an anticompetitive conduct brought to its attention if the Commission, viz. the competent institution pursuant to Article 23 of Regulation 1/2003 and Article 14 of the Merger Regulation, has failed to do so.[699]

The four presented restraints on the CJEU's unlimited jurisdiction do not impede the provision of a fair trial. Applicant undertakings can very easily overcome the first two hurdles by submitting their action within the two-month deadline of

[695] *PROAS*, note 399, paras 44; *Galp*, note 399, paras 76-77; Case C-604/13 P *Aloys F. Dornbracht GmbH & Co. KG v Commission* EU:2017:45, para 53.

[696] See Chapter 4.1.3.

[697] Alexander Arabadjiev, 'Unlimited Jurisdiction: What Does it Mean Today?' in Pascal Cardonnel, Allan Rosas and Nils Wahl (eds), *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh* (Hart Publishing 2012) 392.

[698] Case T-275/94 *Groupement des cartes bancaires "CB" v Commission* [1995] ECR II-2169, paras 59-60; *Trioplast Industrier*, note 30, paras 58-59.

[699] See also Chapter 4.1.3.

Article 263 TFEU and by putting forward specific grounds against the amount of their fine. The third limitation does not prevent the EU judicature from thoroughly reviewing the legality and annulling all the parts of an administrative decision whereas the fourth limitation does not affect the standard of judicial control in respect of existent penalties, which are the ones actually affecting the interests of legal persons.

6.2. The Review Undertaken by the General Court

The following lines complement the case law we came across in Chapters 4 and 5. They grapple with the review of challenges against the level of the penalty in particular and not against the procedural or substantive validity of the entire decision. The CJEU is called to exercise its unlimited jurisdiction under Article 261 TFEU and vary the impugned pecuniary sanction for reasons which mostly concern the technical application of the Guidelines, the principle of equal treatment and the principle of proportionality.[700] In carrying out its control, it sometimes substitutes the assessment of the Commission even in the absence of a straightforward illegality.

[700] The CJEU reviews the observance of all general principles of EU law by the Commission, see for example Case T-410/03 *Hoechst GmbH v Commission* [2008] ECR II-881, paras 128-137 and 582 (breach of the principle of sound administration); Case T-40/06 *Trioplast Industrier AB v Commission* [2010] ECR II-4893, paras 161-171 (breach of the principle of legal certainty).

6.2.1. Review within the formal framework of the Guidelines

The General Court is frequently asked by undertakings to adjust their fines due to various errors committed by the Commission in the process of establishing and evaluating the circumstances of each case in the light of the Guidelines.

To start from the composition of the basic amount of the fine, in *InnoLux,*[701] the Commission mistakenly included in the value of sales related to the infringement transactions of products not covered by the anti-competitive agreement. The General Court revised the value of sales and recalculated the applicant's fine pursuant to the methodology of the Commission.[702] In *Gosselin Group,*[703] it observed that there was no documentary evidence for the last thirty-seven months of the violation. Adhering to the Guidelines, it went on to reduce the fine's multiplier for duration.[704]

Moving on to the adjustments in the basic amount of the fine, the sanctioned company in *Polimeri Europa*[705] was found liable for a repeated infringement although no past conviction decision had been addressed to it. The fine increase in respect of aggravating circumstances was set aside.[706] In *Coats*,[707] it was pointed out that the applicant had not taken part in most of the anti-competitive meetings and, thus, it had

[701] Case T-91/11 *InnoLux Crop. v Commission* EU:T:2014:92.

[702] ibid, paras 173-174. See also Case T-322/01 *Roquette Frères SA v Commission* [2006] ECR II-3137, paras 55-56 and 293-300; Case T-128/11 *LG Display Co. Ltd and LG Display Taiwan Co. Ltd v Commission* EU:T :2014:88, paras 252-258.

[703] Joined Cases T-208 and 209/08 *Gosselin Group NV and Stichting Administratiekantoor Portielje v Commission* [2011] ECR II-3639.

[704] ibid, paras 168-169 and 174. See also Case T-379/06 *Kaimer GmbH & Co. Holding KG and Others v Commission* [2011] ECR II-0064, paras 77 and 103-105; Case T-362/06 *Ballast Nedam Infra BV v Commission* EU:T:2012:492, paras 136-145.

[705] Case T-59/07 *Polimeri Europa SpA v Commission* [2011] ECR II-4687.

[706] ibid, paras 298-303. See also *Shell Petroleum*, note 464, paras 182, 233-237 and 277-279; Case T-558/08 *Eni SpA v Commission* EU:T:2014:1080, paras 299 and 309-314.

[707] Case T-36/05 *Coats Holdings Ltd and J & P Coats Ltd v Commission* [2007] ECR II-110.

a passive role in the cartel. Referring to the 1998 Guidelines, the EU judicature decreased the penalty by 20% due to mitigating circumstances.[708] In *Pegler*, the applicant did no longer form an economic entity with its parent company at the time of the disputed decision. Given that the financial capacity of the delinquent undertaking had been diminished, the multiplier for deterrence on Pegler's fine was cancelled.[709]

Thereafter, EU judges deal with the 10% ceiling of turnover laid down in Article 23(2) of Regulation 1/2003. In *Tokai Carbon II*,[710] Intech BV had been separated from its parent company right after the end of their infringement. The General Court noted that the legal maximum of 10% should have been applied on the individual turnover of the former subsidiary and not on the aggregate turnover of the whole undertaking. Intech BV's penalty fell by more than 57%.[711]

As concerns the leniency rules, it was held in *Solvay*[712] that the Commission was wrong not to acknowledge that the applicant was the first undertaking to submit valuable information during the administrative procedure for certain aspects of the cartel. The judgment set Solvay's fine reduction for cooperation to the largest level allowed by the applicable provisions of the Leniency Notice.[713] Finally, in *KME II*,[714]

[708] ibid, paras 207-215. See also Case T-220/00 *Cheil Jedang Corp. v Commission* [2003] ECR II-2473, paras 181-183; Case T-90/11 *Ordre national des pharmaciens (ONP) and Others v Commission* EU:T:2014:1049, paras 379-382.

[709] Case T-386/06 *Pegler Ltd v Commission* [2011] ECR II-1267, paras 126-134 and 142-144.

[710] Joined Cases T-71, 74, 87, 91/03 *Tokai Carbon Co. Ltd, Intech EDM BV, Intech EDM AG and SGL Carbon AG v Commission* [2005] ECR II-0010 (hereinafter *Tokai Carbon II*).

[711] ibid, paras 387-392. See also *Sasol*, note 153, paras 440-463; *Parker Hannifin*, note 675, paras 162-185.

[712] Case T-186/06 *Solvay SA v Commission* [2011] ECR II-2839.

[713] ibid, paras 428-439. See also Case T-230/00 *Daesang Corp. and Sewon Europe GmbH* [2003] ECR II-2733, paras 137-145; Case T-161/05 *Hoechst GmbH v Commission* [2009] ECR II-3555, paras 90-102 and 196-198.

the Court stated that the applicants did not establish a causal link between the level of their fines and possible redundancies in their workforce. The plea alleging inability to pay was dismissed.[715]

The eight foregoing judgments evince that every technical step taken by the Commission in fixing an antitrust fine is sufficiently reviewed. The EU judicature verifies the value of the relevant sales (see *InnoLux*), the duration of the infringement (see *Gosselin Group*), the existence of aggravating (see *Polimeri Europa*) or mitigating circumstances (see *Coats*), the necessity for a multiplier for deterrence (see *Pegler*), the observance of the turnover cap (see *Tokai Carbon II*), the correct application of the leniency rules (see *Solvay*) and the recipient's ability to pay (see *KME II*). Throughout this process, it does not refrain from detecting errors or oversights on the part of the Commission and then rectifying the amount of the fine.

However, one could get the impression that the judicial review of penalties in EU competition law is marginal and the exercise of unlimited jurisdiction trapped within the administrative methodology.[716] The General Court seems to confine itself in checking whether the Commission, in setting the fine, has: (a) accurately established the facts and the economic figures, (b) taken into account all the relevant circumstances of the case, (c) complied with the upper limits of Regulation 1/2003

[714] Case T-25/05 *KME Germany AG, KME France SAS and KME Italy SpA v Commission* [2010] ECR II-0091.

[715] ibid, paras 164-173. See also Joined Cases T-204 and 212/08 *Team Relocations NV and Others v Commission* [2011] ECR 3569, paras 171-175; Case T-30/10 *Reagens SpA v Commission* EU:T:2014:253, paras 294-306.

[716] See Gerard, 'EU Antitrust Enforcement in 2025', note 416, 5; Pieter Van Cleynenbreugel, 'Constitutionalizing Comprehensively Tailored Judicial Review in EU Competition Law' (2012) 18 Columbia Journal of European Law 519, 534; Anja Wiesbrock, 'E.ON/GDF: Revisiting the Standard of Judicial Review for Fines in Competition Cases' (2013) 4 JECLAP 58, 59

and the Guidelines.[717] When the Commission fails the three-pronged test, the EU judicature mechanically adjusts the fine in consonance with the Guidelines and the Leniency Notice.[718] When the Commission passes the test, its crucial assessment regarding the amount of the fine appears immune to further judicial scrutiny.

The right to a fair trial requires courts to go past a marginal review of legality and a mechanical adjustment of penalties. Does the CJEU stand up to that condition?

6.2.2. Review of the principle of equal treatment

The principle of equal treatment, a general principle of EU law also protected by Articles 20 and 21 of the Charter,[719] enables the EU judicature to extend its control beyond the bounds of Regulation 1/2003 and the Guidelines. The Commission cannot rely on the latitude of its published rules of practice for the purpose of treating comparable situations differently and different situations in the same way, unless such treatment is objectively justified.[720]

[717] Those limits include the limitation periods of Regulation 1/2003, note 45, Article 25, see Case T-68/06 *Stempher BV and Koninklijke Verpakkingsindustrie Stempher CV v Commission* EU:T:2011:670; Case T-47/10 *Akzo Nobel NV and Others v Commission* EU:T:2015:506, paras 117-129.

[718] See Wouter P.J. Wils, 'The Increased Level of EU Antitrust Fines, Judicial Review and the European Convention on Human Rights' (2010) 33 World Competition 5, 25; Forrester, 'A Challenge for Europe's Judges', note 213, 194.

[719] Case C-550/07 P *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission* [2010] ECR I-8301, para 54; Case C-444/11 P *Team Relocations NV and Others v Commission* EU:C:2013:464, para 168; Case C-618/13 P *Zucchetti Rubinetteria SpA v Commission* EU:C:2017:48, para 38.

[720] Case T-311/94 *BPB de Eendracht NV, formerly Kartonfabriek de Eendracht NV, v Commission* [1998] ECR II-1129, para 309; Case T-304/02 *Hoek Loos NV v Commission* [2006] ECR II-1887, para 96; Case C-76/06 *Britannia Alloys & Chemicals Ltd v Commission* [2007] ECR I-4405, para 40.

In *Gigaset*, the applicant was involved in the infringement at issue for four months less than another offender.[721] The Commission selected an identical multiplier for duration in the basic amount of their fine. The Court stressed that the two situations were not equivalent and that there was no objective justification for being treated as such. It decided to proportionately reduce Gigaset's fine multiplier for duration.[722]

In *Versalis and Eni*,[723] the coefficient for deterrence on the applicants' fine was fixed at a rate four times higher than the one of another cartel participant, despite the fact that their turnover was only two times higher. The judgment spotted the unwarranted unequal treatment and reduced the coefficient for deterrence on the contested fine by 2/4.[724]

Lastly, in *Nintendo*,[725] the applicant received a 25% fine decrease although it had spontaneously provided cooperation of analogous value and at the same stage of the proceedings with another co-offender whose fine was lessened by 40%. The General Court held that the two situations were comparable and lifted Nintendo's fine reduction to 40% as well.[726]

As it transpires from the above cases, the judicial review in relation to the principle of equal treatment does not lack in intensity. The Commission is

[721] Case T-395/09 *Gigaset AG (formerly Arques Industries AG) v Commission* EU:T:2014:23. Gigaset participated in the infringement for twenty-eight months whereas the other offender (SKW) for thirty-two.

[722] ibid, paras 168-192.

[723] Case T-103/08 *Versalis SpA and Eni SpA v Commission* EU:T:2012:686.

[724] ibid, paras 312-326.

[725] Case T-13/03 *Nintendo Co., Ltd and Nintendo of Europe GmbH v Commission* [2009] ECR II-0975.

[726] ibid, paras 169-183 and 215. See also Case T-48/98 *Compañia española para la fabricación inoxidables, SA (Acerinox) v Commission* [2001] ECR II-3859, paras 126-142 and 152; Case T-452/05 *Belgian Sewing Thread (BST) NV v Commission* [2010] ECR II-1373, paras 136-153.

reprimanded when it applies different fine coefficients to similar situations or the same fine coefficients to different situations. The EU judicature does not refuse to impact on the penalties before it in order to remedy an unjustified discrimination.[727] In *Gigaset* and in *Versalis and Eni*, it determined on its own the exact point at which there would be an equal treatment and decreased the amounts of the penalties accordingly. In *Nintendo*, it transposed the rate of reduction the Commission had granted in an analogous situation to the fine of the applicant.

The principle of equal treatment indeed allows the CJEU to examine effectively whether an equivalent benchmark has been applied to certain cases. On the other hand, it does not allow the autonomous review of the validity of that benchmark. Consequently, a supplementary judicial tool is needed so that the right to a fair trial will not be compromised.

6.2.3. Review of the principle of proportionality

Proportionality, a general principle of EU law also enshrined in Article 49(3) of the Charter,[728] can be employed for challenging the lawfulness of a competition penalty irrespective of whether the Commission has abided by its Guidelines and the principle of equal treatment. The amount of the penalty must not go beyond what is appropriate and necessary for punishing the offence.[729] In this framework, the

[727] See also Case T-113/07 *Toshiba Corp. v Commission* [2011] ECR II-3989; Case T-133/07 *Mitsubishi Electric Corp. v Commission* [2011] ECR II-4219 where the General Court annulled the fines.

[728] See Article 5(4) TEU; Case C-176/09 *Luxembourg v Parliament and Council* [2011] ECR I-3727, para 61; Case C-380/09 P *Melli Bank plc v Council* EU:C:2012:137, para 52; Case C-203/12 *Billerud Karlsborg AB and Billerud Skärblacka AB v Naturvårdsverket* EU:C:2013:664, para 34.

[729] See Case T-43/02 *Jungbunzlauer AG v Commission* [2006] ECR II-3435, paras 226-228; Case T-543/08 *RWE AG and RWE Dea AG v Commission* EU:T:2014:627, paras 216-217; Case T-456/10 *Timab Industries and Cie financière et de participations Roullier (CFPR) v Commission* EU:T:2015:296, para 161.

General Court is called to ensure that the Commission has not conferred excessive or deficient importance to factors increasing or decreasing respectively the gravity of the infringement.

On the one hand, the Court carried out an inadequate review in *Infineon* by refraining to respond to the argument of the applicant that the amount of its penalty was incommensurate with the small number of contacts it had with the other cartel participants.[730] On other hand, there are dozens of other judgments which prove that *Infineon* was nothing more than a regrettable exception.[731] Three of them are analysed in more detail below.

In *Evonik Degussa*, the applicants had participated in a cartel for four months, but the multiplier for duration in the basic amount of their fine was rounded up to 1/2, a rate corresponding to a six-month violation. Notwithstanding that the Commission acted in full compliance with its rules of practice, the Court held that the gravity of the violation was inflated and the principle of proportionality infringed. It set the multiplier for duration at 1/3 and revised the fine downwards.[732]

The facts in *Esso* were more complicated.[733] The penalized undertaking was created from a concentration between companies Exxon and Mobil. Unlike Mobil,

[730] *Infineon*, note 396, para 239 in conjunction with Case C-99/17 P *Infineon Technologies AG v Commission* EU:C:2018:773, paras 183 and 211.

[731] For successful pleas, see Case T-77/92 *Parker Pen Ltd v Commission* [1994] ECR II-549, paras 94-95; Joined Cases T-389 and 419/10 *Siderurgica Latina Martin SpA (SLM) and Ori Martin SA v Commission* EU:T:2015:513, paras 326-329 and 434-452; Case T-418/10 *voestalpine AG and voestalpine Wire Rod Austria Gmbh v Commission* EU:T:2015:516, paras 442-469. For unsuccessful pleas, see Case T-73/04 *Le Carbone-Lorraine v Commission* [2008] ECR II-2661, paras 68-125; Case T-12/03 *Itochu Corp. v Commission* [2009] ECR II-909, paras 69-84, 89-99 and 118-125; Case T-357/06 *Koninklijke Wegenbouw Stevin BV v Commission* EU:T:2012:488, paras 252-256.

[732] Case T-391/09 *Evonik Degussa GmbH and AlzChem AG v Commission* EU:T:2014:22, paras 214-236.

[733] Case T-540/08 *Esso Société Anonyme Française and Others v Commission* EU:T:2014:630.

Exxon had not joined the cartel during the seven years prior to the concentration and therefore its sales over that period had not been impacted by the infringement. Nevertheless, the Commission followed its Guidelines verbatim and included the above sales in the calculation of the basic amount of the fine. The General Court found the resultant penalty disproportionate because it exaggerated the economic magnitude of the offence. Exxon's sales at the first seven years of the eleven-year long cartel were excluded from the new calculation and the amount of Esso's fine was reduced appropriately.[734]

Finally, the judgment in *Electrabel* rejected the assertion that the penalty incurred by the applicant for unlawfully implementing a concentration for almost four years was incommensurate with the aim pursued. According to the Court, the infraction was of very long duration and jeopardized the effectiveness of EU Merger Control. There was also inexcusable negligence on Electrabel's part whereas the fine at issue amounted to only 0.04% of the turnover of the undertaking concerned, far below the maximum limit of 10%.[735]

Despite the stain on its record in *Infineon*, I can infer that the EU judicature performs a sufficient review of proportionality of fines. As *Evonik Degussa* and *Esso* demonstrate, it does not hesitate to override the administrative discretion and question aspects of the established methodology of the Commission. Even if a fine lies below the 10% of turnover mentioned in Regulation 1/2003, the Court will not use that ceiling as a panacea. It will not be dissuaded from detecting a breach of the principle of proportionality and exercising its unlimited jurisdiction in order to remedy the illegality. Furthermore, *Electrabel* evinces that it considers the adequacy of penalties

[734] ibid, paras 112-114 and 134-139.

[735] *Electrabel*, note 679, paras 279-287.

on the basis of numerous relevant factors and that it provides specific reasons for its conclusions.

It must be stressed that the review of proportionality does not have an unlimited depth. The EU judicature does not employ it as a Trojan horse for substituting the appraisal of the decision maker. It does not re-evaluate the case so as to fix ab initio the penalty that would be the most suitable and the least onerous in its opinion. If that was true, it would be next to impossible to arrive at the same number with the Commission. Nonetheless, the criteria for deciding whether a penalty can be qualified as proportionate are not any entirely objective and perfectly quantifiable.[736] The EU judicature defines and applies those criteria autonomously and ad hoc. Thereby, it does not leave anything to chance and maintains full control over the legality of any pecuniary sanction in EU competition law.

6.2.4. Substituting the Commission's assessment due to illegalities

So far we have come across disputed measures in which the General Court spotted an illegality and then reduced the amount of the fine in accordance with a tailored application of the Commission Guidelines or the principle of equal treatment or the principle of proportionality.

However, it has been made clear that the unlimited jurisdiction of Article 261 TFEU:

> empowers the Courts of the European Union, in addition to carrying out a mere review of the lawfulness of the penalty, to substitute their own

[736] See also Hans Gilliams, 'Proportionality of EU Competition Fines: Proposal for a Principled Discussion' (2014) 37 World Competition 435, 455.

> appraisal for the Commission's and, consequently, to cancel, reduce or increase the fine or penalty payment imposed.[737]

The fixing of the amount of the fine 'is not an arithmetically precise exercise'.[738] The EU judicature is not bound to follow the methodology of the Commission. It must make 'its own appraisal' bearing in mind all the circumstances of the case.[739]

Dunlop Slazenger was adjudicated before the publication of any fining guidelines.[740] The CJEU did not lower the fine proportionately to the approximately 60% decrease in the duration of the impugned offences. It preferred a smaller reduction of 40% and pointed out that this would represent 'a fair assessment' in light of the coercive implementing means and the serious detriment caused to consumers by the violation.[741]

A similar approach was espoused in *GDF Suez*.[742] The CJEU detected errors in the value of sales and the duration related to the infringement. It admitted that it would have to lessen the applicant's penalty by more than 50% pursuant to the method favored by the Commission. Nevertheless, that would entail a reduction 'greatly disproportionate' to the relative importance of the detected errors and would 'underestimate' the weight of the second violation. The judgment put aside the Guidelines and lowered the fine by only 39.6%.[743]

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[737] *Group Danone*, note 688, para 61; *Chalkor*, note 25, para 63; *Galp*, note 399, para 75; Case C-636/13 P *Roca Sanitario, SA v Commission* EU:C:2017:56, para 33.

[738] Case T-11/06 *Romana Tabacchi Srl v Commission* [2011] ECR II-6681, para 266; Case T-422/10 *Trafilerie Meridionali SpA v Commission* EU:T:2015:512, para 398; *Parker Hannifin*, note 675, para 170.

[739] ibid.

[740] Case T-43/92 *Dunlop Slazenger International Ltd v Commission* [1994] ECR II-441.

[741] ibid, paras 143, 171-172 and 178-179.

[742] Case T-370/09 *GDF Suez AG v Commission* EU:T:2012:333, paras 461-465.

[743] See also Case T-62/98 *Volkswagen AG v Commission* [2000] ECR II-2707, paras 346-348; Case T-146/09 *Parker ITR Srl and Parker-Hannifin Corp v Commission* EU:T:2013:258, paras 251-

The case of *MRI* is different from the previous ones. The General Court substituted the Commission's evaluation for the purpose of keeping the penalty unchanged. The decision had failed to provide adequate reasons for limiting the fine decrease to the lowest possible rate under the provisions of the Leniency Notice. Although the Court stated that the value of MRI's cooperation would have warranted an additional decrease of 10% to the 30% already granted, it ruled that the amount of the fine remained 'appropriate' in view of the worldwide scale, the intensity and the long duration of the anti-competitive conduct.[744]

Finally, in *Romana Tabacchi*, the appraisal of the Commission was again replaced, this time to the benefit of the penalized undertaking. The decision had exaggerated the duration of the offence and the market share of the applicant, but by virtue of the Guidelines those errors would not bring the fine below the maximum limit of 10% of the applicant's turnover. Yet, the General Court carried out 'an equitable assessment of the circumstances of the case', including the illegalities committed by the Commission and the very weak financial capacity of Romana Tabacchi.[745] Referring to the need for an effective and deterrent punishment, it set 'a fair penalty' by applying a reduction of 51.2% to the imposed amount.[746]

After discerning errors in the four aforementioned decisions, the CJEU undertook an autonomous and all-encompassing review. On the basis of concrete reasons, it concluded that the methodology of the Commission would generate fines not sufficiently deterrent in *Dunlop Slazenger*, *GDF Suez* and *MRI* as well as a fine

257 (set aside on appeal); Case T-360/09 *E.ON Ruhrgas AG and E.ON AG v Commission* EU:T:2012:332, paras 300-305.

[744] *MRI*, note 463, paras 342 and 352-360. See also Case T-295/94 *Buchmann GmbH v Commission* [1998] ECR II-813, paras 176-178;

[745] *Romana Tabacchi*, note 738, paras 265-284.

[746] ibid, paras 284-285.

overly onerous in *Romana Tabacchi*. It eventually exercised its unlimited jurisdiction by conciliating, in the manner it considered fair, the particularities of each case with the punitive objectives of EU competition law.

It turns out that the EU judicature does not mechanically defer to the Guidelines and the administrative discretion. On the contrary, it asserts its power to evaluate the appropriateness of any contested competition penalty even by substituting the methodology and the appreciation of the Commission.[747]

6.2.5. Unlimited jurisdiction in the absence of an illegality

Article 261 TFEU permits the EU judicature to replace the administrative appraisal on the amount of the penalty and adjust the latter downwards or upwards. The critical question that arises is whether this can take place in cases in which no material error was committed by the Commission.

The General Court gave a negative answer in *BASF*. It maintained that it can use its unlimited jurisdiction 'only where it has made a finding of illegality affecting the decision'.[748] The above statement has never been repeated in another ruling. Actually, it has been plainly repealed by *Sachsa Varpackung* which declared that the exercise of unlimited jurisdiction 'is in no way subordinated to the prior finding of an illegality'.[749]

[747] See the similar view by Wiesbrock, note 716, 59.

[748] Case T-15/02 *BASF AG v Commission* [2006] ECR II-497, para 582. See also Forrester, 'A Challenge for Europe's Judges', note 213, 194-196.

[749] Case T-79/06 *Sachsa Verpackung GmbH v Commission* [2011] ECR II-406, paras 179-180. See also Lenaerts, Maselis and Gutman, note 493, 625; Mariusz Baran and Adam Doniec, 'EU Courts' Jurisdiction over and Review of Decisions Imposing Fines in EU Competition Law' (2010) 3 Yearbook of Antitrust and Regulatory Studies 235, 247-248.

Still, the case law has many times noted that due to the discretion enjoyed by the Commission the review of the fixing of fines 'is limited to determining the absence of manifest error of assessment'.[750] This phrase must not be read on its own. The General Court always puts it into context by clarifying that 'the discretion enjoyed by the Commission and the limits which it has imposed in that regard have no bearing, however, on the exercise by the EU judicature of its unlimited jurisdiction'.[751] The EU judges are therefore enabled to examine the appropriateness of the amounts of fines[752] and consider in this connection additional information 'independently of any manifest errors of assessment made by the Commission'.[753]

In *Compagnie générale maritime,* where thirteen shipping companies had been penalized for fixing their prices, the pleas against the legality of the penalty and the entire measure were rejected.[754] The Commission had opted for a symbolic fine of 10,000 ECUS on each of the offenders due to the pre-existing publicity of the sanctioned agreement, the legal uncertainty in maritime transport and the non-adoption of penalties for similar practices in the past. The Court evaluated the three preceding factors differently from the Commission and concluded that there was 'justification for not imposing a fine'.[755]

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[750] Case T-116/04 *Wieland-Werke AG v Commission* [2009] ECR II-1087, para 32; Case T-19/05 *Boliden AB, Outokumpu Copper Fabrication AB and Outokumpu Copper BCZ SA v Commission* [2010] ECR II-1843, para 77; Case T-21/05 *Chalkor AE Epexergasias Metallon v Commission* [2010] ECR II-1895, para 63; *Heineken Nederland*, note 468, para 309.

[751] *Heineken Nederland*, para 310. The wording was slightly different, but the essence the same in *Wieland-Werke*, para 33; *Boliden*, para 78; *Chalkor*, para 64.

[752] Case C-297/98 P *SCA Holding Ltd v Commission* [2000] ECR I-10101, para 55; Joined Cases T-456 and 457/05 *Gütermann AG and Zwicky & Co. AG v Commission* [2010] ECR II-1443, para 106; Case T-72/09 *Pilkington Group Ltd and Others v Commission* EU:T:2014:1094, para 432.

[753] *Tokai Carbon I*, note 685, para 165; *Tokai Carbon II*, note 710, paras 164. See also *Fuji Electric*, note 437, paras 208-209.

[754] *Compagnie générale maritime*, note 515, paras 150, 277, 402, 471 and 478-479.

[755] ibid, para 488.

In *FNCBV*, it was accepted that the Commission had taken into account all the exceptional circumstances of the case, to wit the non-punishment of similar agreements in the past and the economic crisis in the beef market, when it allowed the applicants a 'substantial' fine reduction of 60%.[756] Without citing a single flaw in the challenged act, the General Court decided that the Commission had not taken 'sufficient account' of those exceptional circumstances. The fine reduction was increased to 70%.[757]

Finally, in *BPB*, no error or oversight was found in the application of the Leniency Notice.[758] That did not prevent the Court from appreciating the value of the undertaking's cooperation in the disclosure of the cartel to a greater degree than the Commission. Replacing the latter's view, it held 'appropriate' to grant BPB a fine decrease of 40% instead of the initial 30%.[759]

In *Compagnie générale maritime*, *FNCBV* and *BPB*, the EU judicature substituted the appraisal of the Commission concerning the necessity to impose a fine, the optimal fine reduction for exceptional circumstances and the optimal fine reduction for cooperation, respectively. It could be argued that it implicitly discerned errors on the part of the Commission, possibly an under-appreciation or over-appreciation of certain elements associated with the gravity of the infringement. If the bar is set that low however, every opinion with whose merits the CJEU merely disagrees could be described as legally unsound. The de facto result would be an

[756] Joined Cases T-217 and 245/03 *Fédération nationale de la coopération bétail et viande (FNCBV) and Fédération nationale des syndicats d'exploitants agricoles (FNSEA) and Others v Commission* [2006] ECR II-4987 (known as *French beef*), paras 356-357.

[757] ibid, paras 358-361.

[758] *BPB*, note 442, para 477.

[759] *BPB*, paras 478-483. See also *Tokai Carbon I*, note 685, paras 409-416, 438-440 and 454-455.

unconditional judicial discretion to discard the Commission's appreciation on the amount of the fine.

From my perspective, the three outlined judgments signify that the EU judicature does not narrow the scope of application of Article 261 TFEU. It can apply its unlimited jurisdiction even in the absence of an illegality.[760] More specifically, there are two independent stages in the judicial review of antitrust penalties.[761]

The first stage focuses on legality and is confined to detecting manifest errors. The value of the relevant sales may have been miscalculated, the duration of the infringement exaggerated, a mitigating circumstance overlooked or a general principle of EU law contravened. The General Court must cancel, decrease or increase the fine in order to best remedy the legal consequences of such defects. On the other hand, the Commission is recognized a degree of discretion in determining the impact of certain factors on the amount of the penalty as long as the principle of proportionality has been complied with. The CJEU shall not for present purposes interfere with the advisability of the Commission's evaluation by ascribing lower or higher significance to one or the other of the above factors.

The second stage is concerned with appropriateness and may override the findings of the first stage.[762] In this context, appropriateness refers to the capability of the penalty to punish fairly and efficiently the given offence and the given offender. The exercise of unlimited jurisdiction is not contingent on the finding of an error, including a breach of the principles of equal treatment and proportionality. The EU

[760] See *Group Danone*, note 688, opinion of AG Maduro, para 45; *Infineon*, note 730, Opinion of AG Wathelet, para 73; Arabadjiev, note 697, 393.

[761] The two stages can be clearly discerned by the Court's train of thought in Case T-53/06 *UPM-Kymmene Oyj v Commission* EU:T:2012:101, para 149.

[762] *Infineon Technologies*, note 730, Opinion of AG Wathelet, para 73.

judicature is free to put aside the administrative methodology and discretion, weigh autonomously all the early or recent circumstances brought to its attention and vary or not vary the fine within the 10% upper limit of the undertaking's turnover. It can replace the legally flawed or unflawed evaluation of the Commission inasmuch as it has reason to believe that it does not provide a just solution to the case.

Consequently, Article 261 TFEU, in combination with Article 31 of Regulation 1/2003 and Article 16 of the Merger Regulation, enlarges and supplements the jurisdiction of the CJEU in actions for annulment in two ways. At the outset, it allows the adjustment of the amount of a contested competition penalty. In addition, it establishes a full merits-based review of that penalty which transcends the formal review of legality carried out under Article 263 TFEU.[763]

The wording of Article 19(1) TEU could serve as a counterargument to the broad meaning of unlimited jurisdiction advocated in the current section. Since the CJEU 'shall ensure that in the interpretation and application of the Treaties the law is observed', there should be nothing left for it to do if no illegalities have been committed.

A potential rejoinder could be that the law is observed when the Treaties have been fairly applied and this is exactly what the control of appropriateness of competition penalties guarantees. I do not agree with the foregoing position. If one accepts it, he should also accept that Article 19(1) TEU enables the EU judges to examine the fairness of every part of a Commission decision, including complex economic assessments.

[763] See *Group Danone*, note 688, para 61; *Chalkor*, note 25, para 63; *Galp*, note 399, para 75; *Roca Sanitario*, note 737, para 33.

A more convincing rejoinder is that the purpose of Article 19(1) TEU is not to choose an overarching system of legality review over an overarching system of merits review, but to underscore the judicial function of the CJEU as opposed to the executive or legislative role of other institutions. The specification of that general judicial function is carried out by Articles 251 to 280 TFEU. In this framework, Article 261 TFEU is perfectly allowed to introduce a full-merits judicial control of penalties in the EU legal order.[764]

6.2.6. Justifying the cautious use of the power of substitution

It has been demonstrated that the EU judicature is empowered to substitute the assessment of the Commission and fix the amount of the fine in accordance with its own, independent reasoning. Nevertheless, it very rarely does those things in practice.[765] Pieter Van Cleynenbreugel is right in saying that the Court 'basically adopts a legality review approach'.[766] It has not developed an autonomous fining policy and generally prefers to exercise its unlimited jurisdiction on the basis of the Guidelines and the principles of equal treatment and proportionality.[767] One must contemplate the grounds for the above stance and whether it is acceptable from the perspective of the right to a fair trial.

The existence of unrestrained competition is a prerequisite for the integrity of the internal market, the centerpiece of the EU. On this account, the fixing of penalties capable of protecting effectively the internal market against past and future distorting

[764] See also Article 19(3) TEU.

[765] Out of the 552 adjudicated cases which concerned competition law fines and are now closed, the General Court replaced the Commission's opinion in less than 15.

[766] Van Cleynenbreugel, 'Constitutionalizing Comprehensively Tailored Judicial Review', note 716, 534.

[767] See also Schwarze, Bechtold and Bosch, note 410, 60.

practices unavoidably becomes a matter of policy. The EU legislature has chosen through Regulation 1/2003 and the Merger Regulation to render the Commission, namely the EU institution entrusted with promoting the general interest of the Union under Article 17 TEU, solely competent to punish competition law infringements.[768]

Consequently, it is for the Commission to design a fining policy.[769] Indeed, it has discharged its duty by publishing and implementing its relevant Guidelines. The latter can be subject to change at any time in consonance with the evolving needs of the wider EU competition policy.[770] For instance, the 2006 Guidelines include a substantially larger fine multiplier for duration than the more lenient 1998 Guidelines whereas they no longer cite passive conduct as a mitigating circumstance.[771] The EU judicature recognized the political character of the transition and adapted its control accordingly.[772]

Unlimited jurisdiction has to be applied on penalties already imposed by another institution and not a tabula rasa. If the Court were automatically to substitute its appraisal for that of the Commission and especially in the absence of illegalities, the whole system of competition law enforcement in the EU would be virtually overturned. Administrative fines would be downgraded to mere proposals for a fine

[768] Under Article 103(2)(d) TFEU, the EU legislature could choose between the Commission and the CJEU.

[769] Bo Vesterdorf, 'The Court of Justice and Unlimited Jurisdiction: What Does It Mean in Practice?' (2009) 6(2) Global Competition Policy 3 <www.competitionpolicyinternational.com/file/view/6016> accessed 02 October 2018.

[770] See *Dansk Rørindustri*, note 671, paras 169 and 173; *Group Danone*, note 688, paras 90-91; *Deutsche Telekom* (CoJ), note 651, para 294.

[771] A 10% fine increase for every year of the infringement was included in the 1998 Fining Guidelines, note 664, whereas the corresponding fine increase is 100% pursuant to the 2006 Fining Guidelines, note 665, point 24.

[772] See Case T-83/08 *Denki Kagaku Kogyo Kabushiki Kaisha and Denka Chemicals GmbH v Commission* EU:T:2012:48, para 253; Case T-82/13 *Panasonic Corp. and MT Picture Display Co. Ltd v Commission* EU:T:2015:612, para 181; Case T-448/14 *Hitachi Metals Ltd v Commission* EU:T:2018:442, para 184.

and judges would end up dictating EU's fining policy pursuant to their own objectives and criteria. Unless they were to publish their own guidelines, legal uncertainty would ensue as well.[773] Overall, the risk of overstepping its mandate and appropriating an executive role assigned by the EU legislature to the Commission has made the EU judicature cautious in the use of its power of substitution.

However, the Court does not hesitate to give precedence to its own opinion as regards the amount of pecuniary sanctions when that is required by compelling reasons of deterrence, as in *Dunlop Slazenger*, *GDF Suez* and *MRI*, or fairness, as in *Compagnie générale maritime*, *FNCBV*, *BPB* and *Romana Tabacchi*. Its ability to decide when the reasons of deterrence or fairness are indeed compelling gives it the last, unconditional word over the appropriateness of any penalty. In essence, the CJEU does not overuse its powers under Article 261 TFEU and thereby it achieves a delicate and desirable balance between the EU's division of powers and the exercise of unlimited jurisdiction. Even if the replacement of the Commission's assessment is not often the end result, the standard of review of fines remains thorough and rigorous enough to afford a fair trial to the affected entities.

6.3. The Review Undertaken by the Court of Justice

The Court of Justice has been formally endowed with unlimited jurisdiction in EU competition law by virtue of Article 31 of Regulation 1/2003 and Article 16 of the Merger Regulation, both implementing Article 261 TFEU. However, it must exercise

[773] See Miro Prek and Silvère Lefèvre, 'Competition litigation before the General Court: Quality if not quantity?'(2016) 53 CML Rev 65, 78-79.

its amending or annulment powers in the context of appeals limited to points of law and precluded from having a wider ambit than the first-instance action.[774] Hence, the Court of Justice enjoys a curtailed jurisdiction in comparison with the General Court.[775]

6.3.1. Review of the technical application of the Guidelines

This section focuses on pleas linked to the accurate implementation of the administrative rules of practice in the fixing of fines. Such pleas are not admissible when they dispute the assessment of the facts or of the evidence carried out by the General Court.[776]

In *Archer Daniels Midland* (*ADM*), the second-instance judgment noted that the statement of objections sent by the Commission to the sanctioned undertaking had not referred to the evidence substantiating its leading role in the cartel.[777] The fine increase in respect of aggravating circumstances was expunged due to an infringement of the rights of the defence.[778]

In *YKK*, the Court of Justice held that the ceiling of 10% laid down in Article 23(2) of Regulation 1/2003 should have been applied on the individual turnover of the appellant for the infringement period prior to its acquisition by the YKK group

[774] Article 256(1)(b) TFEU; Protocol (No 3), note 357, Article 58; Rules of Procedure of the CoJ, note 361, Article 170(1). See also Case C-194/14 P *AC-Treuhand AG v Commission* EU:C:2015:717, paras 54 and 60.

[775] See also Chapter 4.3.1.

[776] Case C-238/12 P *FLSmidth & CO. A/S v Commission* EU:C:2014:284, paras 98-101; *Zucchetti*, note 719, paras 67-70; Case C-619/13 P *Mamoli Robinetteria SpA v Commission* EU:C:2017:50, paras 113-114.

[777] Case C-511/06 P *Archer Daniels Midland Co. v Commission* [2009] ECR I-5843, paras 81-95 and 132-138.

[778] ibid, para 164.

and not on the aggregate turnover of the entire group, which had not previously participated in the offence.[779] As a result, the penalty was decreased.

The Commission can also have recourse to the appellate jurisdiction with the aim of overturning fine adjustments at first instance. In *Commission v Fresh Del Monte*, the Court of Justice set aside the fine reduction for cooperation granted by the General Court.[780] It explained that the defendant had simply replied to a Commission's request for information. Consequently, its conduct did not reveal a genuine spirit of cooperation as it was required by the Leniency Notice.

It turns out that the Court of Justice is diligent when it comes to identifying procedural and substantive legal errors relating to the correct application of the Guidelines at earlier proceedings. Furthermore, it exercises its unlimited jurisdiction for the purpose of addressing the practical implications of such errors on the level of appealed penalties.

6.3.2. Review of the principle of equal treatment

The Court of Justice is competent to check whether the principle of equal treatment has been observed in the determination of competition law fines both by the Commission and by the General Court.[781]

To start with *Guardian Industries*,[782] the Commission had excluded the internal sales of all the participants in the flat glass cartel in order to calculate the

[779] Case C-408/12 P *YKK Corporation and Others v Commission* EU:C:2014:2153, paras 57-68 and 97. See also Case C-637/13 P *Laufen Austria AG v Commission* EU:C:2017:51, paras 44-51.

[780] Joined Cases C-293 and 294/13 P *Fresh Del Monte Produce Inc. v Commission and Commission v Fresh Del Monte Produce Inc.* EU:C:2015:416, paras 180-188. See also Case C-301/04 P *Commission v SGL Carbon AG* [2006] ECR I-5915, paras 66-70 and 76.

[781] Case C-468/07 P *Coats Holdings Ltd and J & P Coats Ltd v Commission* [2008] ECR I-127, para 26; *Westfälische Drahtindustrie*, note 658, para 64.

amounts of their fines. Unlike the other offenders, the appellant had no internal sales. In this connection, the Commission's calculation method had given an 'unjustified advantage' to vertically integrated firms by diminishing the economic importance of their violation.[783] The Court of Justice opted to recalculate the fine by treating Guardian as a vertically integrated company. It subtracted from the latter's value of relevant sales a proportion which would artificially correspond to its internal sales.[784]

In *Moritz J. Weig*,[785] the General Court ruled that the appellant had not participated in the first months of the violation. It consciously decreased the fine to a smaller extent than it would have been dictated by the arithmetical formula followed by the Commission, but offered no specific reasons. The Court of Justice pointed out that the General Court's use of its unlimited jurisdiction resulted in unwarranted discrimination between the appellant and the other members of the cartel whose penalties had been fixed by virtue of a more lenient formula. The judgment lessened the fine in accordance with the original method of the Commission.[786]

Commission v Parker[787] has many similarities with the previous ruling. After annulling Parker-Hannifin's role of leader in the infringement, the General Court did not just discard the fine increase in respect of aggravating circumstances. It reduced the basic amount of the fine as well. Upon appeal, the Court of Justice noted the existence of an inadequate statement of reasons and set aside the reduction in the

[782] Case C-580/12 P *Guardian Industries Corp. and Guardian Europe Sàrl v Commission* EU:C:2014:236.

[783] ibid, para 59.

[784] ibid, paras 60-66 and 76-80. That proportion equaled the average proportion the Commission had subtracted in respect of internal sales for the other members of the flat glass cartel.

[785] Case C-280/98 *Moritz J. Weig GmbH & Co. KG v Commission* [2000] ECR I-9757.

[786] ibid, paras 62-68 and 83. See also Case C-291/98 P *Sarrió SA v Commission* [2000] ECR I-9991, paras 91-100 and 102.

[787] Case C-434/13 P *Commission v Parker Hannifin Manufacturing Srl and Parker-Hannifin Corp.* EU:C:2014:2456.

basic amount of the fine since it was not able to assess its lawfulness in the light of the principle of equal treatment.[788]

Having sufficiently explained its stance, the Court of Justice did not defer to the calculations of the Commission in *Guardian Industries* and did not allow the General Court to hide behind its unlimited jurisdiction so as to substitute the administrative appraisal in *Moritz J. Weig* and *Commission v Parker*. Seeking to rectify the detected discrimination in each one of these cases, it adjusted the level of the appealed penalties. All the above demonstrate that the appellate control on the respect of the principle of equal treatment is strenuously exercised.

6.3.3. The deferential review of proportionality

The proportionality of a penalty is a matter of law which can be raised on appeal. The Court of Justice must ascertain whether the General Court 'took into consideration, in a legally correct manner, all the essential factors to assess the gravity of a particular conduct' and whether it 'responded to a sufficient legal standard to all the arguments raised by the appellant with a view to having the fine cancelled or reduced'.[789] The following case law evinces that the appellate judges effectively perform the foregoing tasks. After that point nevertheless, they interpret their standard of review in a narrow manner.

[788] ibid, paras 80-87. The final amount of the fine was not fixed by the Court of Justice because the case had to be referred back to the General Court so that a neglected factual question could be examined.

[789] Case C-359/01 P *British Sugar plc v Commission* [2004] ECR I-4933, para 47; *Koehler and Others*, note 508, para 125; *Roca Sanitario*, note 737, para 46.

In *FLS Plast*, the Court of Justice held that the General Court did not set the fine at a disproportionate level given the large territorial scope and the hard-core anticompetitive practices associated with the sanctioned cartel.[790]

Next, in *Schenker*,[791] it was ruled that the General Court gave an adequate reply to the raised line of argument which contested the proportionality of the Commission's calculation method. Pursuant to the first-instance judgment, the autonomous criterion of the value of sales related to the infringement pursued an objective of general deterrence and it did not have to be adjusted to reflect the actual economic harm caused by the cartel.[792]

Finally, in *Infineon*, the Court of Justice did not refrain from setting the appealed judgment aside and referring the case back to the General Court by reason that the latter did not examine the plea of the appellant disputing the proportionality of its fine in relation to its limited participation in the cartel.[793]

Two more things must be made clear about the review of proportionality on appeal. Firstly, the Court of Justice shall not substitute its own assessment on grounds of fairness for that of the General Court.[794] Such requests are rejected as inadmissible.[795] Secondly, the threshold for a substantive breach is high. It will be reached only 'if the level of the penalty is not merely inappropriate, but also

[790] *FLS Plast*, note 504, paras 105-113.

[791] Case C-263/16 P *Schenker Ltd v Commission* EU:C:2018:58.

[792] ibid, paras 64-69. See also Case C-264/16 P *Deutsche Bahn AG and Others v Commission* EU:C:2018:60, paras 57-62.

[793] *Infineon*, note 730, paras 200-221.

[794] Case C-310/93 P *BPB Industries plc and British Gypsum Ltd v Commission* [1995] ECR I-865, para 34; Case C-219/95 P *Ferriere Nord SpA v Commission* [1997] ECR I-4411, para 31; Case C-101/15 P *Pilkington Group Ltd and Others v Commission* EU:C:2016:631, para 72.

[795] See for example *British Sugar*, note 789, paras 48-49; *Prym and Prym Consumer*, note 658, paras 111-113; Joined Cases C-93 and 123/13 P *Commission v Versalis SpA and Eni SpA and Versalis SpA and Eni SpA v Commission* EU:C:2015:150, paras 135-137.

excessive to the point of being disproportionate'.[796] In principal, the Court of Justice avoids to re-weigh the circumstances of the case and to second-guess the amount of the penalty wherever the General Court has payed attention to every factor pertinent to the gravity of the offence and has thoroughly replied to every plea formulated before it. In *Villeroy & Boch* for example, the fine was not found disproportionate to the relatively small turnover concerned by the cartel because it did not exceed the 10% ceiling of the delinquent undertaking's total turnover.[797]

Overall, the standard of appellate review is to a large extent deferential to the substantive evaluation performed at first-instance and up to now no plea disputing the proportionality of a sufficiently examined penalty has been upheld by the Court of Justice.

6.4. The Statistical Picture of the Review of Fines

A case's outcome does not necessarily tell something about the applied standard of judicial review. The challenged decision may have been truly flawless or the applicant inattentive to its flaws. Nevertheless, certain indications cannot be entirely ignored. It is very easy to question the meticulousness of a court when it has a 0% annulment rate and impossible to do so when its annulment rate equals 100%. For the sake of completeness therefore, I will examine the statistical picture of judgments on

[796] Case C-89/11 P *E.ON Energie AG v Commission* EU:C:2012:738, para 126; Case C-70/12 P *Quinn Barlo Ltd and Others v Commission* EU:C:2013:351, para 57; Case C-608/13 *Compañía Española de Petróleos (CEPSA), SA v Commission* EU:C:2016:414, para 48.

[797] Case C-644/13 P *Villeroy & Boch v Commission* EU:C:2017:59, paras 81-82. See also Case C-625/13 *Villeroy & Boch AG v Commission* EU:C:2015:785, paras 192-193; *Villeroy & Boch Austria*, note 409, paras 94-95.

contested EU competition fines. At the outset, every case will be presented individually. Thereby, I will be able to substantiate the aggregate data that will be revealed and discussed right after.

6.4.1. Itemized tables of adjudicated cases

There are three tables in the current section. They include all the cases involving fines for anti-competitive agreements or concerted practices, abuses of a dominant position and substantive violations of the Merger Regulation respectively that the General Court has adjudicated from its establishment in 1989 until the 30th of September 2018.[798] The former year marks the introduction of the existent two-tier system of judicial review in EU competition law. Each fine is tied up to the legal person that has incurred it and not to an undertaking on account that every separate legal person is protected on its own by the right to a fair trial.

The 1st column of each table displays the case number before the General Court and in square brackets the year of the judgment. Joined cases may temporarily disrupt the numerical order. The 2nd column outlines the applicant companies of each case[799] and the 3rd column the amount of the fine in ECUs or euros imposed by the Commission on each applicant.[800] The 4th column shows the amount of the fine as adjusted by the General Court and in round brackets the percentage change between the initial fine and the fine after the first-instance proceedings. The 5th column

[798] Fines for procedural violations of Regulation 1/2003 and the Merger Regulation are excluded because they do not penalize the conduct of undertakings in the market and thus do not form part of the core of EU competition law. Cases not adjudicated by the General Court (e.g., time-barred or withdrawn actions) are also excluded since the contested decision was not reviewed.

[799] For reasons of convenience, the name of the first applicant is the only one mentioned in certain judgments.

[800] For reasons of convenience, the contested fines in certain joint cases or cases with more than one applicant have been together. Fines in square brackets are part of a larger fine imposed jointly on another company as well.

mentions the grounds for every penalty adjustment.[801] Grounds subsequently stricken by the Court of Justice are marked accordingly.

The last three columns are applicable only where an appeal was lodged. The 6th column displays the case number before the Court of Justice and in square brackets the year of the judgment. In general, it is assumed that the applicant at first instance is also the appellant. Be that as it may, cases appealed by the Commission are marked with an asterisk (*). Cases cross-appealed by the given defendant are marked with a cross (+). The 7th column shows the amount of the fine as adjusted by the Court of Justice and in round brackets the total percentage change between the fine originally imposed by the Commission and the one after the second-instance proceedings. The 8th column mentions the grounds for every penalty adjustment.

[801] The grounds are summarized, but on certain occasions additional explanations are provided.

6.4.1.1. Table of contested fines for infringements of Article 101(1) TFEU

Case T-	Applicant	Commission fine (ECUs or euros)	GC fine/ (% change)	Ground for adjustment	Case C-	CoJ fine/ (% change)	Ground for adjustment
1/89 [1991]	Rhône Poulenc	500,000	Unchanged		———		
2/89 [1991]	Petrofina	600,000	300,000 (-50%)	Lesser duration of infringement	———		
3/89 [1991]	Atochem	1,750,000	Unchanged		———		
4/89 [1991]	BASF	2,500,000	2,125,000 (-15%)	Lesser duration of infringement	———		
6/89 [1991]	Enichem Anic	750,000	450,000 (-40%)	i) Lesser duration of infringement ii) Participation in aspects of the infringement not proven	49/92 P * + [1999]	Unchanged	
7/89 [1991]	Hercules Chemicals	2,750,000	Unchanged		51/92 P [1999]	Unchanged	
8/89 [1991]	DSM	2,750,000	Unchanged		———		
9/89 [1992]	Hüls	2,750,000	2,333,750 (-15%)	Lesser duration of infringement	199/92 P [1999]	Unchanged	
10/89 [1992]	Hoechst	9,000,000	Unchanged		227/92 P [1999]	Unchanged	
11/89 [1992]	Shell	9,000,000	Unchanged		234/92 P [1999]	Unchanged	
12/89 [1992]	Solvay	2,500,000	Unchanged		———		
13/89 [1992]	ICI	10,000,000	9,000,000 (-10%)	Cooperation in administrative procedure	200/92 P [1999]	Unchanged	
14/89 [1992]	Montedipe	11,000,000	Unchanged		235/92 P [1999]	Unchanged	
15/89 [1992]	Chemie Linz	1,000,000	Unchanged		245/92 P [1999]	Unchanged	
61/89 [1992]	Dansk Pelsdyravl-erforening	500,000	300,000 (-40%)	i) Certain infringements not proven ii) No statement of reasons for an anti-	———		

Case T-	Applicant	Commission fine (ECUs or euros)	GC fine/ (% change)	Ground for adjustment	Case C-	CoJ fine/ (% change)	Ground for adjustment
				competitive contractual clause			
Joined 68/89	SIV	4,700,000	671,428 (-85.1%)	i) Certain infringements not proven			
77/89	FP	7,000,000	1,000,000 (-85.1%)	ii) Lesser duration of upheld infringements	———		
78/89 [1992]	VP	1,700,000	0 (-100%)	Infringements not proven			
Joined 79/89 84/89 85/89 86/89 89/89 91/89 92/89 94/89 96/89 98/89 102/89 104/89 [1992]	BASF and 11 other applicants	19,250,000 (in total)	0 (-100%)	~~Decision declared non-existent for irregular authentication~~	137/92 P * [1994]	Unchanged	Decision annulled for irregular authentication
Joined 80/89 81/89 83/89 87/89 88/89 90/89 93/89 95/89 97/89 99/89 100/89 101/89 103/89 105/89 107/89 112/89 [1995]	BASF and 15 other applicants	36,250,000 (in total)	0 (-100%)	i) Unlawful amendment of decision after its adoption ii) Lack of competence of outgoing Competition Commissioner to sign the decision iii) Irregular authentication of decision	———		
141/89 [1995]	Trefil-europe	1,143,000	Unchanged		———		
142/89 [1995]	Boël	550,000	400,000 (-27.27%)	Not member of a powerful economic entity→ mitigating circumstance	———		
143/89 [1995]	Ferriere Nord	320,000	Unchanged		219/95 P [1997]	Unchanged	

Case T-	Applicant	Commission fine (ECUs or euros)	GC fine/ (% change)	Ground for adjustment	Case C-	CoJ fine/ (% change)	Ground for adjustment
144/89 [1995]	Cockerill Sambre	315,000	252,000 (-20%)	Participation in a certain infringement not proven	———		
145/89 [1995]	Baustahl-gewebe	4,500,000	~~3,000,000~~ ~~(33.33%)~~	i) Participation in certain infringements not proven ii) Presumption that a certain agreement was lawful→ mitigating circumstance	185/95 P [1998]	2,950,000 (-34.44%)	Excessive length of first-instance proceedings
147/89 [1995]	Société métallurgi-que de Normandie	50,000	Unchanged		———		
148/89 [1995]	Trefilunion	1,375,000	1,235,000 (-10.18%)	Participation in a certain infringement not proven	———		
149/89 [1995]	Sotralentz	228,000	57,000 (-75%)	i) Lesser duration of infringement ii) Participation in certain infringements not proven	———		
150/89 [1995]	Martinelli	20,000	Unchanged		———		
151/89 [1995]	Société des treillis and panneaux soudés	150,000	Unchanged		———		
152/89 [1995]	ILRO	13,000	Unchanged		———		
12/90 [1991]	Bayer	500,000	Unchanged		———		
30/91 [1995]	Solvay	7,000,000	0 (-100%)	Lack of access to potentially exculpatory documents	———		
31/91 [1995]	Solvay	3,000,000	0 (-100%)	Irregular authentication of decision	287/95 P * [2000]	Unchanged	
36/91 [1995]	ICI	7,000,000	0 (-100%)	Lack of access to potentially			

Case T-	Applicant	Commission fine (ECUs or euros)	GC fine/ (% change)	Ground for adjustment	Case C-	CoJ fine/ (% change)	Ground for adjustment
				exculpatory documents			
29/92 [1995]	SPO and 28 other applicants (SPO not fined)	22,498,000 (in total)	Unchanged		137/95 P [1996]	Unchanged	
38/92 [1994]	AWS Benelux	150,000	0 (-100%)	Inadequate SoR regarding imputation of subsidiary's conduct to applicant	———		
Joined 39/92	CB	5,000,000	2,000,000 (-60%)	Certain unlawful agreement not proven	———		
40/92 [1994]	Europay	1,000,000	0 (-100%)	Not enabled to reply to second SO			
43/92 [1994]	Dunlop Slazenger	5,000,000	3,000,000 (-40%)	Lesser duration of infringements	———		
66/92 [1994]	Herlitz	40,000	Unchanged		———		
77/92 [1994]	Parker Pen	700,000	400,000 (-42.86%)	Disproportio-nate significance to applicant's overall sales in comparison with its specific sales related to the infringement	———		
14/93 [1995]	Union inter-nationale des chemins de fer	1,000,000	0 (-100%)	Erroneous legal basis of decision	264/95 P * [1997]	Unchanged	
134/94 [1999]	NMH Stahlwerke	150,000	110,000 (-26.67%)	No participation in an aspect of the infringement	———		
137/94 [1999]	ARBED	11,200,000	10,000,000 (-10.71%)	~~i) Participation in a certain infringement not proven~~ ~~ii) Lesser duration of a certain~~	176/99 P [2003]	0 (-100%)	No statement of objections (SO) addressed to appellant for the conduct of its subsidiary

Case T-	Applicant	Commission fine (ECUs or euros)	GC fine/ (% change)	Ground for adjustment	Case C-	CoJ fine/ (% change)	Ground for adjustment
				~~infringement~~ ~~iii) No statement of reasons regarding role of instigator~~ ~~iv) Anti-competitive effects of the infringements exaggerated~~			
138/94 [1999]	Cockerill-Sambre	4,000,000	3,580,000 (-10.5%)	i) Participation in a certain infringement not proven ii) Lesser duration of a certain infringement iii) Anti-competitive effects of the infringements exaggerated	———		
141/94 [1999]	Thyssen Stahl	6,500,000	4,400,000 (-32.31%)	i) Participation in a certain infringement not proven ii) Lesser duration of a certain infringement iii) No liability for repeated infringement iv) Anti-competitive effects of the infringements exaggerated	194/99 P [2003]	Unchanged	
145/94 [1999]	Unimétal	12,300,000	8,300,000 (-32.52%)	i) Participation in a certain infringement not proven	———		

Case T-	Applicant	Commission fine (ECUs or euros)	GC fine/ (% change)	Ground for adjustment	Case C-	CoJ fine/ (% change)	Ground for adjustment
				ii) Lesser duration of a certain infringement iii) No statement of reasons regarding role of instigator iv) No liability for repeated infringement v) Anti-competitive effects of the infringements exaggerated			
147/94 [1999]	Krupp Hoesch	13,000,000	9,000,000 (-30.77%)	No participation in an aspect of the infringement	195/99 P [2003]	Unchanged	
148/94 [1999]	Preussag	9,500,000	8,600,000 (-9.47%)	i) Participation in a certain infringement not proven ii) Lesser duration of a certain infringement iii) Anti-competitive effects of the infringements exaggerated	182/99 P [2003]	Unchanged	
151/94 [1999]	British Steel	32,000,000	20,000,000 (-37.5%)	i) Participation in a certain infringement not proven ii) Lesser duration of a certain infringement iii) Certain infringement not mentioned	199/99 P [2003]	Unchanged	

Case T-	Applicant	Commission fine (ECUs or euros)	GC fine/ (% change)	Ground for adjustment	Case C-	CoJ fine/ (% change)	Ground for adjustment
				in operative part of decision iv) No liability for repeated infringement v) Anti-competitive effects of the infringements exaggerated			
156/94 [1999]	Aristrain	10,600,000	7,100,000 (-33.02%)	i) Erroneous relevant turnover ii) Certain infringement not mentioned in operative part of the decision iii) Unequal treatment regarding degree of participation in certain infringements iv) Anti-competitive effects of the infringements exaggerated	196/99 P [2003]	Case referred back to GC	No statement of reasons regarding appellant's liability for conduct of sister company
156/94 [2004]			2,540,000 (-76.04%)	v) Turnover of sister company should have been excluded from the relevant turnover	———		
157/94 [1999]	Ensidesa	4,000,000	3,350,000 (-16.25%)	i) Certain infringement not mentioned in operative part of decision ii) Unequal treatment regarding	198/99 P [2003]	Unchanged	

Case T-	Applicant	Commission fine (ECUs or euros)	GC fine/ (% change)	Ground for adjustment	Case C-	CoJ fine/ (% change)	Ground for adjustment
				degree of participation in certain infringements iii) Anti-competitive effects of the infringements exaggerated			
295/94 [1998]	Buchmann	2,200,000	2,150,000 (-2.27%)	Unequal treatment regarding turnover used to calculate the fine	———		
304/94 [1998]	Europa Carton	2,000,000	Unchanged		———		
Joined 305/94	LVM	750,000	Unchanged		Joined 238/99 P	Unchanged	
306/94	Elf Atochem	3,200,000	2,600,000 (-18.75%)	Error in calculating market share	247/99 P		
307/94	BASF	1,500,000	Unchanged		———		
313/94	Shell	850,000					
314/94	DSM	600,000			244/99 P	Unchanged	
315/94	Wacker	1,500,000			252/99 P		
316/94	Hoechst	1,500,000					
318/94	SAV	400,000	135,000 (-66.25%)	Lesser duration of infringement	———		
325/94	Monte-dison	1,750,000	Unchanged		245/99 P	Unchanged	
328/94	ICI	2,500,000	1,550,000 (-38%)	Error in calculating market share	254/99 P		
329/94	Hüls	2,200,000	Unchanged		250/99 P		
335/94 [1999]	Enichem	2,500,000			251/99 P [2002]		
308/94 [1998]	Cascades	16,200,000	Unchanged		279/98 P [2000]	Case referred back to GC	No liability of appellant for conduct of subsidiaries before acquiring them
308/94 [2002]			13,538,000 (-16.43%)	Turnover of subsidiaries prior to their acquisition unlawfully included in the relevant turnover	———		

Case T-	Applicant	Commission fine (ECUs or euros)	GC fine/ (% change)	Ground for adjustment	Case C-	CoJ fine/ (% change)	Ground for adjustment
309/94 [1998]	KNP	3,000,000	2,700,000 (-10%)	Unequal treatment regarding reference year used to calculate the fine	248/98 P [2000]	2,600,000 (-13.33%)	No liability of appellant for conduct of subsidiary before acquiring it→ lesser duration of infringement
310/94 [1998]	Gruber + Weber	1,000,000	730,000 (-27%)	Sales of irrelevant products included in the relevant turnover	———		
311/94 [1998]	BPB de Eendracht	1,750,000	750,000 (-57.14%)	i) Lesser duration of infringement ii) Participation in an aspect of the infringement not proven	———		
317/94 [1998]	Weig	3,000,000	2,500,000 (-16.67%)	Lesser duration of infringement	280/98 P [2000]	1,900,000 (-36.67%)	Unequal treatment regarding calculation of fines for members of the same cartel
319/94 [1998]	Fiskeby Board	1,000,000	Unchanged		———		
327/94 [1998]	SCA Holding	2,200,000	Unchanged		297/98 P [2000]	Unchanged	
334/94 [1998]	Sarrió	15,500,000	14,000,000 (-9.68%)	i) Lesser duration of infringement ii) Participation in an aspect of the infringement not proven	291/98 P [2000]	13,750,000 (-11.29%)	Unequal treatment regarding calculation of fines for members of the same cartel
337/94 [2000]	Enso-Gutzeit	3,250,000	0 (-100%)	Infringement not proven	———		
338/94 [1998]	Finnboard	20,000,000	Unchanged		298/98 P [2000]	Unchanged	
Joined 339/94 to 342/94	Metsä-Serla and 3 other applicants	[20,000,000] (total joint liability with Finnboard)	Unchanged		294/98 P [2000]	Unchanged	

Case T-	Applicant	Commission fine (ECUs or euros)	GC fine/ (% change)	Ground for adjustment	Case C-	CoJ fine/ (% change)	Ground for adjustment
[1998]							
347/94 [1998]	Mayr-Melnhof	21,000,000	17,000,000 (-19.05%)	i) Sales of irrelevant products included in the relevant turnover ii) No liability of applicant for conduct of subsidiary before acquiring it→lesser duration of infringement	———		
348/94 [1998]	Enso Española	1,750,000	1,200,000 (-29.41%)	Lesser duration of infringement	282/98 P [2000]	Unchanged	
352/94 [1998]	Mo och Domsjö	22,750,000	Unchanged		283/98 P [2000]	Unchanged	
354/94 [1998]	Stora	11,250,000	Unchanged		286/98 P [2000]	Case referred back to GC	No liability of appellant for conduct of subsidiaries before acquiring them
354/94 [2002]			4,670,000 (-58.49%)	i) Lesser duration of infringement ii) Turnover of subsidiaries prior to their acquisition unlawfully included in the relevant turnover	———		
Joined 25/95	CBR	8,032,000	2,547,000 (-68.29%)	Lesser duration of infringement	Joined		
26/95	Cembureau	100,000	0 (-100%)	SO did not mention the possibility of a fine			
30/95	FIC	100,000					
31/95	ENCI	7,316,000		Infringement not proven			
32/95	VNC	100,000		SO did not mention the possibility of a fine			
34/95	Ciments	1,052,000	617,000				

Case T-	Applicant	Commission fine (ECUs or euros)	GC fine/ (% change)	Ground for adjustment	Case C-	CoJ fine/ (% change)	Ground for adjustment
	Luxem-bourgeois		(-47.34%)	Lesser duration of infringement			
35/95	Dyckerhoff	13,284,000	8,043,000 (-39.45%)				
36/95	SFIC	100,000	0 (-100%)	SO did not mention the possibility of a fine			
37/95	Vicat	8,272,000	2,407,000 (-70.9%)	Lesser duration of infringement			
38/95	Cedest	2,522,000	0 (-100%)	Lack of access to potentially exculpatory documents			
39/95	Ciments Français	25,768,000	13,570,000 (-41.35%)	i) Lesser duration of infringement ii) Turnover of subsidiaries acquired after the infringement unlawfully included in the relevant turnover	211/00 P	10,671,000 (-58.59%)	Turnover of another subsidiary acquired after the infringement unlawfully included in the relevant turnover
42/95	Heidel-berger	15,652,000	7,056,000 (-54.92%)	Lesser duration of infringement			
43/95	Lafarge	23,900,000	15,276,000 (-36.08%)				
44/95	Aalborg	4,008,000	2,349,000 (-41.39%)		204/00 P	Unchanged	
45/95	Alsen-Breitenburg	3,841,000	0 (-100%)	Infringement not proven			
46/95	Nord-cement	1,850,000					
48/95	BDZ	100,000		SO did not mention the possibility of a fine			
50/95	Unicem	11,652,000	6,399,000 (-45.08%)	Lesser duration of infringement	217/00 P	Unchanged	
51/95	Buzzi	3,652,000	0 (-100%)	Infringement not proven			
52/95	Valenciana	1,866,000	638,000	i) Lesser			

Case T-	Applicant	Commission fine (ECUs or euros)	GC fine/ (% change)	Ground for adjustment	Case C-	CoJ fine/ (% change)	Ground for adjustment
			(-65.81%)	duration of infringement ii) Lesser intensity of participation in the infringement			
53/95	Rugby	5,144,000	0	Infringement not proven			
54/95	BCA	100,000	(-100%)	SO did not mention the possibility of a fine			
55/95	Asland	5,337,000	740,000 (-86.13%)	Lesser duration of infringement			
56/95	Castle	7,964,000	0	Infringement not proven			
57/95	Heracles	5,748,000	(-100%)				
58/95	Uniland	1,971,000	592,000 (-69.96%)	Lesser duration of infringement			
59/95	Oficemen	70,000	0 (-100%)	SO did not mention the possibility of a fine			
60/95	Irish Cement	3,524,000	2,065,000 (-41.4%)	Lesser duration of infringement	205/00 P	Unchanged	
61/95	Cimpor	9,324,000	4,312,000 (-53.75%)				
62/95	SECIL	3,017,000	1,395,000 (-53.76%)				
63/95	ATIC	70,000	0 (-100%)	SO did not mention the possibility of a fine			
64/95	Titan	5,625,000		Infringement not proven			
65/95	Italcementi	33,580,000	26,789,000 (-20.22%)	Lesser duration of infringement	213/00 P	Unchanged	
68/95	Holderbank	5,331,000	1,918,000 (-64.02%)				
69/95	Hornos Ibéricos	1,784,000	836,000 (-53.14%)				
70/95	Aker	40,000	14,000 (-65%)				
71/95	EUROC	40,000	14,000				

Case T-	Applicant	Commission fine (ECUs or euros)	GC fine/ (% change)	Ground for adjustment	Case C-	CoJ fine/ (% change)	Ground for adjustment
			(-65%)				
87/95	Cementir	8,248,000	7,471,000 (-9.42%)		219/00 P [2004]	Unchanged	
88/95	Blue Circle	15,824,000	7,717,000 (-51.23%)				
103/95	AGCIT	100,000	0 (-100%)	SO did not mention the possibility of a fine	———		
104/95 [2000]	Halkis	1,856,000	510,000 (-72.52%)	Lesser duration of infringement			
49/95 [1996]	Van Megen	10,000	Unchanged		———		
86/95 [2002]	Compagnie générale maritime and 12 other applicants	130,000 (in total)	0 (-100%)	i) No secret cartel ii) Complex legal framework iii) Misled by Commission over the legality of the agreement iv) No fine ever imposed for similar agreement →mitigating circumstances	———		
175/95 [1999]	BASF	2,700,000	Unchanged		———		
176/95 [1999]	Accinauto	10,000	Unchanged		———		
Joined 213/95	SCK	300,000	100,000 (-66.67%)	Disproportio-nate fine in relation to applicant's individual turnover	———		
18/96 [1997]	FNK	11,500,000	Unchanged				
41/96 [2000]	Bayer	3,000,000	0 (-100%)	No agreement within the meaning of Article 101(1) TFEU	Joined 2/01 P 3/01 P * [2004]	Unchanged	

Case T-	Applicant	Commission fine (ECUs or euros)	GC fine/ (% change)	Ground for adjustment	Case C-	CoJ fine/ (% change)	Ground for adjustment
Joined 45/98	Krupp Thyssen Stainless	8,100,000	4,032,000 (-50.22%)	i) Defective SO regarding applicant's liability for conduct of subsidiary ii) Unequal treatment regarding cooperation in administrative procedure	Joined 65/02 P	Unchanged	
47/98 [2001]	AST	4,540,000	4,032,000 (-11.19%)	Unequal treatment regarding cooperation in administrative procedure	73/02 P [2001]		
48/98 [2001]	Acerinox	3,530,000	3,136,000 (-11.16%)		57/02 P [2005]	Unchanged	
62/98 [2000]	Volkswa-gen	102,000,000	90,000,000 (-11.76%)	i) Lesser duration of infringement ii) Illegality of certain practices not proven	338/00 P + [2003]	Unchanged	
Joined 202/98	Tate & Lyle	7,000,000	5,600,000 (-20%)	Cooperation in administrative procedure	———		
204/98	British Sugar	39,600,000	Unchanged		359/01 P [2004]	Unchanged	
207/98 [2001]	Napier Brown	1,800,000			———		
9/99 [2002]	HFB KG	4,950,000 (jointly and severally liable)	0 (-100%)	Not existent at the time of the infringement	———		
	HFB GmbH						
	Isoplus		Unchanged		Joined 202/02 P		
	Isoplus Gesell-schaft						
	Isoplus Gmbh						
15/99 [2002]	Brugg	925,000	Unchanged		207/02 P	Unchanged	
16/99 [2002]	Lögstör Rör	1,500,000	Unchanged		208/02 P		
17/99 [2002]	KE KELIT	360,000	Unchanged		205/02 P		
21/99 [2002]	Dansk Rørindustri	1,475,000	Unchanged		189/02 P		

Case T-	Applicant	Commission fine (ECUs or euros)	GC fine/ (% change)	Ground for adjustment	Case C-	CoJ fine/ (% change)	Ground for adjustment
23/99 [2002]	LR af 1998	8,900,000	Unchanged		206/02 P		
28/99 [2002]	Sigma	400,000	300,000 (-25%)	Participation in a certain infringement not proven	———		
31/99 [2002]	ABB	70,000,000	65,000,000 (-7.16%)	Unequal treatment regarding cooperation in administrative procedure	213/02 P [2005]	Unchanged	
56/99 [2003]	Marlines	260,000	Unchanged		112/04 P [2005]	Unchanged	
59/99 [2003]	Ventouris	1,010,000	252,500 (-75%)	Unequal treatment compared to companies involved in both infringements	———		
61/99 [2003]	Adriatica	980,000	245,000 (-75%)		111/04 P + [2006]	Unchanged	
65/99 [2003]	Strintzis	1,500,000	Unchanged		110/04 P + [2006]	Unchanged	
66/99 [2003]	Minoan	3,260,000	Unchanged		121/04 P + [2005]	Unchanged	
Joined 5/00	FEG	4,400,000	Unchanged		105/04 P [2006]	Unchanged	
6/00 [2003]	TU	2,150,000			———		
44/00 [2004]	Mannes-mann	13,500,000	12,600,000 (-6.67%)	Lesser duration of infringement	411/04 P [2007]	Unchanged	
48/00 [2004]	Corus UK	12,600,000	11,700,000 (-7.14%)		———		
50/00 [2004]	Dalmine	10,800,000	10,080,000 (-7.14%)		407/04 P [2007]	Unchanged	
Joined 67/00	JFE	54,000,000 (in total)	43,740,000 (-19%)	i) Lesser duration of infringement ii) Unequal treatment compared to cartel members not fined for their second infringement	Joined		
68/00	Nippon				———		
71/00	Sumitomo				403/04 P		
78/00 [2004]	Kawasaki				405/04 P [2007]	Unchanged	
213/00 [2003]	CMA CGM and 13 other	6,096,000 (in total)	0 (-100%)	Expired limitation period for	236/03 P [2004]	Unchanged	

Case T-	Applicant	Commission fine (ECUs or euros)	GC fine/ (% change)	Ground for adjustment	Case C-	CoJ fine/ (% change)	Ground for adjustment
	applicants			imposing fine			
220/00 [2003]	Cheil Jedang	12,200,000	10,080,000 (-17.38%)	Passive role in the infringement →mitigating circumstance	———		
223/00 [2003]	Kyowa Hakko Kogyo / Kyowa Hakko Europe	13,200,000 (jointly and severally liable)	Unchanged		———		
224/00 [2003]	ADM Company / ADM Ingredients	47,300,000 (jointly and severally liable)	43,875,000 (-7.24%)	Cooperation in administrative procedure	397/03 P [2006]	Unchanged	
230/00 [2003]	Daesang / Sewon Europe	8,900,000 (jointly and severally liable)	7,128,240 (-19.9%)	Cooperation in administrative procedure	———		
368/00 [2003]	General Motors Nederland / Opel Nederland	43,000,000 (jointly and severally liable)	35,475,000 (-17.5%)	No agreement for an aspect of the infringement	551/03 P [2006]	Unchanged	
58/01 [2009]	Solvay	3,000,000	2,250,000 (-25%)	~~Lesser duration of infringement~~	110/10 P [2011]	0 (-100%)	i) Lack of access to certain documents ii) Lack of hearing before Commission
67/01 [2004]	JCB	39,614,000	30,000,000 (-24.27%)	i) Certain aspect of the infringement not proven ~~ii) Anti-competitive clause notified to Commission~~	167/04 P [2006]	30,864,000 (-22.09%)	Breach of commitment not to implement notified anti-competitive clause
208/01 [2003]	Volkswa-gen	30,960,000	0 (-100%)	No agreement within the meaning of Article 101(1) TFEU	74/04 P * [2006]	Unchanged	
Joined 236/01	Tokai	24,500,000	12,276,000 (-49.89%)	Unequal treatment regarding starting amount of fine	———		

Case T-	Applicant	Commission fine (ECUs or euros)	GC fine/ (% change)	Ground for adjustment	Case C-	CoJ fine/ (% change)	Ground for adjustment
239/01	SGL	80,200,000	69,114,000 (-13.82%)	i) Cooperation in administrative procedure ii) Small fine increase for contesting the facts after Commission decision	301/04 P * [2006]	75,700,000 (-5.61%)	Cooperation in administrative procedure not genuine
					308/04 P [2006]	Unchanged	
244/01	Nippon	12,200,000	6,274,000 (-48.57%)	i) Unequal and disproportio-nate treatment regarding starting amount of fine ii) Small fine increase for contesting the facts after Commission decision	———		
245/01	Showa Denko	17,400,000	10,440,000 (-40%)	Unequal and disproportio-nate treatment regarding multiplier for deterrence	289/04 P [2006]	Unchanged	
246/01	GrafTech	50,400,000	42,050,000 (-16.57%)	Cooperation in administrative procedure			
251/01	SEC	12,200,000	6,138,000 (-49.69%)	Unequal and disproportio-nate treatment regarding starting amount of fine	———		
252/01 [2004]	C/G	10,300,000	6,480,000 (-37.09%)	i) Unequal and disproportio-nate treatment regarding starting amount of fine ii) Cooperation in administrative			

Case T-	Applicant	Commission fine (ECUs or euros)	GC fine/ (% change)	Ground for adjustment	Case C-	CoJ fine/ (% change)	Ground for adjustment
				procedure			
241/01 [2005]	SAS	39,375,000	Unchanged		———		
314/01 [2006]	Avebe	3,600,000	Unchanged		———		
322/01 [2006]	Roquettes Frères	10,800,000	8,105,000 (-24.95%)	i) Incorrect data regarding relevant turnover ii) Small fine increase for serious negligence in providing turnover figures to Commission	———		
325/01 [2005]	Daimler-Chrysler	71,825,000	9,800,000 (-86.36%)	No agreement within the meaning of Article 101(1) TFEU for certain infringements	———		
329/01 [2006]	ADM	10,130,000	Unchanged		510/06 P [2009]		
330/01 [2006]	Akzo Nobel	9,000,000	Unchanged		———		
15/02 [2006]	BASF	296,160,000	236,845,000 (-20.03%)	i) Instigator role for parts of the infringement not proven ii) Cooperation in administrative procedure	———		
26/02 [2006]	Daiichi	23,400,000	18,000,000 (-23.08%)	Cooperation in administrative procedure	———		
33/02 [2005]	Britannia	3,370,000	Unchanged		76/06 P [2007]		
38/02 [2005]	Group Danone	44,043,000	42,412,500 (-3.7%)	No causal link between a threat and the extension of the cartel→ smaller fine increase for aggravating circumstances	3/06 P [2007]		

Case T-	Applicant	Commission fine (ECUs or euros)	GC fine/ (% change)	Ground for adjustment	Case C-	CoJ fine/ (% change)	Ground for adjustment
43/02 [2006]	Jungbunz-lauer	17,640,000	Unchanged		———		
44/02 [2004]	Dresdner Bank	28,000,000	0 (-100%)	Infringement not proven	———		
48/02 [2005]	Brouwerij Haacht	270,000	Unchanged		———		
Joined 49/02 50/02 51/02 [2005]	Brasserie nationale and 2 other applicants	448,000 (in total)	Unchanged		———		
52/02 [2005]	SNCZ	1,530,000	Unchanged		———		
54/02 [2004]	HBV	2,800,000	0 (-100%)	Infringement not proven	———		
56/02 [2004]	HBV	28,000,000			———		
59/02 [2006]	ADM	39,690,000	Unchanged		511/06 P [2009]	29,400,000 (-25.32%)	Documents regarding role of leader not included in SO
60/02 [2004]	DVB Bank	14,000,000	0 (-100%)	Infringement not proven	———		
61/02 [2004]	Commerz-bank	28,000,000			———		
62/02 [2005]	Union Pigments	350,000	Unchanged		———		
64/02 [2005]	Heubach	3,780,000	Unchanged		———		
Joined 109/02	Bolloré	22,680,000	Unchanged		Joined 327/07 P	0 (-100%)	Defective SO regarding liability for personal involvement in the infringement
118/02	AWA	184,270,000	141,750,000 (-23.07%)	Unequal treatment regarding cooperation in administrative procedure	———		
122/02	MHTP	21,240,000	Unchanged				
125/02	Koehler	33,070,000			322/07 P	Unchanged	
126/02	Zanders	29,760,000			———		
128/02	Mougeot	3,640,000					
129/02	Torraspapel	14,170,000					
132/02	Divipa	1,750,000			338/07 P [2009]	Unchanged	
136/02 [2007]	Zicuñaga	1,540,000	1,309,000	Participation in an aspect of	———		

Case T-	Applicant	Commission fine (ECUs or euros)	GC fine/ (% change)	Ground for adjustment	Case C-	CoJ fine/ (% change)	Ground for adjustment
			(-15%)	the infringement not proven			
Joined 259/02	RZB	30,380,000	Unchanged		Joined 133/07 P 135/07 P	Unchanged	
260/02	Bank Austria	30,380,000					
261/02	BAWAG	7,590,000					
262/02	RLB	1,520,000					
263/02	PSK	7,590,000	3,795,000 (-50%)	Error in calculating market share			
264/02	Erste Bank	37,690,000	Unchanged		125/07 P 137/07 P [2009]	Unchanged	
271/02 [2006]	ÖVAG	7,590,000					
	NÖ-Hypo	1,520,000					
279/02 [2006]	Degussa	118,125,000	91,125,000 (-22.86%)	No anti-competitive effects of infringement for certain periods	266/06 P [2008]	Unchanged	
303/02 [2006]	Westfalen	430,000	Unchanged				
304/02 [2006]	Hoek Loos	12,600,000	Unchanged				
12/03 [2009]	Itochu	4,500,000	Unchanged				
13/03 [2009]	Nintendo	149,128,000 (jointly and severally liable)	119,242,500 (-20.04%)	Unequal treatment regarding cooperation in administrative procedure			
	Nintendo of Europe						
18/03 [2009]	CD-Contact Data	1,000,000	500,000 (-50%)	Unequal treatment regarding passive role in the infringement	260/09 P [2011]	Unchanged	
Joined 27/03 46/03 58/03 79/03 80/03 97/03 98/03 [2007]	SP and 7 other applicants	44,320,000 (in total)	0 (-100%)	Legal basis of decision no longer in force at the time of its adoption			
45/03 [2007]	Riva Acciaio	26,900,000					
50/03 [2008]	Saint-Gobain Gyproc	4,320,000	Unchanged				

Case T-	Applicant	Commission fine (ECUs or euros)	GC fine/ (% change)	Ground for adjustment	Case C-	CoJ fine/ (% change)	Ground for adjustment
52/03 [2008]	Knauf Gips	85,800,000	Unchanged		407/08 P [2010]	Unchanged	
53/03 [2008]	BPB	138,600,000	118,800,000 (-14.29%)	Cooperation in administrative procedure	———		
54/03 [2008]	Lafarge	249,600,000	Unchanged		413/08 P [2010]	Unchanged	
Joined 71/03 74/03 87/03	Tokai	6,970,000	Unchanged		———		
	Intech BV	980,000 (jointly and severally liable)	Unchanged				
	Intech AG		[420,000] (-57.14%)	Individual application of 10% ceiling of turnover			
91/03 [2005]	SGL	27,750,000	18,451,970 (-33.51%)	i) Error in calculating market share ii) Unequal treatment regarding role of ringleader	328/05 P [2007]	Unchanged	
77/03 [2007]	Feralpi Siderurgica	10,250,000	0 (-100%)	Legal basis of decision no longer in force at the time of its adoption	———		
94/03 [2007]	Ferriere Nord	3,570,000			———		
Joined 217/03 245/03 [2006]	FNCBV and 4 other applicants	15,960,000 (in total)	11,970,000 (-25%)	i) 1st time punishment of such agreement ii) Deteriorating economic context → exceptional circumstances	Joined 101/07 P 110/07 P [2008]	Unchanged	
410/03 [2008]	Hoechst	99,000,000	74,250,000 (-25%)	i) Imprecise SO regarding role of leader ii) Breach of principle of sound administration and unequal treatment regarding cooperation in administrative procedure	———		

Case T-	Applicant	Commission fine (ECUs or euros)	GC fine/ (% change)	Ground for adjustment	Case C-	CoJ fine/ (% change)	Ground for adjustment
68/04 [2008]	SGL	23,640,000	Unchanged		564/08 P [2009]	Unchanged	
69/04 [2008]	Schunk Schunk Kohlenstoff	30,870,000 (jointly and severally liable)	Unchanged		———		
73/04 [2008]	Carbone-Lorraine	43,050,000	Unchanged		554/08 P [2009]	Unchanged	
99/04 [2008]	AC-Treuhand	1,000	Unchanged		———		
116/04 [2009]	Wieland-Werke	20,790,000	Unchanged		———		
120/04 [2006]	Peróxidos Orgánicos	500,000	Unchanged		———		
122/04 [2009]	Outokumpu Luvata	18,130,000 (jointly and severally liable)	Unchanged		———		
127/04 [2009]	KME Germany and 2 other applicants	39,810,000 (in total)	Unchanged		272/09 P [2011]	Unchanged	
11/05 [2010]	Wieland-Werke and 2 other applicants	27,841,100 (in total)	Unchanged		———		
18/05 [2010]	IMI and 2 other applicants	44,980,000 (jointly and severally liable)	38,556,000 (-14.28%)	i) Lesser duration of infringement ii) Unequal treatment regarding extent of participation in the cartel	———		
19/05 [2010]	Boliden and 2 other applicants	32,600,000 (jointly and severally liable)	Unchanged		———		
20/05 [2010]	Outokumpu Luvata	36,140,000 (jointly and severally liable)	Unchanged		———		
21/05 [2010]	Chalkor	9,160,000	8,246,7000 (-9.97%)	Unequal treatment regarding extent of participation in the cartel	386/10 P [2011]		
24/05 [2010]	Alliance One SCTC	[1,822,500] (jointly and severally liable with WWTE)	Unchanged		Joined 628/10 P	Unchanged	
	TCLT		0	Unequal treatment	14/11 P *		

Case T-	Applicant	Commission fine (ECUs or euros)	GC fine/ (% change)	Ground for adjustment	Case C-	CoJ fine/ (% change)	Ground for adjustment
			(-100%)	regarding presumption of parental liability	[2012]		
25/05 [2010]	KME Germany and 2 other applicants	67,080,000 (in total)	Unchanged		389/10 P [2011]	Unchanged	
29/05 [2010]	Deltafina	11,880,000	6,120,000 (-48.48%)	i) Role of leader not proven ii) Cooperation in administrative procedure	———		
30/05 [2007]	Prym Prym Consumer	30,000,000 (jointly and severally liable)	27,000,000 (-10%)	Cooperation in administrative procedure	534/07 P [2009]	Unchanged	
33/05 [2011]	Cetarsa	3,631,500	3,147,300 (-13.33%)		181/11 P + [2012]	Unchanged	
36/05 [2007]	Coats Holdings Coats	30,000,000 (jointly and severally liable)	20,000,000 (-33.33%)	i) Lesser duration of infringement ii) Passive role in the infringement →mitigating circumstance	468/07 P [2008]	Unchanged	
37/05 [2011]	WWTE	1,822,500	1,579,500 (-13.33%)	Cooperation in administrative procedure	240/11 P + [2012]	Unchanged	
38/05 [2011]	Agro-expansión	2,592,000 (jointly and severally liable)	2,430,000 (-6.25%)	Cooperation in administrative procedure	668/11 P [2013]	Unchanged	
41/05 [2011]	Alliance One		[2,187,000] (-15.63%)	i) No liability of applicant for conduct of subsidiary before acquiring it→ lesser duration of infringement ii) Cooperation in administrative procedure	679/11 P + [2013]		
Joined							

Case T-	Applicant	Commission fine (ECUs or euros)	GC fine/ (% change)	Ground for adjustment	Case C-	CoJ fine/ (% change)	Ground for adjustment
101/05	BASF	34,970,000	35,024,000 (+0.15%)	No single and continuous infringement →expired limitation period for fining first infringement → i) Lesser duration of infringement ii) Fine reduction for cooperation in first infringement set aside	———		
111/05 [2007]	UCB	10,380,000	1,870,000 (-81.98%)	No single and continuous infringement →expired limitation period for fining first infringement → i) Lesser duration of infringement ii) Larger fine reduction for cooperation in second infringement			
112/05 [2007]	Akzo Nobel and 4 other applicants	20,990,000 (jointly and severally liable)	Unchanged		97/08 P [2009]	Unchanged	
161/05 [2009]	Hoechst	74,030,000	66,627,000 (-10%)	Cooperation in administrative procedure	———		
168/05 [2009]	Arkema	58,500,000	Unchanged		520/09 P [2011]	Unchanged	
174/05 [2009]	Elf Aquitaine	[45,000,000] (jointly and severally liable with Arkema)	Unchanged		521/09 P [2011]	0 (-100%)	Inadequate statement of reasons regarding imputation of subsidiary's conduct to appellant
175/05	Akzo	84,380,000	Unchanged		———		

Case T-	Applicant	Commission fine (ECUs or euros)	GC fine/ (% change)	Ground for adjustment	Case C-	CoJ fine/ (% change)	Ground for adjustment
[2009]	Nobel and 6 other applicants						
446/05 [2010]	Amann Cousin	17,978,000 (in total)	Unchanged		———		
448/05 [2010]	Oxley Threads	1,271,000	Unchanged		———		
450/05 [2009]	Peugeot Peugeot Netherland	49,500,000 (jointly and severally liable)	44,550,000 (-10%)	Anti-competitive effects of infringement exaggerated	———		
452/05 [2010]	BST	979,000	856,800 (-12.48%)	Unequal treatment regarding cooperation in administrative procedure	———		
Joined 456/05 457/05 [2010]	Gütermann Zwicky	4,195,000 (in total)	Unchanged		———		
11/06 [2011]	Romana Tabacchi	2,050,000	1,000,000 (-51.22%)	i) Lesser duration of infringement ii) Unequal treatment regarding turnover reference year iii) Inability to pay	———		
12/06 [2011]	Deltafina	30,000,000	Unchanged		578/11 P [2014]	Unchanged	
25/06 [2011]	Alliance One	24,000,000	Unchanged		593/11 P [2012]	Unchanged	
26/06 [2010]	Trioplast Wittenheim	17,850,000	Unchanged		———		
39/06 [2011]	Transcatab	[14,000,000] (jointly and severally liable with Alliance One)	Unchanged		654/11 P [2012]	Unchanged	
40/06 [2010]	Trioplast Industrier	[7,730,000] (jointly and severally liable with Trioplast Wittenheim)	[2,730,000] (-64.68%)	i) Applicant not enabled to know the share of the fine it would have to pay→ breach of principles of legal certainty and that penalties	———		

Case T-	Applicant	Commission fine (ECUs or euros)	GC fine/ (% change)	Ground for adjustment	Case C-	CoJ fine/ (% change)	Ground for adjustment
				should be specific to the offender and to the offence ii) Turnover reference year not appropriate			
51/06 [2011]	Fardem	[2,200,000] (jointly and severally liable with Kendrion)	Unchanged		———		
53/06 [2012]	UPM-Kymmene	56,550,000	50,700,000 (-10.34%)	Lesser duration of infringement	———		
54/06 [2011]	Kendrion	34,000,000	Unchanged		50/12 P [2013]	Unchanged	
Joined 55/06 66/06 [2011]	RKW JM Gesell-schaft	39,000,000 (jointly and severally liable)	Unchanged		———		
59/06 [2011]	Low & Bonar Bonar	12,240,000 (jointly and severally liable)	9,180,000 (-25%)	Lesser duration of infringement	———		
64/06 [2012]	FLS Plast	[15,300,000] (jointly and severally liable with Trioplast Wittenheim)	14,450,000 (-5.55%)	No actual control on subsidiary over a certain period→lesser duration of infringement	243/12 P [2014]	Unchanged	
65/06 [2012]	FLSmidth				238/12 P [2014]		
68/06 [2011]	Stempher BV Stempher CV	2,370,000 (jointly and severally liable)	0 (-100%)	Lesser duration of infringement →expired limitation period for imposing fine	———		
72/06 [2011]	Group Gascogne	[9,900,000] (jointly and severally liable with Sachsa)	Unchanged		58/12 P [2013]	Unchanged	
76/06 [2011]	ASPLA	42,000,000 (jointly and severally liable)	Unchanged		35/12 P [2012]	Unchanged	
78/06 [2011]	Álvarez				36/12 P [2014]		
79/06 [2011]	Sachsa	13,200,000	Unchanged		40/12 P [2013]	Unchanged	
85/06 [2008]	General Química and 2 other applicants	3,380,000 (jointly and severally liable)	Unchanged		90/09 P [2011]	Unchanged	
186/06 [2011]	Solvay	167,062,000	139,500,000	i) Lesser duration of	455/11 P +	Unchanged	

Case T-	Applicant	Commission fine (ECUs or euros)	GC fine/ (% change)	Ground for adjustment	Case C-	CoJ fine/ (% change)	Ground for adjustment
			(-16.5%)	infringement ii) Cooperation in administrative procedure	[2013]		
189/06 [2011]	Arkema France	78,663,000	Unchanged		———		
190/06 [2011]	Total	[42,000,000] (jointly and severally liable with Arkema)	Unchanged		495/11 P [2012]		
	Elf Aquitaine	[65,100,000] (jointly and severally liable with Arkema)					
191/06 [2011]	FMC Foret	25,000,000	Unchanged		———		
192/06 [2011]	Caffaro	1,078,000 (jointly and severally liable)	Unchanged		447/11 P [2013]	Unchanged	
194/06 [2011]	SNIA				448/11P [2013]		
195/06 [2011]	Solvay Solexis	[25,619,000] (jointly and severally liable with Edison)	Unchanged		449/11 P [2013]	Unchanged	
196/06 [2011]	Edison	58,125,000	0 (-100%)	No statement of reasons in reply to submissions against presumption of decisive influence to subsidiary	446/11 P * [2013]	Unchanged	
197/06 [2011]	FMC Corp	[25,000,000] (jointly and severally liable with FMC Foret)	Unchanged		———		
206/06 [2011]	Total	[140,400,000] (jointly and severally liable with Arkema)	Unchanged		421/11 P [2012]	Unchanged	
	Elf Aquitaine	[181,350,000] (jointly and severally liable with Arkema)					
208/06 [2011]	Quinn Barlo and 2 other applicants	9,000,000 (jointly and severally liable)	8,250,000 (-8.33%)	Lesser duration of infringement	70/12 P [2013]	Unchanged	
214/06 [2012]	ICI	91,406,250	Unchanged		———		
216/06 [2011]	Lucite	25,025,000 (jointly and	Unchanged		———		
	Lucite UK						

Case T-	Applicant	Commission fine (ECUs or euros)	GC fine/ (% change)	Ground for adjustment	Case C-	CoJ fine/ (% change)	Ground for adjustment
		severally liable)					
217/06 [2011]	Arkema France and 2 other applicants	219,131,250 (jointly and severally liable)	113,343,750 (-48.28%)	No longer part of a large undertaking→ reduced fine increase for deterrence	———		
343/06 [2012]	Shell and 2 other applicants	108,000,000 (jointly and severally liable)	81,000,000 (-25%)	Role of instigator and leader not proven	———		
344/06 [2012]	Total	[13,500,000] (jointly and severally liable with Total Nederland)	Unchanged		———		
347/06 [2012]	Nynäs Petroleum Nynas Belgium	13,500,000 (jointly and severally liable)	Unchanged		———		
348/06 [2012]	Total Nederland	20,250,000	Unchanged		———		
351/06 [2012]	Dura Groep	5,400,000 (total single amount)	Unchanged		———		
352/06 [2012]	Dura Infra						
353/06 [2012]	Vermeer BV						
354/06 [2012]	BAM NBM	13,500,000	Unchanged		———		
	HBG	7,200,000					
355/06 [2012]	Koninklijke BAM	[8,250,000] (jointly and severally liable with BAM NBM)					
356/06 [2012]	Koninklijke Volker	27,360,000 (jointly and severally liable)	Unchanged		———		
357/06 [2012]	Koninklijke Stevin				586/12 P [2013]	Unchanged	
359/06 [2012]	Heijmans Infra	17,100,000 (jointly and severally liable)	Unchanged		———		
360/06 [2012]	Heijmans NV						
361/06 [2012]	Ballast Nedam	4,650,000 (jointly and	Unchanged		612/12 P [2014]	3,450,000 (-25.8%)	SO did not enable applicant to understand it would be held liable for subsidiary's conduct→ lesser duration of infringement

Case T-	Applicant	Commission fine (ECUs or euros)	GC fine/ (% change)	Ground for adjustment	Case C-	CoJ fine/ (% change)	Ground for adjustment
362/06 [2012]	Ballast Nedam Infra	severally liable)	[3,450,000] (-25.8%)	SO did not enable applicant to understand it would be held liable for subsidiary's conduct→ lesser duration of infringement	———		
370/06 [2012]	Kuwait Petroleum and 2 other applicants	16,632,000 (jointly and severally liable)	Unchanged		581/12 P [2013]	Unchanged	
375/06 [2011]	Viega	54,290,000	Unchanged		276/11 P [2013]	Unchanged	
376/06 [2011]	Legris	46,800,000 (total single amount)	Unchanged		289/11 P [2012]	Unchanged	
377/06 [2011]	Comap				290/11 P [2012]		
378/06 [2011]	IMI and 5 other applicants	48,300,000 (total single amount)	Unchanged		———		
379/06 [2011]	Kaimer	7,970,000 (jointly and severally liable)	7,150,000 (-10.29%)	Lesser duration of infringement	264/11 P [2012]	Unchanged	
	Sanha Kaimer						
	Sanha Italia	[7,150,000] (jointly and severally liable with Kaimer)	[6,325,000] (-11.54%)				
381/06 [2011]	FRA.BO	1,580,000	Unchanged		———		
382/06 [2011]	Tomkins	5,250,000	4,250,000 (-19.05%)	Lesser duration of infringement	286/11 P [2013]	Unchanged	
384/06 [2011]	IBP	11,260,000	Unchanged		———		
	IBP France	11,260,000					
385/06 [2011]	Aalberts and 2 other applicants	102,840,000 (total single amount)	0 (-100%)	Infringement not proven	287/11 P * [2013]	Unchanged	
386/06 [2011]	Pegler	[5,250,000] (jointly and severally liable with Tomkins)	[3,400,000] (-35.23%)	i) Lesser duration of infringement ii) No longer part of parent company→ lower multiplier for deterrence	———		
405/06 [2009]	Arcelor-Mittal		Unchanged		Joined 201/09 P		
	Arcelor-Mittal	10,000,000	0	Expired limitation		Unchanged	

Case T-	Applicant	Commission fine (ECUs or euros)	GC fine/ (% change)	Ground for adjustment	Case C-	CoJ fine/ (% change)	Ground for adjustment
	Belval	(jointly and severally liable)	(-100%)	period for imposing fine	216/09 P * [2011]		
	Arcelor-Mittal Inter-national						
24/07 [2009]	Thyssen-Krupp	3,168,000	Unchanged		352/09 P [2011]	Unchanged	
38/07 [2011]	Shell and 2 other applicants	160,875,000 (jointly and severally liable)	Unchanged		———		
39/07 [2011]	ENI	272,250,000	181,500,000 (-33.33%)	No liability for repeated infringement	508/11 P + [2013]	Unchanged	
42/07 [2011]	Dow Chemical and 3 other applicants	64,575,000 (total single amount)	Unchanged		499/11 P [2013]	Unchanged	
44/07 [2011]	Kaučuk	17,550,000 (jointly and severally liable)	0 (-100%)	Infringement not proven	———		
45/07 [2011]	Unipetrol						
53/07 [2011]	Trade-Stomil	3,800,000	0 (-100%)		———		
59/07 [2011]	Polimeri	[272,250,000] (jointly and severally liable with ENI)	[181,500,000] (-33.33%)	No liability for repeated infringement	511/11 P + [2013]	Unchanged	
110/07 [2011]	Siemens AG	396,562,500	Unchanged		239/11 P (joined with 489 and 498/11 P) [2013]	Unchanged	
112/07 [2011]	Hitachi and 2 other applicants	51,750,000 (total single amount)	Unchanged		———		
113/07 [2011]	Toshiba	90,900,000	0 (-100%)	Unequal treatment regarding turnover reference year	498/11 P (joined with 239 and 489/11 P) [2013]	Unchanged	
Joined 117/07	Areva T&D SA	53,550,000	48,195,000 (-10%)	Unequal and disproportio-nate treatment regarding role of leader	Joined 247/11 P	Unchanged	
	Areva Holding	[25,500,000] (jointly and severally liable with Areva T&D SA)	[20,400,000] (-20%)				
	Areva SA						
	Areva AG						
121/07 [2011]	Alstom	[53,550,000] (jointly and severally liable with Areva)	[48,195,000]		253/11 P [2014]	[27,795,000]	Unlawful joint and several liability of subsidiary's

Case T-	Applicant	Commission fine (ECUs or euros)	GC fine/ (% change)	Ground for adjustment	Case C-	CoJ fine/ (% change)	Ground for adjustment
		11,475,000 (exclusively liable)	10,327,500 (-10% in total)			Unchanged (-41.37% in total)	successive parent companies
Joined 122/07	Siemens Österreich	[12,600,000] (jointly and severally liable with Siemens Ltd)	Unchanged		Joined 231/11 P *	Unchanged	
	VA Tech						
123/07	Siemens Ltd	22,050,000			232/11 P	Unchanged	
124/07 [2011]	Siemens SA	22,050,000 (jointly and severally liable with other companies)	18,450,000 (-16.33%)	~~Commission failed to determine the applicants' exact share of the fine~~	233/11 P [2014]	22,050,000 (0%)	GC not competent to determine the exact share of the fine for entities jointly and severally liable
	Magrini						
132/07 [2011]	Fuji Electric	3,750,000	3,550,000 (-5.93%)	Lesser duration of infringement	———		
133/07 [2011]	Mitsubishi	118,575,000	0 (-100%)	Unequal treatment regarding turnover reference year	489/11 P (joined with 239 and 498/11 P) [2013]	Unchanged	
138/07 [2011]	Schindler Holding and 5 other applicants	143,748,000 (total single amount)	Unchanged		501/11 P [2013]	Unchanged	
Joined 141/07 142/07 145/07 146/07 [2011]	General Technic-Otis and 5 other applicants	224,932,950 (total single amount)	Unchanged		494/11P [2012]	Unchanged	
					493/11 P [2012]		
Joined 144/07 147/07 to 150/07 154/07 [2011]	Thyssen-Krup and 6 other applicants	479,669,850 (total single amount)	319,779,000 (-33.33%)	No liability for repeated infringement	———		
151/07 [2011]	Kone and 2 other applicants	142,120,000 (total single amount)	Unchanged		510/11 P [2013]	Unchanged	
234/07 [2011]	Grolsch	31,658,000	0 (-100%)	No statement of reasons regarding imputation of subsidiary's conduct to applicant	———		

Case T-	Applicant	Commission fine (ECUs or euros)	GC fine/ (% change)	Ground for adjustment	Case C-	CoJ fine/ (% change)	Ground for adjustment
235/07 [2011]	Bavaria	22,850,000	20,712,375 (-9.36%)	i) Certain aspect of the infringement not proven ii) Excessive length of administrative procedure	445/11 P [2012]	Unchanged	
240/07 [2011]	Heineken Nederland Heineken NV	219,275,000 (jointly and severally liable)	197,985,937.5 (-9.71%)		452/11 P [2012]	Unchanged	
439/07 [2012]	Coats Holdings	122,405,000	Unchanged		———		
445/07 [2012]	Berning & Söhne	1,123,000	Unchanged		———		
448/07 [2012]	YKK Corp YKK Holding	62,500,000 (jointly and severally liable)	Unchanged		408/12 P [2012]	Unchanged	
	YKK Stocko	87,750,000	Unchanged			71,292,800 (-18.75%)	Individual application of 10% ceiling of turnover over a certain infringement period
461/07 [2011]	Visa Europe Visa Inter-national	10,200,000 (jointly and severally liable)	Unchanged		———		
462/07 [2013]	Galp and 2 other applicants	8,622,500 (total single amount)	8,277,500 (-4.44%)	Direct participation in aspects of the infringement not proven	603/13 P [2016]	7,700,000 (-11%)	GC erroneously attributed indirect liability for aspects of the infringement
482/07 [2013]	Nynäs Petroleum Nynas Petróleo	10,642,500 (total single amount)	10,406,000 (-2.22%)	Participation in an aspect of the infringement not proven	———		
495/07 [2013]	PROAS	83,850,000	Unchanged		616/13 P [2016]	Unchanged	
496/07 [2013]	Repsol and 2 other applicants	80,496,000 (jointly and severally liable)	Unchanged		617/13 P [2016]	Unchanged	
497/07 [2013]	CEPSA	[83,850,000] (jointly and severally liable with PROAS)	Unchanged		608/13 P [2016]	Unchanged	
76/08 [2012]	El du Pont and 2 other applicants	59,250,000	Unchanged		172/12 P [2013]	Unchanged	
77/08 [2012]	Dow Chemical	4,425,000	Unchanged		179/12 P [2013]	Unchanged	

Case T-	Applicant	Commission fine (ECUs or euros)	GC fine/ (% change)	Ground for adjustment	Case C-	CoJ fine/ (% change)	Ground for adjustment
82/08 [2012]	Guardian Industries Guardian Europe	148,000,000 (jointly and severally liable)	Unchanged		580/12 P [2014]	103,600,000 (-30%)	Unequal treatment regarding calculation of sales related to the infringement
83/08 [2012]	Denki Kagaku Kogyo Denka Chemicals	47,000,000 (jointly and severally liable)	Unchanged		———		
103/08 [2012]	Versalis Eni	132,160,000 (jointly and severally liable)	106,200,000 (-19.64%)	i) Unequal treatment regarding multiplier for deterrence ii) Past infringement decision not addressed to Eni→lower fine increase for repeated infringement	Joined 93/13 P 123/13 P * [2015]	Unchanged	
199/08 [2011]	Ziegler	9,200,000	Unchanged		439/11 P [2013]	Unchanged	
Joined 204/08 212/08 [2011]	Team Relocations and 3 other applicants	3,490,000 (total single amount)	Unchanged		444/11 P [2013]	Unchanged	
Joined 208/08	Gosselin	3,280,000	2,320,000 (-29.27%)	Lesser duration of infringement	429/11 P [2013]	Unchanged	
209/08 [2011]	Stichting Portielje	[270,000] (jointly and severally liable with Gosselin)	0 (-100%)	~~Presumption of decisive influence to subsidiary rebutted~~	440/11 P * [2013]	[270,000] (0%)	Links tying parent company to subsidiary not taken into account by GC
210/08 [2011]	Coppens	104,000	0 (-100%)	No liability for a single and continuous infringement	441/11 P * [2012]	35,000 (-66.35%)	Liability for a constituent part of the single and continuous infringement
211/08 [2011]	Putters	395,000	Unchanged		———		
299/08 [2011]	Elf Aquitaine	59,020,000 (total single amount)	Unchanged		404/11 P [2012]	Unchanged	
343/08 [2011]	Arkema France				———		

Case T-	Applicant	Commission fine (ECUs or euros)	GC fine/ (% change)	Ground for adjustment	Case C-	CoJ fine/ (% change)	Ground for adjustment
348/08 [2011]	Aragonesas	9,900,000 (jointly and severally liable)	0 (-100%)	Lesser duration of infringement	———		
349/08 [2011]	Uralita			Applicant benefited from judgment concerning its subsidiary	———		
404/98 [2013]	Fluorsid Minmet	1,600,000 (jointly and severally liable)	Unchanged		———		
406/08 [2013]	ICF	1,700,000	Unchanged		467/13 P [2014]	Unchanged	
540/08 [2014]	Esso	83,588,4000	62,712,895 (-24.97%)	Starting amount of fine disproportio-nate to economic importance of infringement	———		
	Esso Deutsch-land	[27,081,600] (jointly and severally liable with Esso)	Unchanged				
	Exxon-Mobil Exxon Corp	[34,670,400] (jointly and severally liable with Esso)					
541/08 [2014]	Sasol Sasol Holding	[250,700,000] (jointly and severally liable with Sasol Wax GmbH)	[71,042,197] (-71.66%)	No decisive influence to delinquent subsidiary before a certain period → lesser duration of infringement	———		
	Sasol Wax Inter-national		[119,122,197] (-52.48%)	Individual application of 10% ceiling of turnover over a certain infringement period			
	Sasol Wax	318,200,000	149,982,197 (-52.87%)				
543/08 [2014]	RWE RWE Dea	37,440,000 (jointly and severally liable)	35,888,562 (-4.14%)	No decisive influence to delinquent joint venture→ lesser duration	———		

Case T-	Applicant	Commission fine (ECUs or euros)	GC fine/ (% change)	Ground for adjustment	Case C-	CoJ fine/ (% change)	Ground for adjustment
				of infringement			
544/08 [2014]	Hansen H&R Wax	24,000,000 (jointly and severally liable)	Unchanged		90/15 P [2017]	Unchanged	
548/08 [2013]	Total	128,163,000 (jointly and severally liable with Total Raffinage)	Unchanged		597/13 P [2015]	125,459,842 (-2.11%)	Applicant benefited from judgment concerning its subsidiary
550/08 [2014]	Tudapetrol	12,000,000	Unchanged		94/15 P [2017]	Unchanged	
551/08 [2014]	H&R Chem-Pharm	[22,000,000] (jointly and severally liable with Hansen)	Unchanged		95/15 P [2017]	Unchanged	
558/08 [2014]	Eni	29,120,000	18,200,000 (-37.5%)	No liability for repeated infringement			
562/08 [2014]	Repsol and 2 other applicants	19,800,000	Unchanged				
566/08 [2014]	Total Raffinage	[128,163,000] (jointly and severally liable with Total)	[125,459,842] (-2.11%)	Unequal and disproportio-nate treatment regarding multiplier for duration of infringement	634/13 P [2015]	Unchanged	
587/08 [2013]	Fresh Del Monte	14,700,000	8,820,000 (-40%)	i) Limited participation in the infringement →mitigating circumstance ~~ii) Cooperation in administrative procedure~~	Joined 293/13 P 294/13 P * [2015]	9,800,000 (-33.33%)	Cooperation in administrative procedure not genuine
588/08 [2013]	Dole Food Dole Germany	45,600,000 (jointly and severally liable)	Unchanged		286/13 P [2015]	Unchanged	
Joined 56/09 73/09 [2014]	Saint-Gobain and 3 other applicants	880,000,000 (jointly and severally liable)	715,000,000 (-18.75%)	Past infringement decision not addressed to applicants→ lower fine increase for repeated infringement			
68/09 [2014]	Soliver	4,396,000	0	Participation in single and			

Case T-	Applicant	Commission fine (ECUs or euros)	GC fine/ (% change)	Ground for adjustment	Case C-	CoJ fine/ (% change)	Ground for adjustment
			(-100%)	continuous infringement not proven			
72/09 [2014]	Pilkington and 4 other applicants	357,000,000 (jointly and severally liable)	Unchanged		101/15 P [2016]	Unchanged	
146/09 [2013]	Parker ITR	25,610,000	6,400,000 (-75%)	~~No links with company liable for the infringement over a certain period →~~ ~~i) lesser duration of infringement~~ ~~ii) finding of role of leader annulled~~	434/13 P * [2014]	Fine reductions set aside and case referred back to GC	Failure of GC to examine arguments regarding links between applicant and company liable for the infringement over a certain period
	Parker-Hannifin	[8,320,000] (jointly and severally liable with ITR)	[6,300,000] (-24.48%)	~~Finding of role of leader annulled~~			Failure of GC to provide adequate statement of reasons regarding a portion of fine reduction
146/09 RENV [2016]			19,945,728 (-22.12%)	Individual application of 10% ceiling of turnover over a certain infringement period	_____		
			[6,400,000] (-23.07%)	Erroneous attribution of role of leader			
Joined 147/09 148/09 [2013]	Trelleborg Industrie Trelleborg	24,500,000 (total single amount)	Unchanged		_____		
154/09 [2013]	MRI	4,900,000	Unchanged		_____		
352/09 [2012]	Novácke chemické	19,600,000	Unchanged		_____		
360/09 [2012]	E.ON Ruhrgas E.ON	553,000,000 (jointly and severally liable)	320,000,000 (-39.62%)	Lesser duration of infringement	_____		
370/09 [2012]	GDF Suez	553,000,000	320,000,000 (-39.62%)		_____		
384/09 [2014]	SKW AG SKW GmbH	13,300,000 (jointly and severally liable)	Unchanged		154/14 P [2016]	Unchanged	

Case T-	Applicant	Commission fine (ECUs or euros)	GC fine/ (% change)	Ground for adjustment	Case C-	CoJ fine/ (% change)	Ground for adjustment
391/09 [2014]	Evonik Degussa	4,680,000 (jointly and severally liable)	3,730,000 (-20.3%)	i) Disproportio-nate multiplier for duration of infringement ii) Cooperation in administrative procedure	155/14 P [2016]	Unchanged	
	AlzChem		[2,490,000] (-46.79%)	i) same as above ii) same as above iii) No liability for repeated infringement			
392/09 [2012]	1. garanto-vaná	[19,600,000] (jointly and severally liable with Novácke)	Unchanged		90/13 P [2014]	Unchanged	
395/09 [2014]	Gigaset	[13,300,000] (jointly and severally liable with SKW)	[12,300,000] (-7.52%)	Unequal treatment regarding multiplier for duration of infringement	———		
399/09 [2013]	HSE	9,100,000	Unchanged		———		
400/09 [2012]	Ecka non ferrum Metall-pulver	6,400,000 (jointly and severally liable)	Unchanged		———		
406/09 [2014]	Donau Chemie	5,000,000	4,350,000 (-13%)	Cooperation in administrative procedure	———		
410/09 [2012]	Almamet	3,040,000	Unchanged		———		
Joined 472/09 55/10 [2014]	SP	[14,350,000] (jointly and severally liable with Lucchini)	0 (-100%)	Individual application of 10% ceiling of turnover	———		
Joined 489/09 490/09 56/10 [2014]	Leali AFLL	7,175,000 (total single amount)	Unchanged		———		
517/09 [2014]	Alstom	16,500,000	0 (-100%)	Inadequate statement of reasons in reply to	———		

Case T-	Applicant	Commission fine (ECUs or euros)	GC fine/ (% change)	Ground for adjustment	Case C-	CoJ fine/ (% change)	Ground for adjustment
				submissions against presumption of decisive influence to subsidiary			
519/09 [2014]	Toshiba	13,200,000	Unchanged		373/14 P [2016]	Unchanged	
521/09 [2014]	Alstom Grid	[13,530,000] (jointly and severally liable with Alstom)	Unchanged (exclusively liable following Alstom's exoneration)		———		
Joined 23/10 24/10 [2014]	Arkema CECA	20,934,200 (total single amount)	Unchanged		———		
27/10 [2014]	AC-Treuhand	174,0000	Unchanged		194/14 P [2015]	Unchanged	
30/10 [2014]	Reagens	10,791,000	Unchanged		———		
40/10 [2014]	Elf Aquitaine	7,712,600	Unchanged		———		
45/10 [2015]	GEA Group	3,346,200	Unchanged		———		
46/10 [2014]	Faci	5,940,000	Unchanged		291/14 P [2015]	Unchanged	
47/10 [2015]	Akzo Nobel	40,600,000	40,194,000 (-1%)	Unequal treatment regarding length of administrative procedure	656/15 P [2017]	Unchanged	
	Akcros Chemicals	[12,002,000] (jointly and severally liable with Akzo Nobel)	[11,891,980] (-1%)		———		
	Akzo Chemicals Akzo BV	[16,900,000] (total joint liability with Akzo Nobel)	0 (-100%)	Expired limitation period for imposing fine	Appeal not fine-related		
69/10 [2014]	IRO	3,580,000	Unchanged		———		
70/10 [2014]	Feralpi	10,250,000	Unchanged		85/15 P [2017]	0 (-100%)	Failure of Commission to hold appropriate hearing
83/10 [2014]	Riva Fire	26,900,000	26,093,000 (-3%)	~~Lesser duration of an aspect of the infringement~~	89/15 P [2017]		
85/10 [2014]	Alfa Acciai	7,175,000	Unchanged		87/15 P [2017]		
90/10 [2014]	Ferriere Nord	3,570,000	3,421,400 (-4.16%)	~~Lesser duration of an aspect of the infringement~~	88/15 P [2017]		
91/10 [2014]	Lucchini	14,350,000	Unchanged		———		
92/10	Ferriera				86/15 P		Failure of

Case T-	Applicant	Commission fine (ECUs or euros)	GC fine/ (% change)	Ground for adjustment	Case C-	CoJ fine/ (% change)	Ground for adjustment
[2014]	Valsabbia	10,250,000 (jointly and severally liable)	Unchanged		[2017]	0 (-100%)	Commission to hold appropriate hearing
	Valsabbia						
189/10 [2015]	GEA Group	3,346,200	0 (-100%)	i) Lack of access to file ii) Lack of hearing before Commission			
364/10 [2013]	Duravit and 2 other applicants	29,266,235	Unchanged		609/13 P [2017]	Unchanged	
368/10 [2013]	Cisal	1,196,269	Unchanged		———		
372/10 [2012]	Bolloré	21,262,500	Unchanged		414/12 P [2014]	Unchanged	
Joined 373/10	Villeroy & Boch Austria	71,531,000 (total single amount)	Unchanged		626/13 P [2017]	Unchanged	
374/10	Villeroy & Boch AG				625/13 P [2017]		
382/10	Villeroy and Boch				644/13 P [2017]		
402/10 [2014]	Villeroy & Boch - Belgium				642/13 [2017]		
375/10 [2014]	Hansa and 3 other fined applicants	14,758,220 (total single amount)	Unchanged		611/13 P [2017]	Unchanged	
376/10 [2014]	Mamoli	1,041,531	Unchanged		619/13 P [2017]	Unchanged	
Joined 379/10	Keramag	[26,068,884] (jointly and severally liable with Sanitec)	Unchanged		613/13 P * + [2017]	Unchanged	
	Koralle	3,489,227					
	Sphinx	[5,915,690] (total joint liability with Sanitec)					
	Pozzi						
	PCT	[7,109,299] (total joint liability)	0 (-100%)	~~Infringement not proven~~		Fine reductions set aside and case referred back to GC	Errors of GC regarding rules applicable to the examination of evidence
	Allia						
381/10 [2013]	Sanitec	54,200,773	47,091,474 (-13.12%)	~~Lesser duration of infringement~~			
Joined 379/10 RENV 381/10 RENV [2018]			Unchanged		———		

Case T-	Applicant	Commission fine (ECUs or euros)	GC fine/ (% change)	Ground for adjustment	Case C-	CoJ fine/ (% change)	Ground for adjustment
380/10 [2014] 380/10 REC [2014]	Wabco Europe	[64,413,902] (jointly and severally liable with Trane)	[26,996,170] (-58.09%)	i) Defective statement of reasons→ lesser duration of infringement ii) Sales covered by immunity unlawfully taken into account for fine calculation			
	Trane	326,091,196	120,268,400 (-63.12%)				
	Ideal Standard Italia	[12,323,430] (jointly and severally liable with Trane)	[4,422,500] (-64.11%)				
	Ideal Standard GmbH	[5,575,920] (jointly and severally liable with Trane)	Unchanged				
	Wabco Austria	[4,130,000] (jointly and severally liable with Trane)					
386/10 [2013]	Dornbracht	12,517,671	Unchanged		604/13 P [2017]	Unchanged	
Joined 389/10 419/10 [2015]	SLM	15,956,000	15,256,000 (-4.39%)	Disproportio-nate fine in relation to limited participation in the infringement	Joined 505/15 P 490/15 P [2016]	Unchanged	
	Ori Martin	[14,000,000] (jointly and severally liable with SLM)	[13,300,000] (-5%)				
391/10 [2015]	Nedri	5,056,000	Unchanged				
393/10 [2015]	Westfä-lische and 2 other applicants	46,550,000 (total single amount)	Unchanged		523/15 P [2016]	Unchanged	
396/10 [2013]	Zucchetti	3,996,000	Unchanged		618/13 P [2017]	Unchanged	
398/10 [2015]	Fapricela	8,874,000	Unchanged		510/15 P [2016]	Unchanged	
406/10 [2015]	Emesa Galycas	3,444,700 (in total)	Unchanged				
408/10 [2013]	Roca Sanitario	[24,400,000] (total joint liability with Laufen and Roca)	[23,998,000] (-1.65%)	Applicant benefited from judgment concerning its subsidiary	636/13 P [2017]	Unchanged	
411/10 [2013]			Unchanged		637/13 P [2017]	Case referred back to GC	10% ceiling unlawfully applied to turnover of Roca group

Case T-	Applicant	Commission fine (ECUs or euros)	GC fine/ (% change)	Ground for adjustment	Case C-	CoJ fine/ (% change)	Ground for adjustment
	Laufen	32,000,000					over a certain infringement period
411/10 RENV [2017]			22,488,001 (-29.72%)	Individual application of 10% ceiling of turnover over a certain infringement period			
412/10 [2013]	Roca	6,700,000	6,298,000 (-6%)	Cooperation in administrative procedure	638/13 P [2017]	Unchanged	
Joined 413/10 414/10 [2015]	Socritel Companhia Previdente	12,590,000 (jointly and severally liable)	Unchanged				
418/10 [2015]	voestalpine voestalpine Austria	22,000,000 (jointly and severally liable)	7,500,000 (-65.91%)	Disproportio-nate fine in relation to limited participation in the infringement			
422/10 [2015] 422/10 REC [2015]	Trafilerie Meridionali	3,249,000	Unchanged		519/15 P [2016]	Unchanged	
423/10 [2015]	Redaelli Tecna	6,341,000	Unchanged				
Joined 426/10 to 429/10 [2016]	Moreda-Riviere Trefilerías and 3 other applicants	54,389,000 (total single amount)	Unchanged		Joined 457/16 P to 461/16 P [2017]	Unchanged	
436/10 [2015]	HIT Groep	1,877,500	Unchanged		514/15 P [2016]	Unchanged	
456/10 [2015]	Timab CFRP	59,850,000 (jointly and severally liable)	Unchanged		411/15 P [2017]	Unchanged	
9/11 [2015]	Air Canada	21,037,500					
28/11 [2015]	KLM	127,160,000					
36/11 [2015]	Japan Airlines	35,700,000					
38/11 [2015]	Cathay Pacific	57,120,000					
39/11 [2015]	Cargolux	79,900,000					
40/11 [2015]	Latam Airlines	8,220,000 (jointly and		Contradiction			

Case T-	Applicant	Commission fine (ECUs or euros)	GC fine/ (% change)	Ground for adjustment	Case C-	CoJ fine/ (% change)	Ground for adjustment
	Lan Cargo	severally liable)	0	between statement of reasons and operative part of decision			
43/11 [2015]	Singapore Airlines	74,800,000 (jointly and severally liable)	(-100%)				
	SAC						
48/11 [2015]	British Airways	104,040,000			Appeal not fine-related		
56/11 [2015]	SAS Cargo and 2 other applicants	70,167,500 (total single amount)					
62/11 [2015]	Air France-KLM	182,920,000 (jointly and severally liable)					
63/11 [2015]	Air France						
67/11 [2015]	Martinair	29,500,000					
90/11 [2014]	ONP and 2 other applicants	5,000,000	4,750,000 (-5%)	Infringement encouraged by ministerial circular→ mitigating circumstance			
91/11 [2014]	InnoLux	300,000,000	288,000,000 (-4%)	Sales of irrelevant products included in the value of sales related to the infringement	231/14 P [2015]	Unchanged	
128/11 [2015]	LG	215,000,000 (jointly and severally liable)	210,000,000 (-2.33%)	Sales covered by immunity unlawfully taken into account for fine calculation	227/14 P [2015]	Unchanged	
	LG Taiwan						
	Akcros Chemicals						
485/11 [2015]	Akzo Nobel	40,600,000 (total single amount)	0 (-100%)	Lack of sufficient time to express views before Commission			
	Akcros Chemicals						
655/11 [2015]	FSL and 2 other applicants	8,919,000 (jointly and severally liable)	6,689,000 (-25%)	Lesser duration of infringement	469/15 P [2017]	Unchanged	
250/12 [2015]	COEMAC	4,231,000	Unchanged				
251/12 [2016]	EGL and 2 other applicants	3,029,000 (total single amount)	Unchanged				
254/12 [2016]	Kühne + Nagel and 4 other applicants	53,674,000 (total single amount)	Unchanged		261/16 P [2018]	Unchanged	
264/12 [2016]	UTi Worldwide	3,068,000	2,965,000	Fine of parent company			

Case T-	Applicant	Commission fine (ECUs or euros)	GC fine/ (% change)	Ground for adjustment	Case C-	CoJ fine/ (% change)	Ground for adjustment
			(-3.36%)	exceeded combined fine of subsidiaries whose conduct was imputed to it			
	UTi BV UTI UK	[2,965,000] (total joint liability with UTi Worldwide)	Unchanged				
265/12 [2016]	Schenker	3,673,000	Unchanged		263/16 P [2018]	Unchanged	
267/12 [2016]	Deutsche Bahn and 3 other applicants	31,262,000 (total single amount)	Unchanged		264/16 P [2018]	Unchanged	
270/12 [2016]	Panalpina and 2 other applicants	46,484,000 (total single amount)	Unchanged		271/16 P [2018]	Unchanged	
404/12 [2016]	Toshiba	56,793,000	Unchanged		180/16 P [2017]	Unchanged	
409/12 [2016]	Mitsubishi	79,467,000	Unchanged				
82/13 [2015]	Panasonic	252,101,000	219,222,000 (-13.04%)	Unjustified departure from the Guidelines regarding calculation of value of sales related to the infringement	608/15 P [2016]	Unchanged	
	MT Picture	[94,623,000] (jointly and severally liable with Panasonic)	90,356,000 (-4.51%)				
84/13 [2015]	Samsung SDI Samsung SDI Malaysia	150,842,000 (total single amount)	Unchanged		615/15 P [2017]	Unchanged	
91/13 [2015]	LG	687,537,000	Unchanged		Joined 588/15 P	Unchanged	
92/13 [2015]	Philips	313,356,000	Unchanged		622/15 P [2017]		
104/13 [2015]	Toshiba	[86,738,000] (jointly and severally liable with Panasonic) 28,048,000 (exclusively liable)	[82,826,000] 0 (-27.84% in total)	i) Lesser duration of infringement ii) Unjustified departure from the Guidelines regarding calculation of value of sales related to the infringement	623/15 P [2017]	Unchanged	
208/13	Portugal	12,290,000	0	Erroneous			

Case T-	Applicant	Commission fine (ECUs or euros)	GC fine/ (% change)	Ground for adjustment	Case C-	CoJ fine/ (% change)	Ground for adjustment
[2016]	Telecom		(-100%)	calculation of value of sales related to the infringement			
216/13 [2016]	Telefónica	66,894,000			487/16 P [2017]	Unchanged	
460/13 [2016]	Sun Pharma-ceuticals Ranbaxy	10,323,000 (jointly and severally liable)	Unchanged		586/16 P	Case pending	
467/13 [2016]	Arrow Group Arrow Generics	9,975,000 (total single amount)	Unchanged		601/16 P		
469/13 [2016]	Generics	[7,766,843] (jointly and severally liable with Merck)	Unchanged		588/16 P		
470/13 [2016]	Merck	21,411,000	Unchanged		614/16 P		
471/13 [2016]	Xellia Alpharma	10,530,000 (jointly and severally liable)	Unchanged		611/16 P		
472/13 [2016]	Lundbeck Lundbeck Ltd	93,766,000 (total single amount)	Unchanged		591/16 P		
54/14 [2016]	Goldfish and 3 other applicants	27,082,000 (total single amount)	Unchanged				
58/14 [2018]	Stührk	1,132,000	0 (-100%)	Inadequate statement of reasons regarding amount of fine			
419/14 [2018]	Goldman Sachs	37,303,000	Unchanged		595/18 P	Case pending	
422/14 [2018]	Viscas	34,992,000	Unchanged		582/18 P		
438/14 [2018]	Silec Cable General Cable	1,976,000 (total single amount)	Unchanged		599/18 P		
439/14 [2018]	LS Cable & System	11,349,000	Unchanged		596/18 P		
441/14 [2018]	Brugg Kabel Kabe-lwerke Brugg	8,490,000 (jointly and severally liable)	Unchanged		591/18 P		
444/14 [2018]	Furukawa Electric	8,858,000	Unchanged		589/18 P		
446/14 [2018]	Taihan Electric Wire	6,223,000	Unchanged				
447/14 [2018]	NKT NKT A/S	3,887,000 (jointly and severally liable)	Unchanged		607/18 P		
448/14	Hitachi	23,087,000	Unchanged				

Case T-	Applicant	Commission fine (ECUs or euros)	GC fine/ (% change)	Ground for adjustment	Case C-	CoJ fine/ (% change)	Ground for adjustment
[2018]							
449/14 [2018]	Nexans France Nexans	70,670,000 (total single amount)	Unchanged		606/18 P		
450/14 [2018]	Sumitomo J-Power	2,630,000 [20,741,000] (jointly liable with Hitachi)	Unchanged		—		
451/14 [2018]	Fujicura	8,152,000	Unchanged		451/14 P	Case pending	
455/14 [2018]	Pirelli	67,310,000	Unchanged		611/18 P		
475/14 [2018]	Prysmian Prysmian-CS	[104,613,000] (total joint liability with Goldman Sachs and Pirelli)	Unchanged		601/18 P		
758/14 [2016]	Infineon	82,784,000	Unchanged		99/17 P [2018]	Case referred back to GC	GC failed to examine argument contesting proportio-nality of fine
758/14 RENV			Case pending				
762/14 [2016]	Philips Philips France	20,148,000 (jointly and severally liable)	Unchanged		98/17 P [2018]	Unchanged	
95/15 [2016]	Printeos and 4 other applicants	4,729,000 (jointly and severally liable)	0 (-100%)	Inadequate statement of reasons regarding different fine adjustments for undertakings involved in the same infringement	—		
180/15 [2017]	Icap and 2 other applicants	14,960,000 (total single amount)	0 (-100%)	Inadequate statement of reasons regarding determination of amount of fine	39/18 P *	Case pending	

6.4.1.2. Table of contested fines for infringements of Article 102 TFEU

Case T-	Applicant	Commission fine (ECUs or euros)	GC fine/ (% change)	Ground for adjustment	Case C-	CoJ fine/ (% change)	Ground for adjustment
30/89 [1991]	Hilti	6,000,000	Unchanged		53/92 P [1994]	Unchanged	
65/89 [1993]	BPB British Gypsum	3,150,000 (in total)	Unchanged		310/93 P [1995]	Unchanged	
32/91 [1995]	Solvay	20,000,000	0 (-100%)	Irregular authentication of decision	288/95 P * [2000]	Unchanged	
37/91 [1995]	ICI	10,000,000			286/95 P * [2000]	Unchanged	
83/91 [1994]	Tetra Pak	75,000,000	Unchanged		333/94 P [1996]	Unchanged	
Joined 24/93	CMB	9,600,000	8,640,000 (-10%)	~~Lesser duration of infringement~~	Joined 295/96 P	0 (-100%)	SO did not make appellants aware that fines would be imposed individually on them
25/93	Dafra-Lines	200,000	180,000 (-10%)		396/96 P [2000]		
26/93	Deutsche Africa	200,000	180,000 (-10%)	Lesser duration of infringement	_____		
29/93 [1996]	Nedlloyd	100,000	90,000 (-10%)				
229/94 [1997]	Deutsche Bahn	11,000,000	Unchanged		436/97 P [1999]	Unchanged	
228/97 [1999]	Irish Sugar	8,800,000	7,883,326 (-10.42%)	Certain abuse of dominant position not proven	497/99 P [2001]	Unchanged	
139/98 [2001]	AAMS	6,000,000	Unchanged		_____		
Joined 191/98 212/98 213/98 214/98 [2003]	Atlantic Container Line and 15 other applicants	272,980,000 (in total)	0 (-100%)	i) Immunity from fines regarding aspects of 1st abuse ii) Legal uncertainty over the finding of 1st abuse→ mitigating circumstance iii) Practices constituting 1st abuse revealed by	_____		

Case T-	Applicant	Commission fine (ECUs or euros)	GC fine/ (% change)	Ground for adjustment	Case C-	CoJ fine/ (% change)	Ground for adjustment
				applicants to Commission →mitigating circumstance iv) Competitors not affected by 2nd abuse v) No opportunity to comment on incriminating documents for 2nd abuse			
219/99 [2003]	British Airways	6,800,000	Unchanged		95/04 P [2007]	Unchanged	
57/01 [2009]	Solvay	20,000,000	19,000,000 (-5%)	~~No liability for repeated infringement~~	109/10 P [2011]	0 (-100%)	i) Lack of access to certain documents ii) Lack of hearing before Commission
66/01 [2010]	ICI	10,000,000	8,000,000 (-20%)	i) Lesser duration of infringement ii) No liability for repeated infringement	_____		
203/01 [2003]	Michelin	19,760,000	Unchanged		_____		
271/03 [2008]	Deutsche Telekom	12,600,000	Unchanged		280/08 P [2010]	Unchanged	
340/03 [2007]	France Télécom	10,350,000	Unchanged		202/07 P [2009]	Unchanged	
201/04 [2007]	Microsoft	497,196,304	Unchanged		_____		
276/04 [2008]	CMB	3,400,000	Unchanged		_____		
321/05 [2010]	Astra-Zeneca Astra-Zeneca plc	60,000,000 (total single amount)	52,500,000 (-12.5%)	Abusive character of certain practices not proven	457/10 P + [2012]	Unchanged	
155/06 [2010]	Tomra and 6 other applicants	24,000,000 (jointly and severally liable)	Unchanged		549/10 P [2012]	Unchanged	
336/07 [2012]	Telefónica Telefónica de España	151,875,000 (jointly and severally liable)	Unchanged		295/12 P [2014]	Unchanged	

Case T-	Applicant	Commission fine (ECUs or euros)	GC fine/ (% change)	Ground for adjustment	Case C-	CoJ fine/ (% change)	Ground for adjustment
286/09 [2014]	Intel	1,060,000,000	Unchanged		413/14 P [2017]	Case referred back to GC	Failure of GC to consider arguments contesting the economic test applied by Commission
286/09 RENV			Case pending				
486/11 [2015]	Orange Polska	127,554,194	Unchanged		123/16 P [2018]	Unchanged	

6.4.1.3. Table of contested fines for infringements of the Merger Regulation

Case T-	Applicant	Commission fine (ECUs or euros)	GC fine/ (% change)	Ground for adjustment	Case C-	CoJ Fine/ (% change)	Ground for adjustment
332/09 [2012]	Electrabel	20,000,000	Unchanged		84/13 P [2014]	Unchanged	
704/14 [2017]	Marine Harvest	20,000,000	Unchanged		10/18 P	Case pending	

6.4.2. Aggregate statistical tables of adjudicated cases

The six tables below present aggregate statistics for all the adjudicated and closed competition cases of the preceding section. Pending cases before the General Court or the Court of Justice as well as first-instance judgments still eligible for appeal are excluded because the penalties at issue and the reasons provided for any variations are subject to change. Fines imposed on the same applicant for unrelated infringements as well as fines re-adopted by the Commission, for instance after

annulment of its initial decision, are counted separately since judicial review was exercised on the basis of different circumstances.

The first three tables outline the aggregate final adjustments made by the CJEU on the amount of fines imposed for violations of Article 101(1) TFEU,[802] Article 102 TFEU and the Merger Regulation respectively. Those adjustments are allocated into six small categories, depending on the magnitude of the applied adjustment, and in two large ones, depending on whether the fine was reduced or not. The average fine adjustment per applicant is also included in a separate box. The fourth table summarizes the statistics of the previous three.

The fifth table is concerned with the intensity of judicial control through time. It juxtaposes the reductions applied by the CJEU to antitrust fines imposed by the Commission before the introduction of the 1998 Guidelines with the reductions allowed to antitrust fines that have been adopted from 1998 onwards.[803]

The sixth table places the grounds provided for all the above fine adjustments into twenty-three categories and mentions the total number of applicants affected by each category of grounds.[804] Grounds accepted by the General Court, but subsequently set aside by the Court of Justice do not count as successful grounds.

[802] See also Damien M.B. Gerard, 'Breaking the EU Antitrust Enforcement Deadlock: Re-Empowering the Courts?' (2011) 36 EL Rev 457, 469, where the adjudicated cartel cases are placed into two categories: cases adjudicated from 1995 to 2005 and cases adjudicated from 2006 to 2010.

[803] Since there are no fining guidelines for infringements of the Merger Regulation, the relevant fines are excluded from this table.

[804] Some grounds have to be placed into two categories, for instance an unequal and disproportionate treatment is deemed to breach both the principle of equal treatment and the principle of proportionality.

6.4.2.1. Table of fine adjustments for infringements of Article 101(1) TFEU

	Total	Reduction 0.01 to 24.99%	Reduction 25 to 49.99%	Reduction 50 to 99.99%	Reduction 100%	No change	Increase
Applicants	797	119	73	45	160	399	1
Percent of total	100%	14.93%	9.16%	5.65%	20.08%	50.06%	0.13%
		49.81%				50.19%	
Average adjustment per applicant	-28.68%						

6.4.2.2. Table of fine adjustments for infringements of Article 102 TFEU

	Total	Reduction 0.01 to 24.99%	Reduction 25 to 49.99%	Reduction 50 to 99.99%	Reduction 100%	No change	Increase
Applicants	49	6	0	0	21	22	0
Percent of total	100%	12.24%	0%	0%	42.86%	44.9%	0%
		55.1%				44.9%	
Average adjustment per applicant	-44.4%						

6.4.2.3. Table of fine adjustments for infringements of the Merger Regulation

	Total	Reduction 0.01 to 24.99%	Reduction 25 to 49.99%	Reduction 50 to 99.99%	Reduction 100%	No change	Increase
Applicants	1	0	0	0	0	1	0
Percent of total	100%	0%	0%	0%	0%	100%	0%
Average adjustment per applicant	0%						

6.4.2.4. Table of fine adjustments for all substantive violations of EU competition law

	Total	Reduction 0.01 to 24.99%	Reduction 25 to 49.99%	Reduction 50 to 99.99%	Reduction 100%	No change	Increase
Applicants	847	125	73	45	181	422	1
Percent of total	100%	14.76%	8.62%	5.31%	21.37%	49.82%	0.12%
		50.06%				49.94%	
Average adjustment per applicant	-29.56%						

6.4.2.5. Table of fine reductions for violations of Articles 101(1) and 102 TFEU before and after Commission Guidelines

	Before Guidelines	After Guidelines
Applicants	210	636
Fine reductions	138	286
Probability of fine reduction	65.71%	44.97%
Average adjustment per applicant	-47.36%	-23.72%

6.4.2.6. Table of grounds for fine reductions in EU competition law

Successful grounds for fine reductions	Affected applicants		
	Article 101 TFEU violations	Article 102 TFEU violations	Total
Defective legal basis of decision	12	0	12
Infringement of the rights of the defence	24	21	45
Defective statement of reasons	33	0	33
Irregular authentication of decision	29	2	31
Infringement or aspect of the infringement not proven	58	3	61

Successful grounds for fine reductions	Affected applicants		
	Article 101 TFEU violations	**Article 102 TFEU violations**	**Total**
Expired limitation period for imposing fine	22	0	22
Immunity from fine	6	16	22
Miscalculation of a financial figure	15	0	15
Lesser duration of infringement (5 on procedural grounds)	98	3	101
Exaggerated effects of infringement	10	16	26
Erroneous multiplier for deterrence	4	0	4
Annulled aggravating circumstance (3 on procedural grounds)	27	1	28
Mitigating circumstance	26	16	42
Erroneous application of 10% ceiling of turnover	7	0	7
Cooperation in administrative procedure	26	0	26
Inability to pay	1	0	1
Breach of legal certainty	1	0	1
Breach of sound administration	1	0	1
Unequal treatment	49	0	49
Breach of proportionality	19	0	19
Excessive length of administrative or judicial procedure	4	0	4
Other procedural	8	0	8
Other substantive	10	1	11

6.4.3. Statistical analysis of the judicial practice

We have studied a very large statistical sample consisting of 847 applicants in 565 closed competition cases[805] which have been decided by 431 rulings of the General

[805] Appealed cases and cases referred back to the General Court by the Court of Justice are not counted separately.

Court[806] and 214 of the Court of Justice from October 1991 to September 2018. It is now safe to draw some inferences.

To start with, it is astonishing that 50.1% of the applicants have benefited from a downwards adjustment on their fine. Contrary to what Anne MacGregor and Bogdan Gecic argue, fine reductions do not constitute 'a few exceptions'.[807] It has been more likely for the CJEU to lower a penalty than keep it unchanged or increase it. This element evinces the zeal and efficiency of the judicial control. The Court has completely annulled the challenged fine in 21.4% of the cases, a fact demonstrating to its willingness to confront the Commission, but also to the relatively low probability of the latter being completely defeated.[808] The 29.6% average fine decrease per applicant is high and capable of alleviating considerably the financial burden on sanctioned entities.

It is worth noting that prior to the introduction of the Commission guidelines companies had a 20.7% larger chance of receiving a fine reduction whilst the average reduction received was 23.6% larger as well. Bearing in mind the legal uncertainty and vagueness accompanying the setting of antitrust penalties back then, the CJEU possibly felt obliged to exercise its unlimited jurisdiction more often and more intensely so as to protect the interests of penalized firms. Another plausible explanation for the aforementioned discrepancies is that the Commission has learned from its mistakes and has not repeated them through time. For instance, five of its

[806] Rectified judgments by the General Court are not counted separately.

[807] MacGregor and Gecic, note 121, 431, state that: 'Statistics show that the EU courts have generally declined to alter the amount of fines set by the Commission, with only a few exceptions'.

[808] See Christopher Harding, 'Why Go to Court in Europe? An Analysis of Cartel Appeals 1995-2004' (2005) 30 EL Rev 349, 368.

decisions, affecting 31 applicants, were annulled for irregular authentication from 1991 to 1997 and none after that period.

In the Guidelines era, the 45% success rate of sanctioned undertakings remains a token of an effective and invasive judicial control whereas the -23.7% average fine adjustment may be almost half of what it was before, but it is in no way insignificant. Lastly, given that the percentage of contested penalties adopted by the Commission on the basis of the Guidelines will be growing in the future, we can expect the average success rate and the average fine reduction per applicant to drop slightly from the current 50.1% and 29.6% respectively.

Moving on, the available data prove that the EU judicature does not shy away from reviewing every single aspect of the legality of penalties. Fine reductions have been granted for any possible procedural or substantive reason, 45 times due to an infringement of the rights of the defence, 33 due to a defective statement of reasons, 18 due to a miscalculation of a financial figure, 42 due to the existence of mitigating circumstances, 49 due to an unequal treatment. Certain grounds succeed quite rarely however. Only 1 inability to pay and 19 breaches of the principle of proportionality have been detected. The ability to pay and the principle of proportionality are not quantifiable parameters. Perhaps, EU judges prefer to rely on more tangible errors in order to avoid substituting the assessment of the Commission or it could be that the ceiling of 10% of turnover diminishes the chances of an unbearable or disproportionate fine.

If we compare the review of fines for violations of Article 101 TFEU with the one for violations of Article 102 TFEU, we will observe that the applicants' chances of receiving a fine reduction are quite close, 49.8% and 55.1% respectively. The gap

widens on the average fine adjustment per applicant which is 28.7% and 44.4% respectively. Statistics might not be telling the whole truth about the present comparison. The sample for Article 102 TFEU cases is not big enough to guarantee the same pattern in the long run. 16 out of the 27 granted fine decreases concern a single quashed decision. Should they be excluded, the chances of a reduction will plunge to 33.3% and the average adjustment per applicant to 17.4%. This could hint either to a judicial reluctance to scrutinize the complex economic appraisals which are prominent in every abuse of a dominant position or to the Commission's well-substantiated analysis in complex economic cases.

A last interesting point is that the CJEU has never decreased an Article 102 fine due to a breach of the principle of proportionality. Deference to the assessment of the decision-maker could be an explanation, but it could also be that fines are usually set by the Commission far below the maximum limit of 10% of the dominant undertaking's turnover.[809] The EU judicature is less likely to consider such fines disproportionate due to their relatively low level. Again, the statistical evidence is open to more than one interpretation.

The statistical analysis generally attests to the effectiveness of the judicial review given the large frequency with which the CJEU exercises its unlimited jurisdiction for reducing or expunging impugned fines and the variety of reasons it invokes for this cause. A few elements nonetheless, such as the low detection rate of infringements of proportionality, could be construed as an indication of an excessive cautiousness not to replace the assessment of the Commission in the absence of a manifest error.

[809] So far, the largest ratio of fine to turnover is the 8% applied in *Tomra*, note 469.

6.5. Summarizing the Standard of Judicial Review of Penalties

Penalties in EU competition law are initially imposed by the Commission in accordance with Regulation 1/2003, the Merger Regulation and its published Guidelines. The CJEU has been granted 'unlimited jurisdiction' with respect to those pecuniary sanctions. It has the power to void, reduce or increase them on any factual or legal ground. That capacity exceeds the minimum requirements stemming from the pertinent jurisprudence of the ECtHR.

Even though it sounds contradictory, unlimited jurisdiction has certain boundaries. The EU judicature cannot disregard the admissibility criteria for actions of annulment under Article 263 TFEU, modify others constituent parts of an administrative measure and adopt a new, distinct fine or periodic penalty payment. In addition, it may vary a pecuniary sanction only if the latter has been challenged before it and on the basis of the specific pleas raised by the parties. Nevertheless, those limitations are not significant enough to compromise the right to a fair trial of applicant companies according to the ECtHR.

Carrying on with the actual exercise of the judicial powers, the General Court undertakes a painstaking review of legality as regards the amount of penalties. It checks the Commission's compliance with every single point of Regulation 1/2003 and the fining guidelines, starting from the accuracy of the economic figures and the duration of the infringement and finishing with the applicant's ability to pay the fine incurred. In addition, it extends its control outside the framework of the administrative rules of practice by ensuring that the general principles of EU law, including the principles of equal treatment and proportionality, have been abided by.

If it spots any illegalities, it will not hesitate to remedy them by cancelling or altering the level of the fine.

Secondly, the General Court exercises its power under Article 261 TFEU to go beyond a formal review of legality. It appraises the appropriateness of pecuniary sanctions in the light of all the circumstances it considers relevant to the gravity of the infringement. It has adjusted penalties for reasons of deterrence or fairness by substituting the assessment of the Commission even in cases where no error was found. However, it refrains from doing that systematically and thereby does not usurp the policy-making role assigned to another institution by the EU legal system.

Overall, the standard of review of penalties at first instance is exhaustive on all questions of fact and law, including the ones pertaining to proportionality, and therefore suffices to meet the conditions set by Article 6(1) ECHR.

The Court of Justice is enabled to quash or amend appealed fines, but solely on points of law. It scrutinizes the technical application of the Guidelines at all previous proceedings as well as the observance of the principle of equal treatment. On the contrary, it is more deferential when it comes to the principle of proportionality since it wants to refrain from replacing the merits of the General Court's appraisal. Lastly, it uses its unlimited jurisdiction in practice for the purpose of correcting legal errors committed at previous proceedings. Provided that the first-instance tribunal has adequately examined the legality and the proportionality of the sanction, the ECtHR does not demand anything more from a second-instance tribunal.

The statistical picture confirms the effectiveness of the judicial control and the points made in the foregoing paragraphs. Although the rate of successful applicants has moderately dropped after the adoption of the fining guidelines by the

Commission in 1998, it remains impressive that since its establishment the General Court has reduced the majority of the competition fines challenged before it and has upheld a large variety of pleas in this connection.

7. The Standard of Judicial Review Unduly in Question

This chapter puts everything studied in the present thesis together in order to determine in a unified manner the compatibility of the whole standard of judicial review in EU competition law with the right to a fair trial of Article 6(1) ECHR. At the outset, I will summarize the opinion of the CJEU on the subject and thereafter I will carry out my own all-encompassing appraisal. A brief normative analysis will follow on the conflict between the right to a fair trial and the decision-making authority of the executive branch. Finally, I will discuss various proposals for reform of the competition law enforcement system in the EU.

7.1. The View of the CJEU

For the sake of completeness, it would be useful to look at what the institution in question, to wit the EU judicature, thinks about the compliance of its standard of review in EU competition law with the right to a fair trial. The Court of Justice has adjudicated on several such submissions in antitrust cases, but it has not had the chance to do the same in a merger dispute.

In relation to challenges against the judicial control in abstracto, the CJEU has been following a consistent approach as *Schindler*, *Kone* and *Telefónica*

demonstrate.[810] Firstly, it relies on the jurisprudence of the ECtHR. Using *Menarini* as benchmark, it recognizes that a judicial body must have the power to examine and quash the decision of the body below on all questions of fact and law. Secondly, it enumerates the powers of the EU judicature. It can review both the law and the facts, check the Commission's interpretation of information of an economic nature, assess the evidence, annul the decision and alter the amount of the fine by substituting its own appraisal for the one of the Commission. Thirdly, the CJEU always concludes that its outlined standard of review satisfies the requirements of Article 47 of the Charter, which corresponds to Article 6(1) ECHR.[811]

As concerns the adequacy of the judicial control in concreto, the EU judges give emphasis on its actual intensity. On many occasions, such as *KME*, *Chalkor* and *Kone*, they have held that the General Court carried out a full and unrestricted review despite its repeated and misleading references to the 'wide discretion' and 'margin of assessment' enjoyed by the Commission in the fixing of fines.[812] On the contrary, in *CB*, it was ruled that the General Court 'erred in law and failed to observe the standard of review required under the case-law'.[813] Nevertheless, no infringement of Article 6(1) ECHR or of Article 47 of the Charter was detected since the appellant had not invoked these provisions.

On the one hand, the general position of the EU judicature on the issue politically comes as no surprise. The only motivation that it could potentially have to

[810] *Schindler*, note 5, paras 35-39; *Kone*, note 5, paras 20-28; *Telefónica*, note 5, para 51-57.

[811] See also the same conclusion in *KME*, note 24, para 106; *Chalkor*, note 25, para 67; *Otis*, note 25, para 63. The CJEU confirmed the compatibility of the judicial review in EU competition directly with Article 6(1) ECHR in *Schindler* (GC), note 373, para 55; *Telefónica*, note 5, para 51-57.

[812] *KME*, para 109; *Chalkor*, para 82; *Kone*, note 5, para 56. See also Case C-382/12 P *MasterCard Inc. and Others v Commission* EU:C:2014:2201, paras 157-158.

[813] *CB*, note 29, para 92.

unblushingly admit its supposed inability to provide a fair trial would be to elicit some form of enhancement on its competences by the EU legislature. That would be too risky and too inconsistent. The CJEU would not want to lose its credibility by suddenly rendering unlawful the fifty-six year old competition enforcement system of the EU.[814] On the other hand, the Court of Justice is not prejudiced or intransigent. As evinced by *CB*, it would not turn a blind eye to legal errors and would reprimand the General Court in case the latter performed an insufficient review at a particular case.

7.2. Determining the Compatibility of the Standard of Judicial Review in EU Competition Law with Article 6(1) ECHR

It all comes down to the underlying question of this thesis: Is the standard of judicial review in EU competition law compatible with the right to a fair trial of Article 6(1) ECHR? For the purpose of providing my own definitive answer, I will assess whether every single one of the relevant requirements stemming from the case law of the ECtHR is fulfilled by the overall control of the General Court and of the Court of Justice with respect to Commission decisions.

7.2.1. The procedural guarantees at the administrative procedure

Before focusing on the EU judicature, it is essential to have a glimpse at the procedure pursuant to which the Commission adopts its competition decisions. In disputes falling under the civil head of Article 6(1) ECHR, the ECtHR normally

[814] See Regulation 17 [1962], note 593.

applies the *Bryan* test.[815] One of the three criteria of the test is the robustness of the procedural guarantees at the administrative stage. If the latter are deficient, the tribunal subsequently handling the case might need to exercise an entirely unlimited review in order to remedy any irregularities compromising the right to a fair trial.

Within the framework of the decision-making process in EU competition law, the undertakings and associations of undertakings concerned are entitled to protect their legal professional privilege, to avoid incriminating themselves, to reply to statements of objections within a reasonable time and to have an oral hearing conducted by an independent third party, namely the Hearing Officer. Moreover, they have the right to bring certain important aspects autonomously before the CJEU, such as disputes over legal professional privilege and decisions requesting information or ordering inspections.[816]

The foregoing safeguards bolster the fairness of the administrative phase and significantly diminish the margin for arbitrariness on the part of the Commission. As a result, the General Court does not need to apply a standard of review more intensive than the one presented right below.

7.2.2. The power of the General Court to examine and quash

For the provision of a fair trial, the ECtHR requires independent and impartial tribunals to possess 'full jurisdiction'. They must be able to examine and quash the act of the lower body on all factual and legal questions[817] including the ones

[815] See *Bryan*, note 271, in Chapter 3.2.3.; *Tsfayo*, note 284, in Chapter 3.2.4.; *Tsanova-Gecheva*, note 293, in Chapter 3.2.5.

[816] See Chapter 2.1.3.

[817] See Chapter 3.1.1. ; Chapter 3.3.1.

pertaining to the assessment of the evidence and proportionality.[818] On the other hand, the ECtHR does not ask for an amendment of the impugned act[819] or for a de novo[820] or an ex officio review.[821]

At the outset, under Article 263 TFEU, the General Court can inspect competition decisions on grounds of: (a) lack of competence, (b) infringement of an essential procedural requirement, (c) infringement of the Treaties or of any rule relating to their application, which comprise inter alia the establishment of the facts and the general principle of proportionality, or (d) misuse of powers. In this connection, it may freely admit and evaluate any lawfully obtained pieces of evidence regardless of whether they were introduced at the administrative phase. Next, under Article 264 TFEU, it can void Commission decisions on each of the four grounds mentioned in Article 263 TFEU. Finally, pursuant to Article 261 TFEU in conjunction with Article 31 of Regulation 1/2003 and Article 16 of the Merger Regulation, it has unlimited jurisdiction with respect to penalties. It can cancel, reduce or increase their amount even by replacing the Commission's appraisal.

What the EU judges cannot do is carry out a review of their own motion, re-investigate the case, alter the administrative findings and give directions to the Commission.[822] None of the above capacities is deemed essential by the ECtHR.

Overall, the inspection and reforming powers of the General Court extend to all factual and legal aspects of an administrative decision in EU competition law and

[818] See *Diennet*, note 231, in Chapter 3.1.2.; *Grande Stevens*, note 192, in Chapter 3.1.2.; *Menarini*, note 3, in pages 82-83.

[819] See *Segame*, note 236, in Chapter 3.1.2.

[820] See Chapter 3.2.3., 3.3.1. and 3.3.2.

[821] See Chapter 3.2.2.

[822] See Chapter 4.1.3.

thus they fully satisfy the conditions set by the Strasbourg jurisprudence. As a matter of fact, they go a step further than those conditions given the ability of the EU courts to modify and not just quash pecuniary sanctions.

7.2.3. The power of the General Court to review discretionary assessments

The ECtHR tailors the minimum acceptable standard of control when a technical or policy-making assessment of the administration comes into play. On the one hand, a domestic judicial body must have jurisdiction to void that appraisal after checking: (a) the adequacy of the reasons provided, (b) the quality of the evidence relied on, (c) the reasonableness of the conclusions reached, and (d) whether the purpose of the law has been violated.[823] On the other hand, it is not compelled to replace the administrative decision.[824]

In EU competition law, the Commission performs technical assessments of a complex economic nature which cannot be substituted by the EU judicature. However, the latter is competent to quash those assessments should it detect an illegality. It may ascertain the existence of specific reasons and the absence of a misuse of powers by virtue of Articles 263 and 296 TFEU. Moreover, since its judgment in *Commission v Tetra Laval*, it has been stating that it can also examine whether the evidence used by the Commission is factually accurate, reliable and consistent, whether it contains all the information that should be taken into account

[823] See *Menarini*, note 3, in pages 81-82; Chapter 3.2.5.

[824] ibid; *Bryan*, note 271, in Chapter 3.2.3.

for appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it.[825]

It turns out that the General Court fulfils all four requirements imposed by Strasbourg for offering a fair trial to undertakings whose rights were adversely affected by a complex economic assessment of the Commission in EU competition law.

7.2.4. The exercise of the powers of the General Court

According to the ECtHR, possessing inspection and annulment powers in theory does not secure the observance of Article 6(1) ECHR. Domestic courts must exercise their powers in practice. They need to thoroughly examine the pleas before them without deferring to the findings of non-judicial authorities and explain their judgments.[826]

The CJEU verifies the 'correctness' and not just the 'reasonableness' of the factual findings of the Commission. It looks very closely at the arguments put forward by the applicants. In its case law, it has reprimanded logical inconsistencies in disputed decisions and more importantly it has substituted the appraisal of the Commission by either attaching to the evidence a lower or higher probative value or by accepting an alternative plausible interpretation of the situation.[827] The intensity of

[825] See Chapter 5.1.2.

[826] See Chapter 3.1.3.

[827] See Chapter 4.2.3.1.

its control does not lower with respect to factual presumptions notwithstanding their high probability of being valid.[828]

Likewise, the EU judicature reviews authoritatively the interpretation and the application of both procedural and substantive EU law. The Commission enjoys absolutely no leeway in that area and its opinion has been set aside in cases where it violated procedural provisions, misconstrued legal concepts and chose erroneous legal standards for evaluating the facts and the evidence.[829] Furthermore, the Court grapples with the validity of EU legislative acts underpinning competition decisions without nonetheless judging their expediency.[830] Lastly, it checks whether the Commission has misused its powers even when the latter has ostensibly abided by all the applicable rules.[831]

Next, the General Court has quashed a decent number of competition decisions due to procedural[832] or substantive[833] errors pertaining to complex economic assessments of the Commission. The Court ascertains the accuracy and the credibility of the evidence adduced by both sides. In addition, it ensures that the Commission has taken into account all the relevant factors for appraising the situation at hand and that it has arrived at conclusions scientifically sound and well-supported by the evidence. In this process, the EU judges do not hesitate to engage with economics and to reflect on interactions between prices, supply and demand. They

[828] See Chapter 4.2.4.1.

[829] See Chapter 4.2.1., 4.2.2. and 4.2.3.3.

[830] See Chapter 4.2.3.4.

[831] See Chapter 4.2.4.

[832] See *European Night Services*, note 425, in Chapter 5.2.2.; *UPS*, note 378, in Chapter 5.2.5.2.; *KPN*, note 389, in Chapter 5.2.5.2.

[833] See *Italian Flat Glass*, note 416, in Chapter 5.2.1.1.; *GlaxoSmithKline*, note 515, in Chapter 5.2.2.; *CEAHR*, note 609, in Chapter 5.2.4.; *Airtours*, note 629, in Chapter 5.2.5.3.; *Schneider I*, note 625, in Chapter 5.2.5.3.; *Tetra Laval*, note 640, in Chapter 5.2.5.3.

adequately justify their judgments irrespective of the outcome. Although there have been a couple of cases in which pleas contesting the substantive legality of a complex economic analysis were not duly examined at first-instance,[834] in my opinion the overall case law demonstrates that those instances are isolated and unfortunate exceptions from the rule.

Finally, the General Court strenuously inspects whether the Commission, in setting fines for competition law violations, has observed every single point of its Guidelines together with the principles of equal treatment and proportionality.[835] The Court has cancelled or reduced hundreds of pecuniary sanctions for the above reasons.[836] It exercises its unlimited jurisdiction not solely on the basis of the administrative rules of practice,[837] but also pursuant to its own independent rationale by substituting the assessment of the Commission on the amount of the penalty even in the absence of an illegality.[838] Nevertheless, it usually prefers to follow the methodology of the Guidelines and to adjust flawed sanctions accordingly.

In the light of all the foregoing, I believe that the EU judicature exercises its inspection and reforming powers in a manner sufficiently effective to comply with the right to a fair trial. Its review of the non-economic facts and the law is entirely unrestrained whereas it condones no errors in the area of complex economic assessments. In relation to fines, it may adhere to the Guidelines of the Commission in most of the cases, but it does not refrain from overruling them when the general principles of EU law or compelling reasons of fairness so necessitate.

[834] See *CB*, note 588; *Intel*, note 591; Chapter 5.2.1.2.

[835] See Chapter 6.2.1. to 6.2.3.

[836] See Chapter 6.4.2.6.

[837] See Chapter 6.2.1.

[838] See Chapter 6.2.4. and 6.2.5.

7.2.5. The exercise of the powers of the Court of Justice

If another tribunal has already applied 'full jurisdiction' in the case at hand, the only thing that the ECtHR demands from an appellate court is to exercise the powers assigned to it, whichever those are.[839]

In EU competition law, the Court of Justice can rule on appeals limited to points of law by virtue of Article 256(1)(b) TFEU and alter the amount of pecuniary sanctions within this framework. It thoroughly examines pleas falling under its jurisdiction and determines authoritatively whether the law has been correctly interpreted and applied. It has cancelled decisions or adjusted many fines for various procedural and substantive reasons, including ones relating to the rights of the defence,[840] the technical application of the Guidelines[841] and the principle of equal treatment.[842] Remarkably, it has also set aside four judgments of the General Court where the latter did not exercise an adequate review of the arguments raised at first instance.[843]

As it transpires, the Court of Justice exercises its restrained powers in EU competition law unrestrainedly and does not whitewash errors in previous administrative or judicial proceedings. Its control therefore complies with Article 6(1) ECHR.

[839] See Chapter 3.1.4.

[840] See *ARBED*, note 507, in Chapter 4.3.2.

[841] See *ADM*, note 772 in Chapter 6.3.1.; *YKK*, note 774, in Chapter 6.3.1.

[842] See *Guardian Industries*, note 772, in Chapter 6.3.2.; *Weig*, note 780, in Chapter 6.3.2.

[843] See *PVC II*, note 413, in Chapter 4.2.3.3.; *CB*, note 29, in Chapter 5.3.2.; *Intel*, note 428, in Chapter 5.3.2.; *Infineon*, note 730, in Chapter 6.3.3.

7.2.6. An overall conclusion on the standard of review of the CJEU

From the preceding analysis, the first element that I feel the need to stress is that the standard of judicial review in EU competition law is not homogenous. Although its scope encompasses every component of a Commission decision, its intensity and reforming capacity fluctuate depending on the component at issue. The depth of the control is exhaustive with respect to the legality of the non-economic facts and the law, limited with respect to the legality of complex economic assessments and unlimited with respect to both the legality and the fairness of penalties. Next, the Court can annul any contested part of a decision, but amend only the pecuniary sanctions contained therein.

Secondly, I believe that it has been made abundantly clear that the afore-described compartmentalized standard of first-instance review perfectly fits with the requirements set by the case law of the ECtHR on the right to a fair trial. This well-established finding does not mean that there have not been or that there will not be ad hoc exceptions from the rule. On such rare occasions, the Court of Justice steps in and fixes the problem whenever it is given the chance by the appellant. Given that the Strasbourg Court may deal with the sufficiency of the performed judicial review solely after all the domestic remedies have been exhausted, the EU and its competition enforcement system always manage to save face and avoid a 'manifestly deficient' protection of rights that can potentially lead to a humiliating rebuttal of the *Bosphorus* presumption.[844]

In the light of the above, I can unequivocally conclude that the standard of judicial review in EU competition law is compatible with Article 6(1) ECHR.

[844] See Chapter 1.2.

7.3 A Normative Evaluation of the Right to a Fair Trial

It is time to transcend the bounds of Strasbourg jurisprudence and reflect on the right to a fair trial from a normative perspective. On the one side, we have the person adversely affected by an administrative decision. She resorts to a court hoping to get justice. She wants every factual, legal and political aspect of the dispute to be determined unrestrainedly by an independent and impartial body because she reasonably believes that that body will provide the fairest possible solution to her case. On the other side, we have the administrative agency that adopts the decision. It requires the largest possible leeway in order to exercise its delegated authority in accordance with its own objectives and rationale. It does not want to see its role being duplicated or usurped by a court.

Consequently, the right to a fair trial collides with the policy-making power of the executive branch. Given that every single political decision may potentially impinge on the vested interests of natural and legal persons, courts find themselves in a predicament. How far will they go to protect a given right?

Trevor Allan maintains that when questions of law are closely bound with political choice, 'judicial review secures its legitimacy by avoiding substitution of judgment'.[845] In a similar vein, Chief Justice John Roberts of the US Supreme Court stated in *Obamacare* that judges 'do not consider whether the Act embodies sound policies. That judgment is entrusted to the Nation's elected leaders'.[846] In certain areas, the courts are not entitled to intervene with the aim of giving precedence to one

[845] Trevor R.S. Allan, 'Judicial deference and judicial review: legal doctrine and legal theory' (2011) 127 Law Quarterly Review 96, 97.

[846] *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012).

interest over another because they do not have the legitimacy to overrule the opinion of the democratically elected or delegated institution. For example, it is for the parliament to decide whether wage cuts or tax increases constitute the most appropriate means for addressing a budget deficit.

The foregoing points apply, mutatis mutandis, in EU competition law. The EU legislature has conferred an executive role to the Commission. The latter has the discretion to set enforcement priorities and choose its preferable economic method for assessing complex economic situations. The CJEU has not been granted jurisdiction to substitute those decisions. Its role is to ensure the observance of the law and not to dictate policy. Is the right to a fair trial truly injured by that limitation?

As long as the EU judicature is enabled to check that all the legal provisions have been abided by, the only potential shortcoming for the undertakings concerned is that the technical and the policy-making assessments in EU competition law are performed in line with the specific criteria of the College of Commissioners and not the ones of the EU judges. Even if there exists a latent bias in the former criteria, the victim may challenge the adverse measure on grounds of misuse of powers. Thereby, although the burden of proof falls upon the applicant, the EU judicature can always provide a fair trial by having the last word even on malevolent choices that the Commission has marketed as technical or policy ones.

7.4. Proposals for Reform in the Enforcement System of EU Competition Law

The established compatibility of the standard of judicial review in EU competition law with Article 6(1) ECHR does not mean that there is no room for improvement in the current enforcement system at the direction of further enhancing the right to a fair hearing of the undertakings concerned. Hence, I need to reflect on the pros and cons of certain proposals for reform concerning either the administrative or the judicial stage. The following analysis excludes suggestions requiring a Treaty amendment in view of the very low probability of success of such prospect.

7.4.1. Potential reforms at the administrative stage

It has been previously explained that the combination of the investigative, the prosecutorial and the adjudicative function by the Commission is capable of giving rise to confirmation, hindsight and enforcement bias and thus leading to the finding of infringements and the obstruction of concentrations.[847] Potential solutions must primarily aim at addressing this problem which affects the independence and impartiality of the entire administrative procedure.

An interesting option would be to strengthen the status and the role of the two Hearing Officers who are independent officials attached to the Commissioner for Competition and who are responsible for safeguarding the procedural rights of the parties at the administrative stage.[848] To start with, their tenure could become fixed

[847] See Chapter 2.3.1.

[848] See Chapter 2.1.2.

and protected from early termination save where an organ extraneous to the Commission consents. Next, Terry Calvani and Jenny Leahy argue that each of the Hearing Officers should be enabled to conduct a full oral hearing of the opposing sides, assess all substantive matters of the case and issue a non-binding report with his conclusions.[849] Or more radically he or she could be offered the right to veto fining measures and prohibitions of notified concentrations or have his or her objections overruled solely by a qualified majority of the College of Commissioners.

The empowerment of the position of the Hearing Officer would introduce an institutional counterweight against the College of Commissioners and would enhance the impartiality of the decision-making process. However, it would also entail a time consuming duplication of tasks within the same institution whereas a veto right would grant excessive power on a single individual to the detriment of the principle of collegiality governing the functioning of the Commission.[850] If one wants a completely independent and impartial entity to be crucially involved in the decision-making process, I believe that the most clean and effective path forward would be to empower the CJEU and not to try to tinker the situation through the Hearing Officer.[851]

Next, Arianna Andreangeli mentions the possibility of creating an autonomous body analogous to the European Anti-Fraud Office (OLAF) that would be entrusted with investigating and prosecuting competition cases with its own

[849] Terry Calvani and Jenny Leahy, 'A larger role for the hearing officer: a modest proposal' (2018) 6 Journal of Antitrust Enforcement 213, 227-230. See, in the same vein, Jaime Flattery, 'Balancing Efficiency and Justice in the EU Competition Law: Elements of Procedural Fairness and their Impact on the Right to a Fair Hearing' (2010) 7 The Competition Law Review 53, 79.

[850] For the principle of collegiality, see Article 17(6) TEU; Case C-198/97 *Commission v Germany* [1999] ECR I-3257, para 19; Case C-1/00 *Commission v France* [2001] ECR I-4219, para 79; Case T-457/09 *Westfälisch-Lippischer Sparkassen- und Giroverband v Commission* EU:T:2014:683, paras 154-155.

[851] See Chapter 7.4.2.

agents.[852] Its director would be appointed by the Commission for a fixed term after recommendation by an independent committee and after consultation with other EU institutions as the European Parliament. The decisions would be prepared by the Directorate General for Competition of the Commission.

The above change would eradicate most elements of confirmation and hindsight bias. The decision-making unit would not feel compelled to justify the suspicions and the effort of the separate investigative unit. On the other hand, Article 105(1) TFEU does not allow the investigation of antitrust offences by an organ other than the Commission.[853] Furthermore, it would be very hard for the Commission to dictate the competition policy of the EU if it were not able to guide and supervise the agents investigating and prosecuting the cases. Lastly, there would be an increase in the duration of the administrative phase. The DG Comp would require extra time to become acquainted with the background of each case, including the findings of the autonomous body that would have already carried out the investigation and the prosecution.

Finally, Bruno Nascimbene puts forward the proposal of improving the internal checks and balances within the Commission by rigidly separating the officials charged with investigative and prosecutorial duties from those who prepare the decision.[854] In merger control, this could be done by assigning Phase I and Phase II investigations to different agents of the DG Comp.

[852] Arianna Andreangeli, 'Toward an EU Competition Court: "Article-6-Proofing" Antitrust Proceedings before the Commission?' (2007) 30 World Competition 595, 617-620.

[853] Scordamaglia-Tousis, note 194, 105.

[854] Bruno Nascimbene, 'Fair Trial and the Rights of the Defence in Antitrust Proceedings before the Commission: A Need for Reform?' (2013) 38 EL Rev 573, 580-581.

The present solution is the one that I prefer. Although the investigative and the decision-making units of the DG Comp would remain under the supervision of the same Commissioner and the Commission as a whole would still need to show high enforcement activity by detecting infringements and obstructing concentrations,[855] a second, thorough level of examination would be added in antitrust and merger disputes with the least possible costs. This would reduce the likelihood of arbitrariness and errors on the part of the Commission and as a result it would bolster the integrity of the administrative procedure to the benefit of the undertakings involved.

7.4.2. Potential reforms at the judicial stage

Suggestions for reform pertaining to the judicial stage principally aim at rendering the EU judicature more powerful or more qualified in the examination of complex economic assessments in EU competition law.

Firstly, the simplest path forward is the one advocated by Damien Gerard who urges the General Court to start interpreting Article 261 TFEU in a broad manner.[856] Unlimited jurisdiction would be exercised on every component of a Commission decision imposing a fine and not just on the amount of the fine. The EU judges would not decline to alter the impugned administrative findings and substitute the complex economic assessments of the Commission.

Article 261 TFEU stipulates that certain regulations may give the CJEU 'unlimited jurisdiction with regard to the penalties provided for in such regulations'.

[855] See Wils, 'The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function', note 181, 219.

[856] Gerard, 'EU Antitrust Enforcement in 2025', note 416, 7-8.

The above provision is solely concerned with the penalties and does not make any reference to the acts containing the penalties. Its wording cannot therefore be reasonably construed as conferring to the EU judicature a power which in no way intended to confer. It should be clarified that a broad interpretation of Article 261 TFEU would just affect fining measures and would not enable the Court to replace complex economic appraisals in plain infringement or commitments or complaint or merger decisions.

Secondly, Bo Versterdorf has formulated the option of establishing a specialized competition tribunal by virtue of Article 257 TFEU.[857] It would rule on all first-instance actions against the decisions of the Commission within the field of competition law. The General Court would only adjudicate on appeals and the Court of Justice on exceptional appeals as stated by Article 256(2) TFEU.

The creation of a specialized competition tribunal would afford room to the Council to demand an adequate command of economics for appointment to judicial office under Article 257(4) TFEU.[858] Such technical expertise would allow the judges to scrutinize the complex economic assessments of the Commission more effectively and more quickly. The affected entities would benefit from three levels of jurisdiction as well. On the other hand, without a Treaty amendment, the reviewing powers of the envisaged tribunal would have to remain the same as those of the General Court. Besides, one of the reasons for establishing the latter court was to address the increasing number of complex competition cases. Why waste resources in a new competition tribunal when there is already one? Lastly, the EU legislature is not keen

[857] Vesterdorf, 'Judicial Review in EC Competition Law', note 195, 25.

[858] Article 257(4) TFEU stipulates that the members of the specialized courts should 'possess the ability required for appointment to judicial office'. In the specific context of a specialized competition tribunal, such ability could be construed as including an adequate command of economics.

on specialized judicial organs. It abolished the only one in 2016[859] and chose to expedite delivery of justice by doubling the members of the General Court instead of instituting separate tribunals here and there.[860]

Thirdly, Bo Vesterdorf has referred to the solution of introducing within the General Court one or more specialized chambers whose three or five members would only adjudicate on competition disputes.[861]

The present suggestion is very easy to implement. It would improve the economic skills of the competent judges due to the frequent handling of complex cases and would possibly shorten the duration of the judicial phase. However, a specialized competition chamber would be overused or underused depending on the specific number of pending cases at a given time[862] whereas it would significantly restrain the diversity of opinion existing within the General Court on competition issues.

Fourthly, Donald Slater, Sebastien Thomas and Denis Waelbroeck support the modification of Regulation 1/2003 in order to grant the CJEU decisional authority on the application of Articles 101 and 102 TFEU.[863] The Commission would investigate and prosecute suspected infringements and the General Court would adopt ab initio the decisions and the fines. Indeed, Article 103(2)(d) TFEU permits the Council, on a proposal from the Commission and after consulting the European Parliament, to

[859] See the abolition of the Civil Service Tribunal by Regulation (EU, Euratom) 2016/1192 of the European Parliament and of the Council of 6 July 2016 on the transfer to the General Court of jurisdiction at first instance in disputes between the European Union and its servants [2015] OJ L200/137.

[860] Regulation 2015/2422, note 358, recitals 1 and 6 and Article 1(2).

[861] Vesterdorf, 'Judicial Review in EC Competition Law', note 195, 25-26.

[862] ibid, 26.

[863] Slater, Thomas and Waelbroeck, note 161, 142-143. See also Nascimbene, note 854, 582.

implement the reform. As it transpires from Article 105(1) TFEU and the other Treaty provisions, only the investigative and prosecutorial functions are indissociable from the Commission. In essence, the EU would acquire an antitrust enforcement system resembling the one of the United States where a government agency brings the charges and a district court finds the violations and imposes the penalties.[864]

From the four outlined changes, I believe that only the last one is capable of solving more problems than it would cause. Despite the concomitant prolongation of the judicial procedure and the rise in the caseload of the General Court, the ability of an independent and impartial tribunal to determine antitrust disputes de novo would neutralize the (limited) discretion of the Commission. It would thereby dispel any lingering doubt about the sufficiency of the protection of the right to a fair trial in EU competition law. Furthermore, it would eliminate the administrative costs and the uncertainty caused by the Commission's competence to re-adopt annulled decisions in cases where the CJEU did not exercise its unlimited jurisdiction.[865] Nevertheless, I ought to acknowledge that overturning a system which has been working effectively since the very early years of the European Economic Community does not constitute a pressing need.[866]

Extending the last-mentioned reform to merger control would not be advisable. It would generate a duplication of tasks between the Commission and the CJEU that would remove the indispensable swiftness of the current optimal procedure.

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[864] See Wils, 'The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function', note 181, 205; Scordamaglia-Tousis, note 194, 100-101.

[865] ibid, 222. For examples of re-adopted decisions, see *PVC II* (GC), note 402; *Toshiba II*, note 676; *Mitsubishi II*, note 581.

[866] See Regulation 17 [1962], note 593.

Seven modifications concerning the competition law enforcement system in the EU were debated in this subchapter. I have explained that the disadvantages outweigh the advantages for five them, namely the empowerment of the Hearing Officers, the creation of an investigative agency autonomous from the Commission, the broadening of the scope of Article 261 TFEU by the EU judicature, the establishment of a specialized competition tribunal and the introduction of specialized competition chambers within the General Court. Endowing the CJEU with decisional authority would increase the already satisfactory safeguards it affords to the right to a fair trial, but I am not sure that a change of such enormous magnitude would be worth the risk. The rigid separation of the Commission officials investigating and prosecuting a case from the ones drafting the final decision is the only reform that I unreservedly support due to its capacity to strengthen the impartiality of the administrative competition proceedings without any material repercussions.

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