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THE STANDARD OF JUDICIAL REVIEW IN EU  
COMPETITION CASES:  
THE POSSIBILITY OF INTRODUCING A SYSTEM  
OF MORE INTENSE OR FULL JUDICIAL REVIEW BY  
THE EU COURTS

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*To my family (old and new)*



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## ABBREVIATIONS

CMLR	Common Market Law Review (journal)
CPI	Competition Policy International (journal)
ECLR	European Competition Law Review (journal)
ECR	European Competition Reports of the European Union
EHRLR	European Human Rights Law Review (journal)
ELR	European Law Review (journal)
GCP	Global Competition Policy (journal)
Giur. Comm.	Giurisprudenza Commerciale (journal)
GU	Gazzetta Ufficiale della Repubblica Italiana
OJ	EU Official Journal of the European Union
RTD Eur.	Revue Trimestrielle de Droit Européen (journal)



## INTRODUCTION

The notion ‘standard of judicial review’ is used to indicate the intensity with which a court will review an act or measure brought to its attention on appeal or, conversely, how large a margin of discretion is left to the decision-making authority. In the competition field, in the exercise of their judicial function, the EU Courts<sup>1</sup> apply different standards of review depending on the nature of the assessments they are called upon to evaluate.

Articles 261 and 263 of the Treaty on the Functioning of the EU (hereinafter “TFEU”) contain the general discipline on actions for annulment and unlimited jurisdiction in relation to fines which finds application also in the competition field. The first provision enables the granting of unlimited jurisdiction to the European Courts with regards to the determination of penalties. This power finds further specification in the antitrust field in Article 31 of Regulation 1/2003 and in the merger field in Article 16 of the EU Merger Regulation, in relation to fines and periodic penalty payments. It entails that EU Courts can cancel, reduce or increase fines imposed by the Commission and in doing so they can substitute their own assessment for that of the Commission. Conversely, having regard to the review of the Commission’s substantial findings, Article 263 TFEU allows the European Courts to review only the legality of the measure adopted, *i.e.* the EU Courts are only able to annul an act on the basis of specific grounds of appeal and to refer the case to the Commission for re-examination, without, however, having the power to examine the merits or the opportunity of the measure. Consequently, the Courts cannot substitute with their own assessment the economic and legal appraisal contained in the decision.

Over the years, in the exercise of their judicial review powers in the competition field, and in the absence of express indications in the EU Treaties, the EU Courts have progressively clarified the intensity with which they would subject to review the

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<sup>1</sup> In the following pages the expression “EU Courts” or “European Courts” will be used to identify the EU General Court and the European Court of Justice (formerly Court of First Instance and the Court of Justice of the European Communities), while the expression “Court” will be used for both judicial organs, where appropriate.

Commission's assessments. The standards of review applied thus vary depending on the nature of the findings under consideration. When it is alleged that the Commission committed an error in the statement of the facts at issue or in the interpretation of Articles 101 and 102 TFEU<sup>2</sup> or of the EU Merger Regulation, the EU Courts will exercise a comprehensive review of the decision, namely a careful and exhaustive examination of findings of fact (except for appeals on points of law only to the Court of Justice) and of the assessment of whether the Treaty rules and secondary legislation have been complied with. By contrast, when applicants seek to challenge complex economic assessments and/or complex technical appraisals made by the Commission, the power of judicial control exercised by the EU Courts is less intense. In these cases, the EU Courts confine themselves to verifying whether the relevant procedural rules have been complied with, whether the statement of the 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. Moreover, in reviewing the Commission's interpretation of information of an economic nature, the EU Courts will limit their control to establishing whether the evidence relied on is factually accurate, reliable and consistent, whether that 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. This is known as the so-called 'manifest error' or 'limited' judicial review standard.

This practice of the EU Courts of subjecting to less intense scrutiny complex economic and/or technical assessments undertaken by the Commission has generated over the past years an intense debate as to whether the existing system of judicial review in the competition field is effective and comprehensive, thus requiring no further changes, or rather whether the system should and could be improved by increasing the EU Courts' powers of control.

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<sup>2</sup> With effect from 1 December 2009, Articles 81 and 82 of the Treaty establishing the European Community (the "EC Treaty") have become Articles 101 and 102, respectively, of the TFEU. The two sets of provisions are in substance identical. For the purposes of this work, references to Articles 101 and 102 of the TFEU should be understood as references, respectively, to Articles 81 and 82 of the EC Treaty and, before them, to Articles 85 and 86 of the Treaty establishing the European Economic Community (the "EEC Treaty"). The TFEU also introduced certain changes in terminology, such as the replacement of "Community" by "Union" and "common market" by "internal market". The terminology of the TFEU will be used throughout this work.

Against this background, the present work intends to analyse the characteristics of the 'limited' standard of review in the competition field, its evolution over time, and the main criticisms which have been advanced against its alleged shortcomings, in order to understand whether a system of more intense or full judicial review is necessary and warranted. Part of the analysis will also focus on attempting to understand whether the current EU constitutional framework and the EU Courts, respectively, already provide or have the necessary legal instruments and powers that allow for the introduction of such a system. The various proposals advanced advocating concrete changes will also be presented with a view to ascertaining their plausibility and concrete chances of success in the near future.

Chapter 1 of this work has a descriptive intent: Section I presents the legal framework concerning judicial review of competition decisions. This Section is dedicated to the analysis of the relevant legal provisions that represent the legal basis of the current system of judicial review and illustrates the general approach of the EU Courts to judicial review in the competition field. Particular emphasis is placed here on the standards of review that are typically applied by the EU Courts when carrying out their judicial function, with a special focus on the origins of the 'limited' judicial review standard and on the complex issues which arise from the difficulties inherent in identifying the concrete circumstances that trigger the application of this standard. Section II of the Chapter is dedicated to the presentation of the terms of the debate on the intensity and scope of the EU Courts' powers of review. The arguments that have been developed for and against the introduction of a system of more intense or full judicial control by the EU Courts will be illustrated and the level of dissatisfaction that in certain instances the present system has reached will be analysed and its merits reviewed. Considerable attention is also given to the increased relevance of fundamental rights in the EU framework since the entry into force of the Lisbon Treaty, and to the consequences this may have for the debate on the compatibility of the 'limited' judicial review standard with the right to a fair trial enshrined in both the Charter of Fundamental Rights of the European Union and the European Convention for the protection of human rights and fundamental freedoms. In this context the European Court of Human Rights' *Menarini* judgment and the EFTA Court's *Posten*

*Norge* judgment will be analysed, together with their implications for the system of EU judicial review in the competition field.

Chapter 2 is dedicated to the analysis of the case law in the fields of Articles 101 and 102 TFEU, in order to examine under a closer lense the intensity with which the EU Courts are willing to scrutinize and review complex economic and/or technical matters. This is done in a historical perspective in order to understand which factors, internal or external to the EU system, have contributed to stimulate changes in the intensity of the control exercised by EU judges or have led the latter to expand the realm of application of the ‘limited’ review standard. As will emerge from the analysis of the case law, the EU Courts initially elaborated and applied the ‘manifest error’ standard only in relation to cases decided under Article 85 of the Treaty establishing the European Economic Community (hereinafter “EEC”, later Article 81 of the EC Treaty, now Article 101 TFEU). Over the years, the EU Courts progressively expanded the use of the manifest error test by applying it to new domains. The EU Courts did not only expand the use of this standard to new heads of Article 101 TFEU and to abuse of dominance cases under Article 102 TFEU, but also intervened to increase the categories of assessments that could be caught by this test and thus be subject to more limited review (for example, an expansion occurred to cover not only ‘complex economic’ but also ‘complex technical’ assessments). More recently, with the entry into force of the Lisbon Treaty and the increased relevance of fundamental rights in the EU framework, the case law in the competition field has become more attentive to discussions on the ‘criminal’ nature of antitrust sanctions, the compatibility of the ‘limited’ judicial review standard with the right to a fair trial, and, in particular, on the consequences this may have for the required intensity of judicial review. In this context the 2011 *KME* and *Chalkor* judgments, representing the first rulings in which the Court of Justice openly adopts a position in relation to the compatibility of the current system of judicial review of competition decisions with the fundamental right to a fair trial, will be critically analysed. The last part of the Chapter explores the more recent case law in order to understand the extent to which the EU Courts continue to consider the existence of the limited judicial review standard not only legitimate but also fully compatible with the right to a fair trial.

In Chapter 3 the relevant case law on the standard of review in EU merger control cases will be analysed. Due to the specific characteristics of these proceedings, which leads to differentiate them from antitrust cases, here the standard of review used by the EU Courts has evolved in ways which deserve autonomous consideration. Three phases can be identified in the merger field: (i) the early cases in which the EU Courts had a more ‘hands-off’ approach and were particularly respectful of the Commission’s margin of appreciation in the case of complex economic and/or technical appraisals; (ii) the so-called ‘merger revolution’ or ‘watershed cases’ that occurred in 2002, year in which the EU Courts annulled three distinct merger prohibition decisions and started to scrutinize intensely the Commission’s assessments; and (iii) the more recent cases in which the EU Courts have consolidated their more dynamic approach to the review of merger decisions.

From the analysis of the case law in both Chapters 2 and 3 various lessons will be derived. In the first place, the lack of guidelines on the application of the ‘limited’ standard of review has given the EU Courts the opportunity to clarify the degree of review that they should undertake, endorsing the view that the standard of review is a product of interpretation of the EU Courts which has evolved over time and could be modified by the EU Courts themselves.

Another lesson that can be derived from the various judgments examined is that complex decisions involving in-depth economic analysis could be assessed by the EU Courts, as the latter have shown their ability to adequately engage in particularly intense judicial scrutiny of intricate cases.

On the other hand, under the ‘limited’ judicial review standard, the EU Courts have been able to shield the Commission’s decisions, in both the antitrust and merger field, from comprehensive review which, if it had effectively taken place, could have allegedly led to different conclusions and outcomes than those reached by the Commission. The existence of the ‘limited’ judicial review standard entails that once the Commission has exercised its discretionary margin of appreciation and opted for one assessment, when the factual and evidential situation of a case allows for a number of equally plausible ones, the EU Courts refrain from substituting their own appreciation for that of the Commission. The most contentious aspect of the existence of the ‘limited’ review standard remains the

circumstance that while the EU Courts may annul a decision when the Commission has committed a manifest error that calls into question the validity of the conclusions reached, in the absence of a manifest error, EU judges refrain from overturning the decision when the Commission's assessment was reasonable and plausible in the circumstances, even if the same evidence might have led to different conclusions depending on the methodology used in interpreting it.

Finally, Chapter 4 is dedicated to the analysis of the proposals that have been made to reform the current system of judicial review in competition cases and that may lead to change and affect in the future the intensity with which EU judges review cases. A number of proposals entail structural changes to the current system while others could be implemented without impacting the general EU architecture in competition cases. An attempt will be made to understand the likelihood that institutional changes may be implemented considering the positive or negative views accompanying them. As to those proposals that are essentially centred on the EU Courts' willingness to intensify the judicial review they carry out, an attempt will be made to understand the likelihood that judicial control may effectively become more intense in the future and, if so, which areas of competition law are likely to be interested by this change. On the basis of the case law findings made in Chapter 2 and 3, estimates will be made of whether and how and in which fields it is most plausible that future changes will occur and conclusions will be drawn on the plausibility of the different theories that advocate for particular changes in the scope and intensity of the review carried out by the EU Courts.



**CHAPTER**

**1**

**THE LEGAL FRAMEWORK, HISTORY AND TERMS OF  
THE DEBATE CONCERNING THE INTRODUCTION OF  
A SYSTEM OF MORE INTENSE OR FULL JUDICIAL  
REVIEW BY THE EU COURTS IN COMPETITION CASES**



## SECTION I: THE LEGAL FRAMEWORK

### 1. RELEVANT LEGAL PROVISIONS

The jurisdiction of the EU Courts to review the Commission's decisions in the competition field stems directly from the Treaties. According to Article 19 of the Treaty on the European Union ("TEU") "[t]he Court of Justice of the European Union shall include the General Court and specialized courts. It shall ensure that in the interpretation of the Treaties the law is observed". In the field of competition law, the EU Courts can achieve this objective primarily through the review of Commission's decisions under Article 263 TFEU, as well as under Article 261 TFEU in respect to fines.<sup>3</sup>

#### *1.1 Review of legality*

The jurisdiction exercised by the EU Courts in the framework of annulment decisions under Article 263 TFEU is considered a review of legality. Under this provision EU judges are called upon to decide whether the act of the institution under examination is legal or

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<sup>3</sup> Most studies relating to actions for annulment are general researches that don't focus specifically on competition law, however, a number of authors do focus their analysis on the competition field; *see, inter alia*, BELLAMY&CHILD, *European Union Law of Competition*, edited by ROTH P., ROSE V., 7<sup>th</sup> edition, Oxford University Press, 2013; ORTIZ BLANCO L., *EU Competition Procedure*, 3d ed., Clarendon Press – Oxford, 2013; KHAN N., *EC Antitrust Procedure*, 6<sup>th</sup> ed., Thomson – Sweet & Maxwell, 2012; GERADIN D., PETIT N., *Judicial Remedies Under EC Competition Law: Complex Issues Arising from the Modernization Process*, Fordham Corporate Law, 2005; available at SSRN: <http://ssrn.com/abstract=877967>. On Article 261 TFEU *see* GERADIN D., *The EU Competition Law Fining System: A Reassessment*, October 2011, TILEC Discussion Paper No. 2011-052, available at SSRN: <http://ssrn.com/abstract=1937582> or <http://dx.doi.org/10.2139/ssrn.1937582>; VESTERDORF B., *The Court of Justice and Unlimited Jurisdiction. What Does it Mean in Practice?*, (30 June 2009) Global Competition Policy, available at [globalcompetitionpolicy.com](http://globalcompetitionpolicy.com); VESTERDORF B., *The General Court's Unlimited Jurisdiction Over Fines*, in *The Role of the Court of Justice of the European Union in Competition Law Cases*, GCLC Annual Conferences Series (edited by MEROLA M. and DERENNE J.) Bruylant, 2010, pp. 139-145; FORRESTER I., *A Challenge for Europe's Judges: The Review of Fines in Competition Cases*, in *The Role of the Court of Justice of the European Union in Competition Law Cases*, GCLC Annual Conferences Series (edited by MEROLA M. and DERENNE J.) Bruylant, 2010, pp. 147-191; BARBIER DE LA SERRE E., *Unlimited jurisdiction: the end of a misnomer?*, in *Kluwer Competition Law Blog*, 12 September 2011; BARBIER DE LA SERRE E., WINCKLER C., *A Landmark Year for the Law on Fines Imposed in EU Competition Proceedings*, *Journal of European Competition Law and Practice*, 2012, Vol. 3, No. 4; BARBIER DE LA SERRE E., WINCKLER C., *A Survey of Legal Issues Regarding Fines Imposed in EU Competition Proceedings (2010)*, *Journal of European Competition Law & Practice*, 2011, Vol. 2, No. 4.

illegal. This system of *a posteriori* control is considered to have been inspired by the judicial systems of the Member States, in particular the French administrative system.<sup>4</sup>

According to Article 263(1) TFEU:

*‘[t]he Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis à vis third parties. It shall review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis à vis third parties.’*

Article 263(2) TFEU also states that:

*‘[i]t shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.’*

Under its current formulation, Article 263 TFEU gives the EU Courts jurisdiction to review the legality of acts adopted by the institutions, including the Commission. The EU Courts can only annul these acts on the grounds provided for by Article 263(2) TFEU<sup>5</sup> and, in case of annulment, the Commission has the obligation to draw the legal consequences of the Courts annulment decision. In this regard, according to Article 266 TFEU, *‘[t]he institution whose act has been declared void or whose failure to act has been declared contrary to the Treaties shall be required to take the necessary measures to comply with the judgment of the Court of Justice of the European Union’*. It stems from the combined reading of Articles 263 and 266 TFEU that the EU Courts can only annul the Commission’s decision and cannot substitute their own decision for that of the Commission.<sup>6</sup> The EU Courts therefore are not called

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<sup>4</sup> See DERENNE J., *The Scope of Judicial Review in EU Economic Cases*, in *The Role of the Court of Justice of the European Union in Competition Law Cases*, GCLC Annual Conferences Series (edited by MEROLA M. and DERENNE J.) Bruylant, 2010, pp. 74-75. It is considered that most of the concepts of judicial review in the original Treaties trace their origins back to French administrative law and the wider continental European legal tradition. This is also due to the circumstance that in the 1950s, at the time when the original Treaties were drafted, none of the Member States were common law jurisdictions; see MACGREGOR A., GECIC B., *Due Process in EU Competition Cases*, in *Journal of European Competition Law & Practice*, 2012, Vol. 3, No. 5, footnote 65.

<sup>5</sup> Article 263 TFEU indicates limited grounds of review of how a decision has been adopted which do not include a review of the merits of the decision itself. A distinction is usually made between the “external” and “internal” legality of an act. The external legality can be challenged for lack of competence or an infringement of an essential procedural requirement, while the internal legality of an act can be challenged on the basis of an error of law or a misuse of powers.

<sup>6</sup> From the point of view of legal terminology, the term ‘appeal’ indicates the exercise of judicial review by courts which can lead to overturning the measure under examination and the replacement of their own

upon to agree or disagree on the opportunity of the decision challenged and do not have the power to reform or modify the measure nor to adopt a new one.<sup>7</sup> The Commission however is under an obligation to draw the relevant legal conclusions and consequences in case of annulment of one of its acts.

## ***1.2 Unlimited jurisdiction in relation to fines***

According to Article 261 TFEU: ‘[r]egulations adopted jointly by the European Parliament and the Council, and by the Council, pursuant to the provision of the Treaties, may give the Court of Justice of the European Union unlimited jurisdiction with regard to the penalties provided for in such regulations’. This possibility of granting unlimited jurisdiction to the EU Courts has been introduced in the antitrust and merger field. In the antitrust field, Article 31 of Council Regulation 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 (“Regulation 1/2003”)<sup>8</sup> states that ‘[t]he 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 payment imposed’. In the merger field, Article 16 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the “EU Merger Regulation”) states that ‘[t]he 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 payments; it may cancel, reduce or increase the fine or periodic penalty payment imposed’.<sup>9</sup>

The TFEU does not define unlimited jurisdiction. In practice, it means that the EU Courts can cancel, reduce, or increase fines imposed by the Commission and in doing so they can substitute their own assessment for that of the Commission.<sup>10</sup> In other terms, the

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findings for those of the decision-maker (also referred to as ‘full appellate review’ or ‘full appellate jurisdiction’). The characteristics of the review of legality and the limited powers EU judges exercise in the framework of an action for annulment under Article 263 TFEU have led to consider the use of the notion of ‘appeal’ for applications made to the EU Courts under this provision a misnomer; see DERENNE J., *The Scope of Judicial Review in EU Economic Cases*, in *The Role of the Court of Justice of the European Union in Competition Law Cases*, GCLC Annual Conferences Series (edited by MEROLA M. and DERENNE J.) Bruylant, 2010, p. 76. In this work the term “appeal” will be used in the more widespread sense to indicate any application made to the EU Courts.

<sup>7</sup> The EU Courts are not entitled to uphold a contested act as this might be annulled in different proceedings based on different grounds.

<sup>8</sup> In OJ [2003] L1/1.

<sup>9</sup> In OJ [2004] L24/1.

<sup>10</sup> Over the years, a scholarly debate has developed concerning the scope of application of the EU Courts’ unlimited jurisdiction. The controversy finds its origin in the conflicting wording used in Article 261 TFEU and Article 31 of Regulation 1/2003. While Article 261 TFEU refers to ‘*unlimited jurisdiction with regard to the*

EU Courts are empowered not only to control the legality of the fines imposed but also to second-guess the Commission's policy and/or opportunity decisions when fixing the amount of the sanction, this regardless of whether or not the Commission has made any error of fact/law or any manifest error of assessment.

### ***1.3 The early case law on judicial review of competition decisions***

The combined reading of Articles 263 and 266 TFEU indicates that the EU Courts cannot substitute their own decision for that of the Commission. However, these provisions remain silent as to the standard and intensity of the review of legality which must be carried out. In the earlier case law, when interpreting these provisions, the EU Courts accepted the view that there was a need to respect an inter-institutional balance where the Commission and the Courts focused on their respective primary functions: competition policy and enforcement on the one hand and judicial review on the other. According to this case-law:

*'although a Community Court may, as part of the judicial review of the acts of the Community administration, partially annul a Commission decision in the field of competition, that does not mean that it has jurisdiction to remake the contested decision [...and] the Court considers that it*

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*penalties provided*, Article 31 of Regulation 1/2003 refers to 'unlimited jurisdiction to review decisions'. This different wording has led a number of scholars to argue that unlimited jurisdiction can be or should be exercised in relation to the whole decision imposing a fine; see, *inter alia*, FORRESTER I., *A Bush in Need of Pruning: The Luxuriant Growth of Light Judicial Review*, European University Institute, Robert Schuman Centre for Advanced Studies, EU Competition Law and Policy Workshop/Proceedings, 2009, pp. 38-40. Forrester contends that 'it is too cautious to hold that the European Courts have unlimited jurisdiction only over the level of the fine in antitrust cases. The CFI has, should have, and should exercise, the broadest possible scope of judicial review under Article 229 EC in antitrust cases' (p. 39). See also GERARD D., *EU Antitrust Enforcement in 2025: Why wait? Full Appellate Jurisdiction, Now*, in CPI Antitrust Journal, December 2010, p. 7: 'the case law settled in favor of the narrow solution...time has come, it is argued, to reverse the trend and to interpret the EU Courts' unlimited jurisdiction as applying to the review of the decisions whereby the Commission imposes fines, i.e., full appellate jurisdiction'. See always GERARD D., *EU Cartel Law and the Shaking Foundations of Judicial Review (10 July 2010)*, available at SSRN: <http://ssrn.com/abstract=1675451> or <http://dx.doi.org/10.2139/ssrn.1675451>. While the GC has not yet expressed itself clearly on this point, the ECJ in the *Prym* judgment (Case C-534/07 P *Prym and Prym Consumer v Commission* [2009] ECR I-7415, para 86) seems to express the view that the exercise of unlimited jurisdiction is not limited to the sole amount of the fine: 'the unlimited jurisdiction conferred on the [General Court] by Article 31 of Regulation 1/2003 in accordance with Article [261 TFEU] authorizes the court to vary the contested measure, even without annulling it, by taking into account all of the factual circumstances, so as to amend, for example, the amount of the fine'. As indicated by the President of the GC Mr. Jaeger: 'the Court of Justice seems to consider that the contested measure can be amended but not only as regards the amount of the fine'; JAEGER M., *Standard of Review in Competition Cases: Can the General Court Increase Coherence in the European Union Judicial System?*, in *Today's Multi-layered Legal Order: Current Issues and Perspectives*, Liber amicorum in honour of Arjen W.H. MEIJ, Paris Legal Publishers, Paris 2011, pp. 120-121.

*is not for itself...to carry out a comprehensive re-assessment of the evidence before it, nor to draw conclusions from that evidence in the light of the rules of competition?'*<sup>11</sup>

As to the Commission's role, the EU Courts have stated that:

*'the supervisory role conferred upon the Commission in competition matters includes the duty to investigate and penalize individual infringements, but it also encompasses the duty to pursue a general policy designed to apply, in competition matters, the principles laid down by the Treaty and to guide the conduct of undertakings in the light of those principles.'*<sup>12</sup>

With regard to the Courts' role in assessing so-called complex economic appraisals, the EU Courts also expressed the view that:

*'the exercise of the Commission's powers necessarily implies complex evaluations on economic matters. A judicial review of these evaluations must take account of their nature by confining itself to an examination of the relevance of the facts and of the legal consequences which the Commission deduces therefrom.'*<sup>13</sup>

Advocate Generals have also stated that:

*'the rules on the division of powers between the Commission and the Community judicature, which are fundamental to the Community institutions system, do not [...] allow the judicature to go further, and [...] to enter into the merits of the Commission's complex economic assessments or to substitute its own point of view for that of the institution.'*<sup>14</sup>

Accordingly, while on the one hand the Treaty provisions make a distinction between the extent of judicial review the EU Courts can undertake in relation to competition decisions (limited) and fines (unlimited), on the other hand, the early case law on the intensity of the EU Courts' review granted the Commission a significant degree of deference with regard to so-called complex economic assessments.<sup>15</sup> In subsection 2.1 in

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<sup>11</sup> Joined Cases T-68, 77-78/89 *Società Italiana Vetro SpA and Others v Commission* [1992] ECR II-1403, paras. 318-320.

<sup>12</sup> Joined Cases T-305 to 307/94, T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *LVM v Commission (PVC case)* [1999] ECR II-931, paras. 148-149.

<sup>13</sup> Joined Cases 56 and 58-64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission*, ECR-299, p. 347 ("*Consten and Grundig*"). *Consten and Grundig* is the first judgment in which the EU Courts exercised deferential judicial scrutiny towards the Commission's complex economic assessments in a competition case; see *infra* subsection 2.1.1 in Chapter 2.

<sup>14</sup> Opinion of Advocate General Tizzano in Case C-12/03 P *Commission v Tetra Laval BV* [2005] ECR I-987, para 89.

<sup>15</sup> Certain commentators criticize the use of the expression 'deference' to describe the limited control exercised by the EU Courts within the framework of their review of legality. The President of the GC, Mr. Jaeger, by way of example, '*fiercely disagree[s] with the expression "judicial deference" to the extent that it implies that the General Court would be biased, a critical violation of its duty of impartiality*'; JAEGER M., *Standard of Review in Competition Cases: Can the General Court Increase Coherence in the European Union Judicial System?*, in *Today's Multi-*

Section I of this Chapter the different standards of review applied by the EU Courts will be illustrated and analyzed.

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layered Legal Order: Current Issues and Perspectives, Liber amicorum in honour of Arjen W.H. MEIJ, Paris Legal Publishers, Paris 2011, p. 138. A number of commentators consider in fact that the GC's review is comprehensive as it *'generally exercises an extensive review over the Commission's findings. It may be that it does not "re-hear" and "re-find" all the evidence [...] but in general it appears to undertake a very thorough review'*; see RATLIFF, *Judicial Review in EC competition cases before the European Courts: Avoiding double renvoi*, in European Competition Law Annual: 2009. The Evaluation of Evidence and its Judicial Review in Competition Cases (editors EHLERMANN Claus-Dieter and MARQUIS Mel), European University Institute, Hart Publishing, Oxford & Portland Oregon, 2011, p. 457.



## 2. STANDARDS OF JUDICIAL REVIEW

The standard of review is the intensity used by the EU Courts when reviewing a Commission decision brought to them on appeal.<sup>16</sup> Given the absence of guidelines on the definition of such standards, the latter have been developed by the EU Courts' case law. Within the grounds for review set out in Article 263 TFEU, the EU Courts have adopted a flexible approach and developed different standards depending on the nature of the assessment under consideration. This raises the question, which will be dealt with further in this work, of whether the EU Courts have the possibility to modify of their own initiative the intensity of the scrutiny to which they subject Commission decisions. As will be seen *infra*, the EU Courts' scrutiny of Commission antitrust and merger decisions has evolved and progressively adapted to the increased complexity of the Commission's decisions. The following subsection will provide an overview of the different standards of review. A detailed analysis of how these standards have developed and changed over time in the antitrust and merger field will be dealt with respectively in Chapters 2 and 3.

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<sup>16</sup> REEVES T., DODOOT N., *Standards of Proof and Standards of Judicial Review in EC Merger Law*, (2005) Annual Proceedings of the Fordham Corporate Law Institute, International Antitrust Law & Policy, (Barry E. Hawk, ed.), Juris Publishing Inc., 2006, p. 119. For a similar definition see BAILEY D., *Standard of Proof in EC Merger Proceedings: A Common Law Perspective*, in CMLR, Vol. 40, 2003, p. 850: '[t]he standard of review refers to the intensity with which a court reviews the procedural propriety, factual and legal correctness and merits of a particular case'; FORRESTER I., *A Bush in Need of Pruning: The Luxuriant Growth of Light Judicial Review*, in European Competition Law Annual, 2009, p. 7: the 'standard of review is the nature and extent of the enquiry the Court will undertake when faced with an appeal concerning a Commission decision'; GERARD D., *Breaking the EU Antitrust Enforcement Deadlock: Re-empowering the Courts*, in European Law Review, 2011, Vol 36(4), p. 468: 'the notion of standard of review is commonly used to refer to the intensity of the scrutiny exercised by the EU Courts over the legality of the act subject to review'; ROSCH J. T., *Observations on Evidentiary Issues in Antitrust Cases*, in European Competition Law Annual: 2009. The Evaluation of Evidence and its Judicial Review in Competition Cases (editors EHLERMANN Claus- Dieter and MARQUIS Mel), European University Institute, Hart Publishing, Oxford & Portland Oregon, 2011, p. 557, p. 559: '[t]he "standard of judicial review" refers, by contrast, to the degree of deference that an appellate court accords o the decision of a competition court or agency'; and JAEGER M., *Standard of Review in Competition Cases: Can the General Court Increase Coherence in the European Union Judicial System?*, in Today's Multi-layered Legal Order: Current Issues and Perspectives, Liber amicorum in honour of Arjen W.H. MEIJ, Paris Legal Publishers, Paris 2011, p. 139: 'standard of review is an expression of how intense the jurisdiction exercise its control over administrative decisions or, in other words, how large a margin of discretion is left to the administration'. See also LEGAL H., *Standards of proof and standards of judicial review in EU competition law*, in Hawk B. (ed.), Annual Proceedings of the Fordham Corporate Law Institute 2006, Vol. 32; and BRUZZONE G., SAIJA A., *Non varcare quella soglia? Limiti al controllo del giudice sulle decisioni antitrust nell'era della modernizzazione e dell'approccio economico*, in Mercato, Concorrenza, Regole, No. 1, 2010, p. 7; CAMILLI E. L., CLARICH M., *Poteri quasi-giudiziali delle Autorità indipendenti*, in M. D-Alberti, A. Pajno (eds.), Arbitri dei mercati, Bologna 2010; and DENOZZA F., *Discrezione e deferenza: il controllo giudiziario sugli atti delle autorità indipendenti "regolatrici"*, in Mercato, Concorrenza, Regole, No. 3/2010.

## 2.1 Types of standards of review

The EU Courts apply different standards of review. The classical formulation of the standard of review applied currently in competition cases is as follows: ‘[a]ccording to settled case-law, when the Court is faced with an application for the annulment of a decision applying Article 81(1) EC, it undertakes a comprehensive review generally of the question whether or not the conditions for the application of Article 81(1) EC are met.’<sup>17</sup> A distinction however can be made between so-called ‘limited’ or ‘marginal’ review, where the Courts only correct manifest errors, and ‘comprehensive’ review, where the Courts’ review is more exhaustive and not limited to correcting only manifest errors of assessment.<sup>18</sup> Indeed, the intensity of judicial control will vary depending on the nature of the assessments that the Courts are reviewing.<sup>19</sup>

### 2.1.1 Law

When it comes to the correct interpretation and application of the law, the EU Courts exercise full control under Article 19 TEU. Indeed, both the GC and the ECJ have unfettered jurisdiction to review any errors of law regarding the scope and interpretation of Articles 101 and 102 TFEU<sup>20</sup> as well as any piece of secondary legislation such as

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<sup>17</sup> Case T-18/03 *CD-Contact Data GmbH v Commission* [2009] ECR II-1021, para 50, and case-law cited therein discussed *infra* in Chapter 2 (Case 42/84 *Remia BV and Others v Commission* [1985] ECR 2545, para 34, and Joined Cases 142 and 156/84 *British-American Tobacco Company Ltd and R. J. Reynolds Industries Inc. v Commission* [1987] ECR 4487, para 62).

<sup>18</sup> See WAHL N., *Standard of Review – Comprehensive or Limited?* European University Institute, Robert Schuman Centre for Advanced Studies, EU Competition Law and Policy Workshop/Proceedings, 2009, pp. 1-p; see also BAILEY D., *Standard of Judicial Review under Articles 101 and 102 TFEU*, in *The Role of the Court of Justice of the European Union in Competition Law Cases*, GCLC Annual Conferences Series (edited by MEROLA M. and DERENNE J.) Bruylant, 2010, p. 105.

<sup>19</sup> For an analysis of the interplay between the standard of review, which refers to the intensity with which the EU Courts review Commission decisions, and the standard of proof, which refers to the standard incumbent on the Commission in concluding that certain behavior infringes the competition rules see, *inter alia*, CASTILLO DE LA TORRE F., *Evidence, Proof and Judicial Review in Cartel Cases*, in *World Competition Law and Economics Review*, No. 4, December 2009; REEVES T., DODOOT N., *Standards of Proof and Standards of Judicial Review in EC Merger Law*, (2005) Annual Proceedings of the Fordham Corporate Law Institute, International Antitrust Law & Policy, (Barry E. Hawk, ed.), Juris Publishing Inc., 2006; and SIBONY A., BARBIER DE LA SERRE E., *Charge de la preuve et théorie du contrôle en droit communautaire de la concurrence: pour un changement de perspective*, in *Revue trimestrielle du droit européen* 43 (2), April-June 2007. On more general issues on evidence and procedure in EU competition law see, *inter alia*, LENAERTS K., *Some Thoughts on Evidence and Procedure in European Community Competition Law*, in *Fordham International Law Journal*, Vol. 30, No. 5, 2007.

<sup>20</sup> From the entry into force of the Lisbon Treaty on 1 December 2009, Articles 81 and 82 of the EC Treaty (ex Articles 85 and 86 of the EEC Treaty) became Articles 101 and 102 of the Treaty on the Functioning of the European Union. References to Articles 101 and 102 TFEU should be understood as references to Articles 81 and 82 EC and, before them, to Articles 85 and 86 EEC.

Regulation 1/2003 or the EU Merger Regulation. Concerning issues of law, the standard of review is the highest, as the Courts can control any error of law whether manifest or not. A typical example is that of the notion of ‘agreement’ under Article 101 TFEU; it is now uncontroversial that the interpretation and application of this concept is an exclusive prerogative of the EU Courts.<sup>21</sup> Furthermore, according to certain authors, the EU Courts have contributed to clarify the interpretation and application of both procedural and substantive aspects of competition law.<sup>22</sup> Concerning the former, the EU Courts’ main contribution has been to clarify and enforce the procedural rights and guarantees of parties to Commission antitrust proceedings; as to the latter, the EU Courts have contributed to develop the legal tests that need to be used to determine the compatibility of certain practices with competition law. The amount of economic reasoning that is required from the EU Courts when developing and enunciating such tests is also considered indicative of the difficulty of distinguishing between legal and economic issues (*see infra* subsection 2.3 of Section I in this Chapter).<sup>23</sup>

A comprehensive review is carried out by the EU Courts not only in relation to the law but also to the facts, as will be examined in the following subsection. The GC had in fact occasion to state in the *Cement* case that: ‘[w]hen the General Court reviews the legality of a decision finding an infringement of Article [101(1)] and/or Article [102], the applicants may call upon to undertake an exhaustive review of both the Commission’s substantive findings of fact and its legal appraisal of those facts’.<sup>24</sup>

### 2.1.2 Facts

As regards the correctness of facts, the EU Courts exercise a comprehensive control. There is no room for discretion for the Commission as to whether a fact is either correct

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<sup>21</sup> In the *Bayer* case, the GC and ECJ rejected the Commission’s arguments that Bayer’s practices amounted to an agreement under Article 101 TFEU; *see* Case T-41/96 *Bayer v Commission* [2000] ECR II-3383, para 62, upheld on appeal in Joined Cases C-2/01 P and C-3/01 P *BAI and Commission v Bayer* [2004] ECR I-23. Examples of cases where the EU Courts annulled Commission decisions on the basis of errors of law are also Case 258/78 *Nungesser v Commission* [1982] ECR 2015 and Case 40/74 *Suiker Unie v Commission* [1975] ECR 1663.

<sup>22</sup> *See* GERADIN N. and PETIT N., *Judicial Review in European Union Competition Law*, in *The Role of the Court of Justice of the European Union in Competition Law Cases*, GCLC Annual Conferences Series (edited by MEROLA M. and DERENNE J.) Bruylant, 2010, pp. 46-47.

<sup>23</sup> *Ibid.*, p. 47.

<sup>24</sup> *See* Joined Cases T-25/95 et al. *Cimenteries CBR and Others v Commission* [2000] ECR II 491, para 719.

or not.<sup>25</sup> This also reflects the purpose for which the Court of First Instance (“CFI”, now the GC) was established, *i.e.* to strengthen the judicial review of factual assessments by the EU system.<sup>26</sup> An adequate review of the facts was one of the main reasons for the creation of the GC, established in order to assist the ECJ with the increasing case workload.<sup>27</sup> As the ECJ stated in the judgment in *Baustahlgewebe*: ‘*the purpose of attaching the Court of First Instance to the Court of Justice and of introducing two levels of jurisdiction was, first, to improve the judicial protection of individual interests, in particular in proceedings necessitating close examination of complex facts, and, second, to maintain the quality and effectiveness of judicial review in the Community legal order*’.<sup>28</sup>

The importance of the review of factual findings has been recognized by Advocate Generals such as Tizzano, which in his Opinion in the *Tetra Laval* case stated that:

‘[w]ith regard to the findings of fact, the review is clearly more intense, in that the issue is to verify objectively and materially the accuracy of certain facts and the correctness of the conclusions drawn in order to establish whether certain known facts make it possible to prove the existence of other facts to be ascertained’.<sup>29</sup>

Similarly, Advocate General Kokott, in her Opinion in *Bertelsmann and Sony* stated:

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<sup>25</sup> Errors of fact are not expressly stated in Article 263 TFEU as a ground for annulment. However, they represent the basic foundation for the conclusion that the contested measure is wrong. For this reason, issues of fact can also be viewed as raising issues of law; *see* CASTILLO DE LA TORRE F., *Evidence, Proof and Judicial Review in Cartel Cases*, in *World Competition Law and Economics Review*, No. 4, December 2009, p. 560. For an overview of the extent of the EU Courts’ jurisdiction to review matters of fact in competition cases and the powers they may exercise to this end *see, inter alia*, LASOK K. P. E., *Judicial Review of Issues of Fact in Competition Cases*, 4 ECLR, 1983, pp. 85-96, and authors cited therein.

<sup>26</sup> ROSE V., *Margins of Appreciation: Changing Contours in Community and Domestic Case Law*, 30 April 2009, available at [globalcompetitionpolicy.com](https://www.competitionpolicyinternational.com/margins-of-appreciation-changing-contours-in-community-and-domestic-case-law) (<https://www.competitionpolicyinternational.com/margins-of-appreciation-changing-contours-in-community-and-domestic-case-law>), p. 5. The CFI was set up with the purpose to hear ‘*actions requiring close examination of complex facts [to] improve the judicial protection of individual interests*’; *see* Recitals to Council Decision 88/591/EEC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities, in OJ [1988] L319/1.

<sup>27</sup> Errors of fact are subject only to the GC’s review, as the ECJ’s review of GC judgments is limited to questions of law (*see* Article 256 TFEU and Article 58 of the Statute of the Court of Justice). Only if the GC’s judgment contains a ‘distortion’ of the facts, *i.e.* factual assumptions in clear contradiction with the case file, this may constitute an illegality leading to the annulment of the judgment by the ECJ. *See* O’ CAOIMH A., *Standard of Proof, Burden of Proof, Standards of Review and Evaluation of Evidence in Antitrust and Merger Cases: Perspective of Court of Justice of the European Union*, in *European Competition Law Annual: 2009. The Evaluation of Evidence and its Judicial Review in Competition Cases* (editors EHLERMANN Claus- Dieter and MARQUIS Mel), European University Institute, Hart Publishing, Oxford & Portland Oregon, 2011, p. 271 onwards.

<sup>28</sup> Case C-185/95 P *Baustahlgewebe GmbH v Commission* [1998] ECR I-8417, para 41; *see* similarly the comments of Advocate General Cosams in Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECR I-11369 para 54.

<sup>29</sup> Opinion of Advocate General Tizzano in Case C-12/03 P *Commission v Tetra Laval BV* [2005] ECR I-987, para 86.

*‘it would be an error to assume that the Commission’s margin of discretion precludes the Community Courts in any event from giving their own analysis of the facts and the evidence. On the contrary, it is essential for the Community Courts to undertake such an assessment of their own where they are assessing whether the factual material on which the Commission’s decision was based was accurate, reliable, consistent and complete, and whether this factual material was capable of substantiating the conclusions the Commission drew from it. Otherwise, the Community Courts could not sensibly assess whether the Commission had stayed within the limits of the margin of discretion allowed to it or had committed a manifest error of assessment’.*<sup>30</sup>

The importance of the appraisal of facts has been recognized also by the GC that has stated that *‘it is incumbent on it [...] to check meticulously the nature and importance of the evidence taken into consideration by the Commission in the decision’.*<sup>31</sup> The EU Courts will check methodically the soundness of the evidence relied upon by the Commission in its decisions.<sup>32</sup> Decisions based on incorrect facts may lead the EU Courts to set aside the Commission’s assessments. The *ICI* case provides an example of an instance where the ECJ partially annulled a Commission decision in so far as the factual evidence relied upon did not support the Commission’s conclusions concerning the duration of the infringement. In this case the Commission’s assessment that the applicant’s abusive behaviour had started in a particular year did not find support in the case file and had to be annulled, leading to a reduction of the fine.<sup>33</sup>

However, one particular difficulty lies in distinguishing between assessments concerning matters of fact and assessments concerning economic matters.<sup>34</sup> As will be seen *infra*, this distinction is not merely theoretical but will determine a different intensity of the review carried out by the EU Courts, comprehensive in the first case and limited in the second. On the other hand, the distinction between matters of fact and matters of law is less

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<sup>30</sup> Opinion of Advocate General Kokott in Case C-413/06 P *Bertelsmann AG and Sony Corporation of America v Impala* [2008] ECR I-4951, para 239.

<sup>31</sup> Joined Cases T-68, 77-78/89 *Società Italiana Vetro SpA and Others v Commission* [1992] ECR II-1403, para 95.

<sup>32</sup> According to certain authors, the EU Courts willingness to scrutinize facts has increased over the years in response to calls for more judicial review; see CRAIG P., *EU Administrative Law*, Oxford University Press, 2012, pp. 400-445. See *contra* CASTILLO DE LA TORRE F., *Evidence, Proof and Judicial Review in Cartel Cases*, in *World Competition Law and Economics Review*, No. 4, December 2009, p. 562: *‘I do not think that such willingness to carefully review findings of fact is so new...an examination of the first judgments of the Court of Justice show great willingness to examine in detail the facts’.*

<sup>33</sup> Case T-66/01 *Imperial Chemical Industries Ltd v Commission* [2010] II-02631, paras. 397-401.

<sup>34</sup> For an overview of the difficulties in distinguishing between facts, appreciation of facts or their qualification see, *inter alia*, SIMON D., *Une Théorie de l’Intensité du Contrôle Juridictionnel est-elle Possible?*, Europe – Editions du Juris-Classeur, April 2002, p. 3.

relevant from the standpoint of the intensity of the review carried out as the EU Courts will scrutinize comprehensively both categories of matters.<sup>35</sup> In the EU case law the following assessments, among others, have concerned matters of fact and called for a comprehensive review by the EU judiciary: the existence of meetings between competitors, their dates and individual participants; the substance of the decisions taken at meetings between competitors and whether and how they have been implemented;<sup>36</sup> the existence of a competitive relationship between two undertakings;<sup>37</sup> *etc.* The categorization of a matter is however not always straightforward and this uncertainty may reflect negatively on the applicants' expectations that the EU Courts carry out a more or less intense review.<sup>38</sup>

### 2.1.3 *Policy choices, complex economic appraisals and/or complex technical appraisals*

When it comes to policy choices, complex economic appraisals and/or complex technical appraisals, the review of the EU Courts is limited. The classical formulation of this so-called 'limited' or 'marginal' standard of judicial review in relation to the Commission's complex economic assessments is the so-called 'manifest error standard'. In the first place, the importance of distinguishing appraisals of an economic nature from other assessments has been expressly recognized in EU case law. By way of example, in the *General Electric* case the General Court emphasized that:

*'[a]s to the nature of the Community judicature's power of review, it is necessary to draw attention to the essential difference between factual matters and findings, on the one hand, which may be found to be inaccurate by the Court in the light of the arguments and evidence before it, and, on the other hand, appraisals of an economic nature'.<sup>39</sup>*

According to the 'limited' review standard, the EU Courts' review of the above-mentioned appraisals made by the Commission is limited to checking *'whether the relevant rules on procedure and on stating reasons have been complied with, whether the facts have been accurately*

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<sup>35</sup> On the difficulties of distinguishing between errors of fact, errors of law and errors of appreciation *see, inter alia*, REEVES T., DODOOT N., *Standards of Proof and Standards of Judicial Review in EC Merger Law*, (2005) Annual Proceedings of the Fordham Corporate Law Institute, International Antitrust Law & Policy, (Barry E. Hawk, ed.), Juris Publishing Inc., 2006, pp. 134-138.

<sup>36</sup> *See* GERADIN N. and PETIT N., *Judicial Review in European Union Competition Law*, in *The Role of the Court of Justice of the European Union in Competition Law Cases*, GCLC Annual Conferences Series (edited by MEROLA M. and DERENNE J.) Bruylant, 2010, p. 48.

<sup>37</sup> Case T-374/95 *European Night Services v Commission* [1998] ECR II-3141.

<sup>38</sup> For an in-depth analysis of the difficulties of categorizing complex economic assessments, *see infra* subsection 2.3 of Section I in this Chapter.

<sup>39</sup> Case T-210/01 *General Electric Company v Commission* [2005] ECR II-05575 ("*General Electric*"), para 62.

stated and whether there has been any manifest error of assessment or a misuse of powers'.<sup>40</sup> In light of the distinction introduced by this formula, while the establishment of facts and the respect of the law, whether substantive or procedural, is subject to a standard of correctness, Commission complex appraisals of an economic or technical nature are subject to a 'manifest error' standard.<sup>41</sup> As will be seen *infra*, this manifest error standard has evolved in the case law of the EU Courts and currently, when reviewing these kind of assessments made by the Commission, EU judges not only must, *inter alia*, establish 'whether the evidence relied on is factually accurate, reliable and consistent but also whether that 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'.<sup>42</sup>

The limitation of the intensity of judicial review depending on the nature of the assessment under examination is not an exclusive prerogative of competition law. Other areas of EU law, including the common agricultural policy, anti-dumping measures and the medical-pharmacological field, among others, also limit the scope of review of certain kinds of assessments.<sup>43</sup> It is considered that these areas all have in common the formulation of non-legal complex assessments of a scientific, technical or economic nature which involve value judgments and/or expert appreciations. The following subsection is dedicated to the analysis of the so-called limited standard of review, from its origins to its applications over time in the competition field.

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<sup>40</sup> See Case T-201/04 *Microsoft Corp. v Commission* ("Microsoft") [2007] ECR II-3601, para 87; see also to that effect, with respect to Article 81 EC (now Article 101 TFEU), Case 42/84, *Remia BV and Others v Commission*, [1985] ECR 2545, para 34, and Joined Cases 142/84 and 156/84, *BAT and Reynolds v Commission*, [1987] ECR 4487, para 62. These cases will be examined in more detail in Chapter 2; in the merger field see *infra* Chapter 3.

<sup>41</sup> See NAZZINI R., *Administrative Enforcement, Judicial Review and Fundamental Rights in EU Competition Law: A Comparative Contextual-functional Perspective*, in CMLR, 2012, Vol. 49(3), p. 994. According to this author the EU Courts also apply a deferential standard to the evaluation of evidence or to issues inextricably intertwined with the evaluation of evidence in those instances where they consider that the Commission is better placed to carry out the task.

<sup>42</sup> Case C-12/03 P *Commission v Tetra Laval BV* [2005] ECR I-987, para 39.

<sup>43</sup> See BAILEY D., *Standard of Judicial Review under Articles 101 and 102 TFEU*, in *The Role of the Court of Justice of the European Union in Competition Law Cases*, GCLC Annual Conferences Series (edited by MEROLA M. and DERENNE J.) Bruylant, 2010, p. 106. For examples of the application of marginal review in the agriculture, dumping and State aid fields; see also FORWOOD N., *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*, European University Institute, Robert Schuman Centre for Advanced Studies, EU Competition Law and Policy Workshop/Proceedings, 2009, p. 5.

## ***2.2. The origins of the limited standard of judicial review***

Historically, the so-called ‘limited’ or ‘marginal’ standard of review finds its roots in Article 33 of the Treaty establishing the European Coal and Steel Community (the “ECSC Treaty”). According to this provision, the Court had jurisdiction over appeals concerning decisions of the Commission on grounds practically identical to those of Article 263 TFEU. Under Article 33 of the ECSC Treaty:

*[t]he Court may not review the conclusions of the Commission, drawn from economic facts and circumstances, which formed the basis of such decisions or recommendations, except where the Commission is alleged to have abused its powers or to have clearly misinterpreted the provisions of the Treaty or of a rule of law relating to its application’.*<sup>44</sup>

There is no equivalent provision in the TEU or in the TFEU. However, this formulation is almost identical to that used by the ECJ in 1966 in the *Consten and Grundig* judgment,<sup>45</sup> the first example of deferential judicial scrutiny in a competition related matter. The ECJ here stated that *‘the exercise of the Commission’s powers necessarily implies complex evaluations on economic matters. A judicial review of these evaluations must take account of their nature by confining itself to an examination of the relevance of the facts and of the legal consequences which the Commission deduces therefrom’.*<sup>46</sup> In this case, the ECJ was confronted with the application of Article 85(3) EEC (now 101(3) TFEU). At the time the Commission enjoyed a monopoly in the application of this provision, which expressly states that Article 85(1) EEC *‘may be declared inapplicable’*, a term indicative of discretion.<sup>47</sup> Since this first judgment, the EU

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<sup>44</sup> Article 33 ECSC has been interpreted in the case law as follows: *‘[t]he first part of the second sentence of Article 33 thus states the limits upon the power of the Court, in its examination of the legality of a measure, to review the choices of economic policy made by the Commission; the second part removes those limitations, provided that the applicant alleges a manifest failure to observe the Treaty or a misuse of powers. According to the case-law of the Court [...] Article 33 does not require that the objection raised be supported by full proof in advance; this moreover would immediately entail the annulment of the decision. Therefore, when considering the admissibility of the arguments intended to induce the Court to examine the evaluation of the situation resulting from the economic facts or circumstances of the case, it is necessary and sufficient that the objections of manifest failure or misuse of powers be supported by appropriate evidence. A stricter requirement would amount to confusing the admissibility of the argument with the proof of its substance; a more liberal interpretation, whereby the mere assertion of one of the claims referred to would be sufficient to open the way to review by the Court of the economic evaluation, would reduce that claim to a mere formality’*; see Joined Cases 154, 205, 206, 226 to 228, 263 and 264/78, 39, 31, 83 and 85/79 *SpA Ferriera Valsabbia and others v Commission* [1980] ECR 907, para 11.

<sup>45</sup> Joined Cases 56 and 58-64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission* [1966] ECR 429.

<sup>46</sup> Joined Cases 56 and 58-64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission* [1966] ECR 429, p. 347.

<sup>47</sup> SCHWEITZER H., *The European Competition Law Enforcement System and the Evolution of Judicial Review*, in European Competition Law Annual: 2009. The Evaluation of Evidence and its Judicial Review in Competition Cases (editors EHLERMANN Claus-Dieter and MARQUIS Mel), European University Institute, Hart Publishing, Oxford & Portland Oregon, 2011, p. 98.



Courts have developed a practice of according deference, a so-called ‘*margin of appreciation*’, to the Commission when undertaking complex economic assessments also in other areas of competition law.<sup>48</sup> Over time, such deference has extended from concerns relating to Community and EU policies to all ‘*complex economic assessments*’ and more recently also to ‘*complex technical appraisals*’.<sup>49</sup>

In practice, this limited standard of judicial review in relation to the Commission's complex economic and/or technical assessments boils down to assessing whether the Commission has made a so-called ‘manifest error of assessment’.<sup>50</sup> Indeed, the Courts confine themselves to verifying whether there has been no misuse of powers, that the rules on procedure and on the statement of reasons have been complied with, that the facts have been accurately stated and that there has been no manifest error of appraisal. Over time the EU Courts have also had occasion to clarify how and what they would review under the manifest error test by stating that in reviewing the Commission’s interpretation of information of an economic nature, the EU Courts would ‘*establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that 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*’.<sup>51</sup>

### ***2.3. The importance of defining complex economic or technical assessments in competition cases***

One of the most controversial issues in the debate on the intensity of the review carried out by the EU Courts in competition cases is the meaning of ‘complex economic

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<sup>48</sup> REEVES T., DODOO N., *Standards of Proof and Standards of Judicial Review in EC Merger Law*, (2005) Annual Proceedings of the Fordham Corporate Law Institute, International Antitrust Law & Policy, (Barry E. Hawk, ed.), Juris Publishing Inc., 2006, p. 137

<sup>49</sup> Case T-201/04 *Microsoft Corp. v Commission* [2007] ECR II-3601, paras. 87-89, 482.

<sup>50</sup> Case T-168/01 *GlaxoSmithKline Services Unlimited v Commission* [2006] ECR II-2969, para 3: ‘*The Court must undertake a comprehensive review of the examination carried out by the Commission, unless that examination entails a complex economic assessment, in which case review by the Court is confined to ascertaining that there has been no misuse of powers, that the rules on procedure and on the statement of reasons have been complied with, that the facts have been accurately stated and that there has been no manifest error of assessment of those facts*’. See also Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland A/S and Others v Commission* [2004] ECR I-123, para 279: ‘*Examination by the Community judicature of the complex economic assessments made by the Commission must necessarily be confined to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of powers*’. See also Case T-48/04 *Qualcomm Wireless Business Solutions Europe BV v Commission* [2009] ECR II-2029, para 92; Case 42/84 *Remia BV and Others v Commission* [1985] ECR 2545, para 34 and Joined Cases 142 and 156/84 *British-American Tobacco Company Ltd and R. J. Reynolds Industries Inc. v Commission* [1987] ECR 4487, para 106.

<sup>51</sup> Case C-12/03 P *Commission v Tetra Laval BV* [2005] ECR I-00987, para 39.

assessments' and the definition of the situations and circumstances that can be considered to fall within this notion.<sup>52</sup> The basic premise of the 'limited' or 'marginal' review standard is that EU judges recognize the existence of a particular discretion to the Commission not for all assessments, but for those that can be considered economically or technically complex. Identifying which assessments fall within this concept is crucial to understand which intensity of review applies, in particular when EU judges will restrain themselves and carry out only a 'limited review'. The difficulty inherent in this distinction has been pointed out by a number of authors,<sup>53</sup> given that controversies may arise in distinguishing between issues of fact (which call for unrestricted review), and economic assessments,<sup>54</sup> in particular when judges are confronted with '*facts of an economic nature*', as defined by former Judge David Edward.<sup>55</sup> Difficulties may also arise in distinguishing, among economic issues, between those that can be considered complex (limited review) and those that can be considered simple (unrestricted review). The risk inherent in these difficulties is that, considering also the Commission's more 'economic' and 'effects based approach' to competition cases, if the notion of 'complex economic assessment' is applied indiscriminately and too extensively, the result will be an excessive broadening of the Commission's discretion, ultimately increasing the number of assessments that are not

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<sup>52</sup> '[C]ette notion d'appréciation économique complexe n'est pas définie ni dans les traités, ni de façon claire dans la jurisprudence communautaire'; see VALLINDAS G., *Le Tribunal et la concurrence: le juge face aux appréciations économiques complexes*, in *Revue des affaires européennes*, No. 3, 2009-2010, p. 441. '[C]i si chiede quali siano gli elementi che consentono al giudice di distinguere [...] tra controllo del diritto e del fatto, da una parte, e valutazione economica complessa, dall'altra. E nel far ciò chiediamoci prima di tutto quali siano le valutazioni economiche complesse, premesso che una definizione di tale nozione non è data nella giurisprudenza di Corte e Tribunale'; OSTI C., *Un giudice a Berlino: equità ed efficienza nelle decisioni dell'Autorità garante della concorrenza*, in *Giur. Comm.*, 2008, Vol. 35, No. 5, p. 879.

<sup>53</sup> See, *inter alia*, GERADIN N. and PETIT N., *Judicial Review in European Union Competition Law*, in *The Role of the Court of Justice of the European Union in Competition Law Cases*, GCLC Annual Conferences Series (edited by MEROLA M. and DERENNE J.) Bruylant, 2010, pp. 46-54; SIRAGUSA M., *Access to the Courts in a Community based on the rule of law*, contribution for the workshop 'Access to Justice' organized at the occasion of the 'Celebration of 20 years of the Court of First Instance of the European Communities' on 25 September 2009 (n 1), p. 133; BELLAMY C., *ECHR and competition law post Menarini: An Overview of EU and national case law*, in *e-competitions*, No. 47946, p. 4; JAEGER M., *The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of the Marginal Review?*, in *Journal of European Competition Law & Practice*, Vol. 2, No. 4, 2011; WAHL N., *Standard of Review – Comprehensive or Limited?*, European University Institute, Robert Schuman Centre for Advanced Studies, EU Competition Law and Policy Workshop/Proceedings, 2009, pp. 5-6.

<sup>54</sup> The distinction between issues of fact and legal questions is less relevant for the discussion on the intensity of judicial review as both call for unrestricted review by the EU Courts, *see supra* subsections 2.1.1 and 2.1.2 of Section I in this Chapter.

<sup>55</sup> GERADIN N. and PETIT N., *Judicial Review in European Union Competition Law*, in *The Role of the Court of Justice of the European Union in Competition Law Cases*, GCLC Annual Conferences Series (edited by MEROLA M. and DERENNE J.) Bruylant, 2010, p. 48.

subject to intense scrutiny. This risk has been well-described by the President of the General Court, Mr. Jaeger, who has stated that:

*‘an issue could however emerge if Courts hesitate in determining the limits of the Commission’s discretion area. Indeed, it would lead them to refrain from applying the intensity contained in this standard of review to situations where they should not...A clear determination of the limits of the margin of appreciation doctrine...and, thus, the type of situations where the judge applies a less intensive standard of review would probably be welcome. For this purpose, the meaning of the expression “complex economic assessments” needs to be cleared up. I should add that this call for clarity is more than a wish but a must’.*<sup>56</sup>

To draw a dividing line between cases of unrestricted factual review and cases of deference to the Commission’s discretion is considered a challenging exercise.<sup>57</sup> Examples of how hard it is to understand which kind of assessments are subject to limited or comprehensive review arise directly from the case law where, depending on the circumstances of the case, certain evaluations, such as those concerning market definition, have been considered to not involve complex economic assessments - calling for unrestricted review -,<sup>58</sup> while in other cases the definition of the relevant market was considered to involve complex economic assessments - triggering only limited review -.<sup>59</sup> Identifying when an assessment is ‘complex’ in nature is another issue which raises controversies. Is it sufficient for an assessment to be difficult in order to be considered

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<sup>56</sup> JAEGER M., *The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of the Marginal Review?*, in *Journal of European Competition Law & Practice*, Vol. 2, No. 4, 2011, pp. 305 and 309.

<sup>57</sup> FORRESTER I. S., *A Bush in Need of Pruning: The Luxuriant Growth of Light Judicial Review*, European University Institute, Robert Schuman Centre for Advanced Studies, EU Competition Law and Policy Workshop/Proceedings, 2009, p. 17.

<sup>58</sup> According to Siragusa, in a number of cases, although the EU Courts engaged in a full and thorough review, issues such as the definition of the relevant market apparently were not considered to require complex economic assessments on the part of the Commission (for example, Case 85/76 *Hoffmann-La Roche* [1979] ECR 462, Case 322/81 *Michelin* [1983] ECR 3461, and Case T-271/03 *Deutsche Telekom AG v Commission* [2008] ECR II-477); SIRAGUSA M., *Annulment Proceedings in Antitrust Cases*, in *The Role of the Court of Justice of the European Union in Competition Law Cases*, GCLC Annual Conferences Series (edited by MEROLA M. and DERENNE J.), Bruylant, 2010, p. 129.

<sup>59</sup> Case T-201/04, *Microsoft Corp. v Commission* [2007] ECR II-3601, para 482: ‘The Court notes at the outset that in so far as the definition of the product market involves complex economic assessments on the part of the Commission, it is subject to only limited review by the Community judicature...’. According to certain commentators, ‘in certain cases the EU Courts’ limited review has spilled over into certain factual issues that did not involve complex appreciations. For instance in 2011 the General Court applied twice the standard of the manifest error of appreciation to the question of whether an undertaking had contested the facts on which the Commission based its allegations (Case T-33/05 *Cetarsa v Commission*, paragraph 271; Case T-37/05 *World Wide Tobacco España v Commission*, paragraph 197). Why did this factual finding require the kind of complex appreciation that normally justifies limited review?; see BARBIER DE LA SERRE E., *A Lesson of Judicial Review from the other European Court in Luxembourg*, in *Kluwer Competition Law Blog*, April 27, 2012, p. 3.

complex, or should the threshold of ‘complexity’ be higher and embrace only particularly problematic and challenging assessments? The circumstance that the EU case law has not been straightforward in this regard, and that the Courts have even overturned what appeared to be complex assessments, underlines even more the ambiguity of defining what is a complex assessment.<sup>60</sup> Certain authors, however, aware of the increasingly central role of economic analysis in competition cases, consider that an assessment which is difficult should not be considered for this reason alone ‘complex’.<sup>61</sup> In particular, the existence of a complex economic assessment should not be confused with the complexity of the case or of the evidence. The circumstance that a case involves consideration of difficult economic arguments and theories, or of evidence of an economic nature, does not necessarily make these assessments ‘complex’ ones. According to certain authors, ‘complexity’ should be interpreted as referring to the nature of the assessment that needs to be made, not to its technical or evidential difficulty. Value judgments ultimately would exemplify these kind of assessments.<sup>62</sup> It has also been contended that ‘complexity’ should embrace only situations where the Commission makes economic policy choices, which would thus be excluded from a comprehensive review, leaving all other economic assessments, irrespective of their level of difficulty, subject to full review.<sup>63</sup>

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<sup>60</sup> FORRESTER I. S., *A Bush in Need of Pruning: The Luxuriant Growth of Light Judicial Review*, European University Institute, Robert Schuman Centre for Advanced Studies, EU Competition Law and Policy Workshop/Proceedings, 2009, p. 25. According to Wahl, the circumstance that, notwithstanding the statement of the existence of a margin of appreciation for the Commission the EU Courts have nonetheless closely examined the evidential basis for the Commission’s findings, has led to question ‘*to what extent the actual content or the review carried out under each of the two labels [comprehensive review and limited review] is equally coherent*’; see WAHL W., *Standard of Review – Comprehensive or Limited?*, in Ehlermann & Marquis European Competition Law Annual 2009: Evaluation of Evidence and its Judicial Review in Competition Cases, Hart Publishing, 2011, p. 285.

<sup>61</sup> FORRESTER I. S., *A Bush in Need of Pruning: The Luxuriant Growth of Light Judicial Review*, European University Institute, Robert Schuman Centre for Advanced Studies, EU Competition Law and Policy Workshop/Proceedings, 2009, p. 17; see also JAEGER M., *The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of the Marginal Review?*, in Journal of European Competition Law & Practice, Vol. 2, No. 4, 2011, pp. 309-310.

<sup>62</sup> FORWOOD N., *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*, European University Institute, Robert Schuman Centre for Advanced Studies, EU Competition Law and Policy Workshop/Proceedings, 2009, pp. 10-13; see also SIRAGUSA M., *Annulment Proceedings in Antitrust Cases*, in The Role of the Court of Justice of the European Union in Competition Law Cases, GCLC Annual Conferences Series (edited by MEROLA M. and DERENNE J.), Bruylant, 2010, p. 133.

<sup>63</sup> JAEGER M., *The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of the Marginal Review?*, in Journal of European Competition Law & Practice, Vol. 2, No. 4, 2011, pp. 310 and 312: ‘*Complex economic assessments should be understood as situations where the Commission has to make an economics-based choice of policy. It should only be in such situations that marginal review should be applied.*’

The above considerations on assessments of an economic nature apply equally to assessments of a technical nature.<sup>64</sup> In other areas of EU law, such as custom duty exemptions and medical staff cases, the ECJ has held that EU judges must address and examine also technical issues, which can thus not be subtracted from their review, and should do so with the help of experts whose opinions they can't substitute for their own.<sup>65</sup> In light of the above, certain authors claim that in relation to technical assessments in the competition field it is not easy to understand *'why the Courts should defer to the Commission's expertise in a particular technical or economic controversy when the Courts themselves have the power to appoint experts, economic and otherwise'*.<sup>66</sup>

In the following Section, the arguments in favour and against the modification of the current system of judicial review in competition cases, in particular from the point of view of its scope and intensity, will be analysed.

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<sup>64</sup> As will be seen *infra* in subsection 3.1.3 of Chapter 2, the broadening of the marginal review standard to technical assessments occurred in the *Microsoft* case.

<sup>65</sup> DERENNE J., *The Scope of Judicial Review in EU Economic Cases*, in *The Role of the Court of Justice of the European Union in Competition Law Cases*, GCLC Annual Conferences Series (edited by MEROLA M. and DERENNE J.) Bruylant, 2010, pp. 77 and 82.

<sup>66</sup> FORRESTER I. S., *A Bush in Need of Pruning: The Luxuriant Growth of Light Judicial Review*, European University Institute, Robert Schuman Centre for Advanced Studies, EU Competition Law and Policy Workshop/Proceedings, 2009, p. 18.



## SECTION II: ARGUMENTS IN FAVOUR AND AGAINST THE INTRODUCTION OF A SYSTEM OF MORE INTENSE OR FULL JUDICIAL REVIEW BY THE EU COURTS IN COMPETITION CASES

The practice of the EU Courts of according deference, within the exercise of their review of legality, to complex economic and/or technical assessments undertaken by the Commission is not expressly mandated by the EU Treaties. A number of authors however believe that the Commission is entitled to a certain amount of discretion in relation to these assessments, and that an expansion of the EU Courts' judicial review powers would subvert the EU's judicial process and encroach on the Commission's prerogatives in the competition field. This view is contested, in a variety of forms and intensities, by a number of authors and commentators that criticize the EU judiciary's indulgent approach and demand that the EU Courts do not leave any discretion to the Commission's assessments in the competition field. Accordingly, over the years, the effectiveness of judicial review in EU competition cases has been the object of intense scholarly debate.<sup>67</sup>

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<sup>67</sup> The present work focuses on the debate concerning the exercise of limited control by the EU Courts within the framework of their powers of review in relation to the review of legality *ex* Article 263 TFEU. It is worth mentioning however that over the years another debate has picked up momentum that concerns the exercise of unlimited jurisdiction by the EU Courts in relation to fines. Here the main criticism is against the EU Courts' restrictive use of their powers of review under Article 261 TFEU. It has been pointed out that the EU Courts have rarely exercised their unlimited jurisdiction in relation to fines, and even more rarely in the absence of a finding of illegality of the decision under examination. *See, inter alia*, BARBIER DE LA SERRE E., *Unlimited jurisdiction: the end of a misnomer?*, in Kluwer Competition Law Blog, 12 September 2011; SIRAGUSA M., *Annulment Proceedings in Antitrust Cases*, in *The Role of the Court of Justice of the European Union in Competition Law Cases*, GCLC Annual Conferences Series (edited by MEROLA M. and DERENNE J.) Bruylant, 2010, p. 130: '[i]n reality, the control of legality performed by the General Court is quite often seriously deficient, its scope being restricted to certain elements of the calculation of the fines. Instead of performing a comprehensive review of the Commission decision...the Court takes a deferential approach to the way in which the Commission exercised its fining powers, and its review is limited to determining the absence of a manifest error of assessment'. *See also* VESTERDORF B., *The Court of Justice and Unlimited Jurisdiction: What Does it Mean in Practice?*, 30 June 2009, Global Competition Policy, available at [globalcompetitionpolicy.com \(https://www.competitionpolicyinternational.com/the-court-of-justice-and-unlimited-jurisdiction-what-does-it-mean-in-practice\)](https://www.competitionpolicyinternational.com/the-court-of-justice-and-unlimited-jurisdiction-what-does-it-mean-in-practice), pp. 2-3: '*the reality is that, almost without exception, the Court limits itself to performing a control of the legality of the fine or, rather, to verifying whether the Commission has applied the Guidelines for the calculation of fines correctly...the exercise of unlimited jurisdiction is, in practice, the very rare exception*'; and WILS P. J. W., *The Increased Level of EU Antitrust Fines, Judicial Review, and the European Convention on Human Rights*, in *World Competition*, Volume 33, No. 1, March 2010, pp. 28-29: '*If...the General Court were ever to refuse to assess the appropriateness of the fine, exercising its full jurisdiction, when requested to do so by the parties, or if the Court were to consider, when exercising its full jurisdiction, that it is not empowered to depart from the methodology used by the Commission, this would be mistaken, and would indeed provide a ground for appeal to the Court of Justice against such a judgment of the General Court*'.

This Section is dedicated to the analysis of the various positions that have been adopted by commentators advocating for or against a change of the current intensity of review applied by the EU Courts in the competition field. The controversial factors of the current system of review that continue to be the object of criticism will be identified and analysed. The theories that have been developed in the literature to justify a review of the *status quo* in the antitrust and merger field will also be illustrated and confronted with the theories of those authors who believe no changes are needed nor warranted.

## 1. INSTITUTIONAL BALANCE AND THE COMMISSION'S ROLE AS COMPETITION AUTHORITY TODAY

One of the main arguments in favor of keeping the current system of judicial review unchanged relates to the perceived need to preserve the inter-institutional balance provided for by the Treaties.<sup>68</sup> The principle of institutional balance implies that each institution has to act in accordance with the powers conferred on it by the Treaties and prohibits any encroachment by one institution on the powers conferred on another.<sup>69</sup>

According to this argument, the Treaty introduced a clear-cut separation of powers in the competition field between the Commission as policy maker and enforcer and the EU Courts as guarantors of the lawfulness of the Commission's exercise of its enforcement powers.<sup>70</sup> The Commission must ensure the application of competition law and in doing so

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<sup>68</sup> See, *inter alia*, the former President of the GC, Mr. Bo Vesterdorf: '[i]n the light of this respect of the institutional balance between the Community courts and the Commission, we have traditionally afforded the Commission a margin of discretion when reviewing its assessment of complex economic matters'; VESTERDORF B., *Chapter 13: The European Court's Case Law in Merger Control*, in *Competition Law and Economics* (edited by A. M. Mateus and T. Moreira), International Competition Law Series Volume 31, Kluwer Law International, 2007, p. 245. See also THILI V. and VANHAMME J., *The "Power of Appraisal" (Pouvoir d'Appréciation) of the Commission of the European Communities vis-à-vis the Powers of Judicial Review of the Communities' Court of Justice and Court of First Instance*, in *Fordham International Law Journal*, Vol. 22, No. 3, 1999, pp. 885-901. According to the authors '[w]hen authorities exercising policy-making powers and judicial authorities are brought together in a functional relationship, as is the case with the Commission and the Courts of the European Communities, "marginal review" is an attractive notion. It is an almost natural response to the difficulty inherent in separation of administrative and judicial powers. In its primitive form, the idea behind the marginal review approach is more or less that: the Courts must not redo the Commission's work, but must nevertheless do something, so they solely check for manifest mistakes in the Commission's assessments, thereby cutting the separation of powers knot nicely through the middle' (p. 898).

<sup>69</sup> See the EU Glossary at [http://europa.eu/legislation\\_summaries/glossary/institutional\\_balance\\_en.htm](http://europa.eu/legislation_summaries/glossary/institutional_balance_en.htm). The principle itself is not expressly defined in the Treaties but was clearly referred to for the first time in the judgment in the *Meroni* case (Case 9/56 *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community* [1958] ECR 11).

<sup>70</sup> Article 17 TEU establishes that the Commission 'shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union'.



may need to elaborate economic or technical assessments. In order to allow it to fulfill its duties, a margin or power of appraisal is recognized to the Commission for certain assessments that call for value judgments. The Commission's technical expertise and experience would also place it in a better position to conduct in-depth economic analysis and would justify recognizing it this prerogative. Against this background, if the EU Courts were given the power to control fully the Commission's appraisal of so-called complex economic and/or technical assessments this would inevitably alter the existing inter-institutional balance, invading the Commission's sphere of competence as a policy maker.

As a former president of the General Court has had the opportunity to state '*[i]n light of this respect of the institutional balance between the Community Courts and the Commission, we have traditionally afforded the Commission a margin of discretion when reviewing its assessment of complex economic matters*'.<sup>71</sup> The importance of the division of powers as a limiting factor to the judges' possibility to review the merits of the Commission's complex economic assessments was emphasized also by Advocate General Tizzano in the *Tetra Laval* case where he stated that '*[t]he rules on the division of powers between the Commission and the Community judicature, which are fundamental to the Community institutional system, do not however allow the*

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TEU on the other hand establishes that the EU Courts '*shall ensure that in the interpretation and application of the Treaties the law is observed*'. In relation to competition law, on the basis of Article 103(2)(d) TFEU, Regulation 1/2003 enacts a system where the Commission is responsible for the development of EU competition policy and with the uniform application of Articles 101 and 102 TFEU. *See, inter alia*, WAHL N., *Standard of Review – Comprehensive or Limited?*, in Claus-Dieter Ehlermann and Mel Marquis, eds., *European Competition Law Annual 2009: Evaluation of Evidence and its Judicial Review in Competition Cases*, forthcoming, Hart Publishing, p. 4; and M. JAEGER, *The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of the Marginal Review?*, in *Journal of European Competition Law & Practice*, Vol. 2, No. 4, 2011, p. 296: '*The application of a standard of review of a lower intensity reflects the institutional partition of competences between the Commission, entrusted for instance with the enforcement of Article 101 and 102 TFEU, the control of concentrations, and more generally the shaping of EU competition policy, on the one hand, and the EU Courts in charge of reviewing the legality of the Commission decisions, on the other*'. Always Jaeger: '*[t]he role of the Community judge, therefore, it is not that of substituting its own appreciation to that of the Commission; it is instead that of sanctioning, if necessary, any manifest error of appreciation. This reflects the institutional partition of competences between the Commission, entrusted with the enforcement of Articles 81 EC and 82 EC, the control of concentrations, and the shaping of the EC competition policy, on the one hand, and the Community Courts in charge of reviewing the legality of the Commission decisions, on the other*'; *see* JAEGER M., *The Court of First Instance and the Management of Competition Law Litigation*, in *EU Competition Law in Context, Essays in Honour of Virpi Tiili, H. Kanninen, N. Korjus and A. Rosas* (eds.), Hart Publishing, Oxford 2009, p. 10. For some authors the separation of powers is the only justification for a dual system of intensity of review; *see* FRITZSCHE A., *Discretion, Scope of Judicial Review and Institutional Balance in European Law*, CMLR, Vol. 47, 2010, pp. 380-387.

<sup>71</sup> VESTERDORF B., *Chapter 13: The European Court's Case Law in Merger Control*, in *Competition Law and Economics* (edited by A. M. Mateus and T. Moreira), International Competition Law Series Volume 31, Kluwer Law International, 2007, pp. 243-254.

*judicature to go further, and particularly [...] to enter into the merits of the Commission's complex economic assessments or to substitute its own point of view for that of the institution*'.<sup>72</sup>

This view is challenged by a number of scholars who argue that limited judicial review could have made sense in the past, at the very offset of the construction of the EU's competition policy, in light of the Commission's specific tasks and role. However, the changes that have occurred over time in the EU antitrust system would no longer justify judicial deference.<sup>73</sup> According to this argument, originally the Commission played a role of advocacy in shaping, promoting and spreading the principles of competition law. It also had exclusive jurisdiction to apply Article 81(3) EC (now 101(3) of the TFEU) and an advisory role through the notification system. In the early years of the EU construction, the Commission therefore had a major role in regulating markets, rule-making and policy building. At the time, its role was rather of guidance than of prosecution and, even when prosecuting, imposed low fines. These activities called for common interest assessments and opportunity choices and could justify a certain degree of judicial deference.<sup>74</sup>

Over the years the competition landscape has increasingly changed. The principles elaborated by the Commission started to be widely accepted and applied in most Member States, with a consequential loss of its advocacy 'monopoly'. With the entry into force of Regulation 1/2003 the Commission also no longer had exclusive jurisdiction to apply Article 101(3) TFEU, and with the elimination of the notification system, its advisory role also vanished.<sup>75</sup> The circumstance that the Commission now exercises a predominantly

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<sup>72</sup> Opinion of Advocate General Tizzano in Case C-12/03 P *Commission v Tetra Laval BV* [2005] I-987, para 89.

<sup>73</sup> See, for an overview on this argument, the paper presented by SIRAGUSA M., *Access to the Courts in a Community based on the rule of law*, Contribution for the workshop 'Access to Justice' organized at the occasion of the 'Celebration of 20 years of the Court of First Instance of the European Communities' on 25 September 2009 (n 1) 129-134 for the 20<sup>th</sup> CFI celebration. According to this author, '*the judicial deference doctrine historically may have been justified in the early days of EU competition law enforcement. Back then the Court may have felt unprepared, or not confident enough, to deal with matters which were at the time perceived as involving questions uniquely within the Commission's expertise and experience... However, the limitations to full judicial review that are inherent in that doctrine are no longer appropriate in the current phase of our competition law enforcement system, over 40 years after the first antitrust cases*'; see SIRAGUSA M., *Annulment Proceedings in Antitrust Cases*, in *The Role of the Court of Justice of the European Union in Competition Law Cases*, GCLC Annual Conferences Series (edited by MEROLA M. and DERENNE J.) Bruylant, 2010, p. 134.

<sup>74</sup> DERENNE J., *The Scope of Judicial Review in EU Economic Cases*, in *The Role of the Court of Justice of the European Union in Competition Law Cases*, GCLC Annual Conferences Series (edited by MEROLA M. and DERENNE J.) Bruylant, 2010, p. 83.

<sup>75</sup> Prior to the adoption of Regulation 1/2003 which abolished the centralized notification and authorization system for Article 81(3) EC (now 101(3) TFEU), the Commission was the sole authority competent to assess the compatibility of agreements with the provisions of Article 81 EC. As stated by one commentator, the reason for this was that '*the prohibition on restrictive agreements was entirely revolutionary in Europe... [t]he revolutionary character of Article 85 EEC (now Article 81 EC) pleaded for a centralized notification and authorization system. Indeed,*

prosecutorial role, which finds its most evident expression in broader powers of investigation and the imposition of high fines in the antitrust field,<sup>76</sup> is an additional element that would justify questioning the judicial deference doctrine.

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*given the radical novelty of the rule, companies and their legal advisors could not be relied upon to assess themselves the compatibility of their agreements with the provisions of Article 81 EC. Similarly, leaving the application of Article 81(3) EC to the courts and authorities of the Member States...would have entailed a major risk of the prohibition laid down in Article 81 EC not being applied in practice, or at least not in a sufficiently uniform manner. The centralized notification and authorization system guaranteed that the new provision would be interpreted and applied by the Commission, which was specifically dedicated to the new religion. The notification system also had an educational function, as companies and their lawyers were educated by the Commission through the authorization process; see WILS W. P. J., Principles of European Antitrust Enforcement, Hart Publishing, 2005, pp. 5-6.*

<sup>76</sup> On the issue of the substantial increase of the amount of fines inflicted by the Commission see CONNOR J. M., *Cartel Fine Severity and the European Commission: 2007-2011*, in ECLR, 2013, Issue 2, pp. 58-77; VENIT J. S., *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*, European University Institute, Robert Schuman Centre for Advanced Studies, EU Competition Law and Policy Workshop/Proceedings, 2009, p. 2.

## 2. THE RELEVANCE OF ECONOMICS IN COMPETITION LAW AND THE EU COURTS' COMPETITION LAW EXPERTISE

### ***2.1. The increased relevance of economics in competition law***

Another important consideration is that economic analysis has progressively gained more and more space in the context of the Commission's antitrust and merger cases. This economics-oriented revolution has been ongoing for more than 10 years,<sup>77</sup> with the Commission at the forefront promoting initiatives and new legislation in order to legitimize its new economic approach to the application of competition rules.<sup>78</sup> However, it has been pointed out that the proliferation of legislation which gives economic evidence and analysis a major role and influence in competition cases, runs '*a risk of misunderstanding the place of economics within the judge's control and leave it in the hands of a non-judicial authority*'.<sup>79</sup> In light of these changes, it has been claimed that the judicial deference doctrine risks giving too much discretion to the Commission as there is '*a discrepancy between, on the one hand, the transformation of the EU antitrust enforcement paradigm over the past decade and the corollary expansion of the Commission discretion and, on the other hand, the shrinking of the intensity of judicial review*'.<sup>80</sup>

The current President of the General Court has highlighted this risk and advocated for a clarification of the notion of 'complexity' and thus of the triggering event of marginal

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<sup>77</sup> See LOWE P., *Taking Sound Decisions on the Basis of Available Evidence*, European University Institute, Robert Schuman Centre for Advanced Studies, EU Competition Law and Policy Workshop/Proceedings, 2009, p. 12: '*During the past ten years, the Commission has gradually moved from a form-based approach to an effects-based approach to competition law enforcement. This change is maybe the most obvious as regards Article 81, where the introduction of the horizontal and vertical guidelines (and the accompanying Block Exemption Regulations) showed not only the increasing importance of economics in the assessment of restrictions on competition, but also the increasing importance of analyzing the actual potential negative effect of the agreement. Another field where the importance of an effects-based economic approach increased during recent years is merger control. A further step in this policy was taken in December 2008 when the Commission published its Guidance paper on the enforcement priorities under Article 82*'.

<sup>78</sup> For an overview of the history of the place of economic analysis in the application of the competition rules see JAEGER M., *The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of the Marginal Review?*, in *Journal of European Competition Law & Practice*, 2011, Vol. 2, No. 4, pp. 305 onwards; FORWOOD N., *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*, forthcoming, Hart Publishing; and ORTIZ BLANCO L., LAMADRID DE PABLO A., *Expert Economic Evidence and Effects-Based Assessments in Competition Law Cases*, in *The Role of the Court of Justice of the European Union in Competition Law Cases*, GCLC Annual Conferences Series (edited by MEROLA M. and DERENNE J.) Bruylant, 2010, pp. 305-312.

<sup>79</sup> See JAEGER M., *The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of the Marginal Review?*, in *Journal of European Competition Law & Practice*, 2011, Vol. 2, No. 4, p. 309.

<sup>80</sup> GERARD D., *EU Antitrust Enforcement in 2025: Why Wait? Full Appellate Jurisdiction, Now*, *CPI Antitrust Journal*, Vol. 1, December 2010, pp. 2-3.

review. As pointed out by one author, ‘*the mere fact that an assessment is made which requires consideration of (possibly esoteric) economic arguments and the examination of economic evidence... does not necessarily make an assessment subject to judicial review a “complex” one, subject only to limited control, even though it may make the task of the judge extremely difficult or burdensome*’.<sup>81</sup> It is often argued that the only way to ensure that the Commission’s economic analysis is not left to the authority’s discretion and is still subject to the EU Courts control, is by abandoning the judicial deference doctrine all together. As the argument goes, in a landscape where the Commission has lost, as mentioned *supra*, its advocacy monopoly in the competition field, and where it increasingly resorts to economic analysis, there is no reason to insulate the Commission from an effective and thorough system of judicial review. These are also the reasons why it is argued that limiting the definition of ‘complex economic assessments’ to ‘*situations where the Commission has to make an economics-based choice of policy*’, as proposed by the President of the General Court Mr. Jaeger,<sup>82</sup> would not seem satisfactory, as not only such policy monopoly in the hands of the Commission could be considered no longer justified today, but ‘policy choices’ is also an indeterminate concept and thus does not solve the problem of defining the concrete situations in relation to which the Commission retains discretion, with the subsequent risk and fear that judicial control would continue to be too light when this is not appropriate.

## ***2.2. The EU Courts’ competition law expertise***

In relation to the expansion of the importance of economic analysis, a number of authors claim that the EU Courts do not have the necessary know-how and knowledge in the competition field to adopt decisions or to substitute the Commission's appraisals of so-

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<sup>81</sup> FORWOOD N., *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*, European University Institute, Robert Schuman Centre for Advanced Studies, EU Competition Law and Policy Workshop/Proceedings, 2009, pp. 264-265. Similarly SIRAGUSA: ‘*the question has been seriously overlooked of how correctly to identify those assessments that are to be regarded as “complex” and subject only to light review. The mere fact that the assessment required of the Commission in a given case includes the consideration of economic arguments and the examination of economic evidence... may make the task of the Commission extremely difficult or burdensome. However, it does not necessarily entail “complex” assessments. Judges of all levels are used to dealing with complex, fact-intensive cases and reaching reasoned and reliable conclusions, and there is no reason why competition cases should be different*’; see SIRAGUSA M., *Annulment Proceedings in Antitrust Cases*, in *The Role of the Court of Justice of the European Union in Competition Law Cases*, GCLC Annual Conferences Series (edited by MEROLA M. and DERENNE J.) Bruylant, 2010, p. 133.

<sup>82</sup> See JAEGER M., *The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of the Marginal Review?*, in *Journal of European Competition Law & Practice*, 2011, Vol. 2, No. 4, p. 313.

called complex economic assessments to their own. Scholarly studies have been made to demonstrate that competition cases when particularly complex might be too complicated for generalist judges to adjudicate on.<sup>83</sup> This lack of expertise would justify the current limits on the ability of the EU Courts to comprehensively review and, if appropriate, substitute their own assessments of so-called complex economic facts/issues for those of the expert competition authority.<sup>84</sup> This argument can be summarized as follows:

*‘[o]ne of the potential reasons behind this limited standard of review is the lack of resources at the EU Courts’ disposal. Although the GC was created, amongst others, with the purpose to bear competition cases at first instance, EU Courts are not specialised antitrust or administrative tribunals. There is no substantive court specialisation in competition matters as, for example, in Germany. The EU Courts also lack the significant numbers of competition economists, as well as the manpower and competition expertise, of the Commission’.*<sup>85</sup>

A number of authors contend that this criticism is unfounded as EU judges are in principle fully equipped with the instruments necessary to conduct an in-depth analysis of the legal and factual situations they are presented with, therefore being perfectly capable of making assessments and drawing conclusions in complex competition cases.<sup>86</sup> According to

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<sup>83</sup> BAYE M. R., WRIGHT J. D., *Is Antitrust Too Complicated for Generalists Judges? The Impact of Economic Complexity and Judicial Training on Appeals*, January 27, 2009, *Journal of Law and Economics*, pp. 1-37. See also POWER JG V., *The Relative Merits of Courts and Agencies in Competition Law – Institutional Design: Administrative Models; Judicial Models; and Mixed Models*, in *European Competition Journal*, April 2010, p. 96: ‘it is very likely that almost everyone would accept that competition agencies are more expert and more experienced in competition law matters than courts general [...] On expertise and experience in competition law matters, agencies will usually trump generalist courts’; CAFFARRA C., WALKER M., *An Exploration Into the Use of Economics Before Courts in Europe*, in *Journal of European Competition Law and Practice*, vol. 1, No. 2, 2010, p. 161: ‘[a]t this stage, the courts still remain considerably less economically sophisticated than many competition authorities. Particularly non-specialist courts tend to be unfamiliar with the analytical framework of much competition policy analysis’; and PETIT N., *How much discretion do, and should, competition authorities enjoy in the course of their enforcement activities? A multi-jurisdictional assessment*, in *Concurrences* No. 1-2010, No. 30047, p. 45: ‘[t]he devolution of discretionary powers to CAs traditionally hinges on three different justifications. First, from a public administration standpoint, a primary reason for delegating discretion to CAs is due to their specialized knowledge or expertise, as compared to elected politicians or other governmental organs. Put simply, CAs are deemed best-placed to make decisions in what is often described as an inscrutable discipline’. The author also indicates independence and the possibility of making optimally efficient decisions as other two justifications.

<sup>84</sup> A number of authors are persuaded that competition authorities and regulatory bodies that employ economists in their staff are (or should be) better suited than courts to evaluate sophisticated economic arguments and evidence; see, *inter alia*, CARLTON D. W., *How Should Economic Evidence be Presented and Evaluated?*, in *European Competition Law Annual: 2009. The Evaluation of Evidence and its Judicial Review in Competition Cases* (editors EHLERMANN Claus- Dieter and MARQUIS Mel), European University Institute, Hart Publishing, Oxford & Portland Oregon, 2011, p. 560.

<sup>85</sup> MACGREGOR A., GECIC B., *Due Process in EU Competition Cases*, *Journal of European Competition Law & Practice*, 2012, Vol. 3, No. 5, footnote 72.

<sup>86</sup> See, *inter alia*, BISHOP S., *Expert Economic Evidence in European Competition Law: Some Personal Views*, in *The Role of the Court of Justice of the European Union in Competition Law Cases*, GCLC Annual Conferences Series (edited by MEROLA M. and DERENNE J.) Bruylant, 2010, 293, at 303: ‘[O]bserved “market” evidence

this argument, EU judges have a wide range of instruments available to them that can assist them in resolving disputes.<sup>87</sup> Judges are used to and are trained to dealing with complex, fact-intensive cases and reaching reasoned decisions, as they are provided with all the instruments and tools available to this end.<sup>88</sup> In particular, they can prescribe measures of inquiry intended to prove the veracity of the facts alleged by one of the parties in support of its pleas in law. The Courts can order the personal appearance of the parties, request information and the production of documents, order oral testimony, commission expert reports and, finally, inspect places or things.<sup>89</sup> The range of measures available to them is diversified, although in relation to competition cases giving rise to complex economic issues, expert witnesses and expert reports made by economists are considered the best instruments that can assist judges.<sup>90</sup> The EU Courts however rarely make use of these

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*indicates that judges are perfectly able and capable of reviewing and assessing “complex economic evidence”*; FORRESTER I. S., *A Bush in Need of Pruning: The Luxuriant Growth of Light Judicial Review*, European University Institute, Robert Schuman Centre for Advanced Studies, EU Competition Law and Policy Workshop/Proceedings, 2009, p. 14: *‘the Courts...enjoy significant powers to gather facts and conduct enquiries, powers which seem perfectly consistent with the exercise of unlimited jurisdiction by the Courts’*.

<sup>87</sup> See FORRESTER I. S., *A Bush in Need of Pruning: The Luxuriant Growth of Light Judicial Review*, European University Institute, Robert Schuman Centre for Advanced Studies, EU Competition Law and Policy Workshop/Proceedings, 2009, p. 18: *‘It is not easy to understand why the Courts should defer to the Commission’s expertise in a particular technical or economic controversy when the Courts have themselves the power to appoint experts, economic and otherwise’*.

<sup>88</sup> The accumulation of experience of the EU Courts in competition cases is considered all the more and increasingly out of kilter with a standard of limited review under which only manifest errors are corrected; see BAILEY D., *Standard of Judicial Review under Articles 101 and 102 TFEU*, in *The Role of the Court of Justice of the European Union in Competition Law Cases*, GCLC Annual Conferences Series (edited by MEROLA M. and DERENNE J.) Bruylant, 2010, p. 117.

<sup>89</sup> See Article 45 of the Rules of Procedure of the Court of Justice and Article 65 of the Rules of Procedure of the General Court. On the importance of expert reports for technical assessments see CASTILLO DE LA TORRE F., *Evidence, Proof and Judicial Review in Cartel Cases*, in *World Competition Law and Economics Review*, No. 4, December 2009, p. 567: *‘procedural rules allow for the appointment of court experts. They could arguably help the court to make the technical assessments without having to rely too heavily on the views of the Commission’*.

<sup>90</sup> Court experts are considered *‘highly valuable to detect manifest errors or errors of fact’*; see BARBIER DE LA SERRE E., SIBONY A., *Expert Evidence Before the EC Courts*, in *CMLR Vol. 45*, 2008, p. 969. It is also considered that *‘[g]reater use of expert evidence could combine with greater understanding of the technical background to favour comprehensive review in all cases (a more radical option) or perhaps a more intense form of review and a greater willingness to identify manifest errors (a more likely development)’*; see BAILEY D., *Standard of Judicial Review under Articles 101 and 102 TFEU*, in *The Role of the Court of Justice of the European Union in Competition Law Cases*, GCLC Annual Conferences Series (edited by MEROLA M. and DERENNE J.) Bruylant, 2010, p. 118. The importance of economic studies for the solution of competition cases has also been emphasized by Advocate Generals: *‘[e]conomic analyses often make up an important part of the evidence in competition cases and can be of great value to the Court in understanding the relevant economic context’*; see Opinion of Advocate General Vesterdorf in Case T-1/89 *Rhône-Poulenc SA v Commission* [1991] II-867, at II-957.

instruments and the cases in which they did commission expert reports represent the exception.<sup>91</sup>

### ***2.3. The judicial review paradox created by the direct applicability of Articles 101 and 102 TFEU***

Since the entry into force of Regulation 1/2003, competition authorities and courts of the Member States are also competent to apply Articles 101 and 102 TFEU where they apply national competition law to agreements and practices which may affect trade between Member States. This raises a number of issues. In the first place, in numerous Member States, such as Belgium, France, Germany, UK, and with nuances also in Denmark, Hungary, Latvia, Luxembourg, and the Netherlands, the decisions adopted by national competition authorities are subject to full appellate judicial review.<sup>92</sup> This entails that national judges are required to undertake in-depth analysis and to review issues which are considered economically complex. In the second place, even where Member States do not subject to full judicial review the determinations of national competition authorities, and exercise only a review of legality, it may still be the case that the practice of national courts is to subject to comprehensive review also complex economic assessments. This may occur when national judges review claims for damages caused by antitrust violations. Since these actions pertain to the civil law domain, national judges may be empowered (differentiations will of course exist between Member States) to exercise intense judicial review, without any space left for the discretion of the national competition authority, and without the limits often imposed by Member States in the administrative field for reviewing decisions adopted by independent national authorities.

In the context of actions for damages, the following paradox can thus occur. In follow-on litigation, national judges may be called upon to enforce decisions adopted in the

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<sup>91</sup> The ECJ appointed its own experts in the *ICI* case (Case 48/69 *ICI v Commission* [1972] ECR 619) and in the *Wood Pulp II* case (Joined Cases C-89/85, C-104/85, C-114/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and others v Commission* [1993] ECR I-1307). These cases exemplify the use of expert reports by the Courts in a competition case in order to verify the validity of the conclusions drawn by the Commission as to the existence of a concerted practice. Also, in *GlaxoSmithKline* the GC reached the conclusion that the Commission had failed to examine satisfactorily the first condition of Article 101(3) TFEU on the basis of economic studies produced by the applicant. This case would also prove the Courts' ability to review economic evidence where necessary. See Case T-168/01 *GlaxoSmithKline Services Unlimited v Commission* [2006] ECR II-2969, para 256; upheld on appeal by the Court of Justice.

<sup>92</sup> GERARD D., *EU Antitrust Enforcement in 2025: "Why Wait? Full Appellate Jurisdiction, Now*, in CPI Antitrust Journal, December 2010, p. 8.



antitrust field by the Commission.<sup>93</sup> In these instances, the Commission's determination of the existence of an infringement cannot be rebutted, all the more if the decision has passed the scrutiny of the EU Courts (even if only a 'limited' review of legality). As indicated by one author, '*defendants face a procedural vicious-circle, pursuant to which their right to a fair trial is denied (or, at least, not wholly safeguarded) both at the administrative level as well as in the subsequent civil litigation stage that typically ensues thereafter. Said in other terms, if competition decisions are to a smaller or larger extent immune from judicial review on the merits, damages awarded by a civil judge could be perceived as being the poisonous fruit of the poisonous administrative proceeding they relate to*'.<sup>94</sup>

On the other hand, when national courts are adjudicating on follow-on damage claims based on a decision by the national competition authority (where EU antitrust law may have been applied in parallel to national antitrust law), the national court may be empowered in the civil domain to scrutinize intensely all of the authorities' determinations (not engaging only in a "limited" or "marginal" review of legality). Accordingly, depending on whether particular behavior has been the object of a Commission or a national authority's decision, in the framework of actions for damages, antitrust determinations may be or not subject to intense scrutiny covering also complex economic assessments.

Similarly, in the framework of stand-alone actions for damages, the following paradox may occur: had the interested party based its action on a Commission decision finding an

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<sup>93</sup> Article 16 of Regulation 1/2003 establishes that Commission decisions have binding effect on national courts and national competition authorities when they apply EU antitrust law. This rule also applies when national courts are hearing an action for damages for loss sustained as a result of an agreement or practice which has been found by a decision of the Commission to infringe Article 101 or 102 TFEU.

<sup>94</sup> GRASSANI S., *Jurisdictional vs. "Juris...Fictional" Review in the Land of Menarini*, (June 7, 2012), 19th St.Gallen International Competition Law Forum ICF - June 7th and 8th 2012; available at SSRN: <http://ssrn.com/abstract=2190929>, p. 2. This matter was recently raised by defendants in the preliminary reference ruling in the OTIS case (Case C-199/11 *European Union (represented by the European Commission) v Otis NV and others*, not yet reported). In 2008, the Commission had filed a case with the Brussels Commercial Court to seek damages from four groups of companies, including Otis, that it had found to have breached Article 101 TFEU. The Brussels Commercial Court referred a number of questions to the ECJ. In the preliminary reference proceedings in front of the ECJ, the defendants argued that their right to effective judicial protection under Article 47 of the EU Charter is infringed as EU rulings in the competition field stem their binding effect over possible follow-on private actions, even though the judicial review carried out by EU Courts is insufficient. In particular, for the defendants the review of legality carried out by the EU Courts under Article 263 TFEU in the sphere of competition law is insufficient because of, *inter alia*, the margin of discretion which those Courts allow the Commission in economic matters. The ECJ rejected this argument. After having described the current characteristics of the EU review of legality and unlimited jurisdiction in relation to fines, it concluded that '[t]he review provided for by the Treaties thus involves review by the EU Courts of both the law and the facts, and means that they have the power to assess the evidence, to annul the contested decision and to alter the amount of a fine. The review of legality provided for in Article 263 TFEU, supplemented by the unlimited jurisdiction in respect of the amount of the fine, provided for in Article 31 of Regulation No 1/2003, therefore meets the requirements of the principle of effective judicial protection in Article 47 of the Charter' (para 63).

infringement (giving rise to follow-on proceedings), the antitrust assessments could have been subject only to limited judicial review by the EU Courts; having opted instead, intentionally or for necessity, for a stand-alone action, the national judge, operating in the civil domain, may be empowered to scrutinize all situations in fact and law, including complex economic or technical assessments.

Situations of this kind raise the question of whether it is still justified today to have and keep a state of affairs where national judges have the possibility to scrutinize an antitrust situation more intensely than EU judges. These situations also prove that various national systems are confident that their judges have the instruments and know-how considered necessary to carry out such task and leads to view as surprising the consideration that EU judges are incapable of conducting such activity in an equally adequate manner.

### 3. DUE PROCESS AND THE FLAWS OF THE CURRENT SYSTEM OF LIMITED REVIEW

#### ***3.1. The concentration of functions in the hands of the Commission***

The current system of limited judicial review in the EU has raised criticisms concerning the extent to which the parties' procedural rights and rights of defense are safeguarded in the competition domain. One of the main arguments raised in this context is that the concentration of investigative, prosecutorial and decision-making powers in the hands of a single authority, namely the Commission, raises the question as to whether such extensive and far-reaching powers are subject to effective controls.<sup>95</sup> The concentration of functions in the hands of a single administrative body is not an unusual feature of many administrative systems.<sup>96</sup> However, this is usually considered acceptable only if the decisions adopted are subject to checks and balances, in particular, effective external control in the form of judicial review by a court.<sup>97</sup>

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<sup>95</sup> Certain commentators consider the risk of bias greater in the context of Article 101 and 102 TFEU proceedings, which are inquisitorial nature, than in merger proceedings which examine the possible ex-post effects of an operation before any harm to competition has occurred; see WILS P. J. W., *The combination of the investigative and prosecutorial function and the adjudicative function in EC antitrust enforcement: A legal and economic analysis*, in *Concurrences*, 2005, No. 3, p. 12.

<sup>96</sup> According to the GCLC's 2009 Working Group on competition enforcement, most countries in the world have opted for a system where prosecution is separated from adjudication of a case and cite Korea, Japan, Canada, Australia and Norway as extra-EU examples. Within the EU, the Working Group cites the 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 192), according to which 20 Member States had a system of one administrative authority investigating and deciding the case. See Working Group, *Enforcement by the Commission. The Decisional and Enforcement Structure in Antitrust Cases and The Commission's Fining System*, Report prepared from the Global Competition Law Centre (GCLC)'s Annual Conference "Towards an Optimal Enforcement of Competition Rules in Europe -- Time for a Review of Regulation 1/2003" (11 and 12 June 2009, Brussels), available at [http://www.learlab.com/conference2009/documents/The%20decisional%20and%20enforcement%20structure%20and%20the%20Commission\\_s%20fining%20system%20GERADIN.pdf](http://www.learlab.com/conference2009/documents/The%20decisional%20and%20enforcement%20structure%20and%20the%20Commission_s%20fining%20system%20GERADIN.pdf), p. 6.

<sup>97</sup> For an overview on the risks of prosecutorial bias inherent in systems where the investigative, prosecutorial and decision-making powers are concentrated in the hands of a single antitrust authority see, *inter alia*, WILS P. J. W., *The combination of the investigative and prosecutorial function and the adjudicative function in EC antitrust enforcement: A legal and economic analysis*, in *Concurrences*, 2005, No. 3, pp. 6-10; and SLATER D., THOMAS S., WAELBROECK D., *Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?*, Research Papers in Law/Cahiers juridiques, No. 5/2008, College of Europe, pp. 26-29. According to VENIT, *'the Commission's dual role as prosecutor and judge, coupled with the inquisitorial and asymmetrical nature of its fact-finding and adjudicative proceedings, its insulation from judicial review during those proceedings and the risk of enforcement and other biases, negatively impact the quality of evidence relied on by the Commission. These limitations make necessary the application of a standard of judicial review strict enough to ensure that the Courts examine facts and assumptions about facts with the necessary rigour to guarantee a sound result on the basis of the evidentiary record'*; see VENIT J. S., *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*, European University Institute, Robert Schuman Centre for Advanced Studies, EU Competition Law and Policy Workshop/Proceedings, 2009, pp. 1-2.

The Commission's numerous duties, more specifically to shape competition law and to adopt final, binding decisions, some of which imposing fines, are not questioned here.<sup>98</sup> This multiplicity of roles and duties, as prosecutor, judge and policy maker may make however the existence of an effective system of judicial control of the Commission's actions all the more necessary.<sup>99</sup> Over the years, in order to ensure that the Commission's multiple roles were exercised efficiently and effectively, a number of internal mechanisms have been developed to subject the exercise of the Commission's powers to adequate checks and balances. Not surprisingly, most of these mechanisms were developed in order to strengthen the Commission's internal decision-making process following a number of judgments, mostly in the merger field, where the GC had quashed down the Commission's decisions.<sup>100</sup> Among these mechanisms, one can recall the creation of the Chief Economist, introduced to reinforce the quality of the Commission's economic reasoning, and the creation of the so-called peer/devil advocate panels, introduced to review the strength of the Commission's case.<sup>101</sup> However, several authors claim that the existence of internal checks, in the form of due process features of the Commission's administrative system, is not enough to ensure the fairness of the system.<sup>102</sup> These features remain of a purely

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<sup>98</sup> For an overview of the current flaws and weaknesses of the Commission's antitrust procedures, including the concentration of investigative, prosecuting and decision-making functions, and the issues of fairness they raise, see, *inter alia*, FORRESTER I. S., *Due Process in EC Competition Cases: A Distinguished Institution with Flawed Procedures*, European Law Review, December 2009.

<sup>99</sup> REEVES T, DODOO N., *Standards of Proof and Standards of Judicial Review in EC Merger Law*, (2005) Annual Proceedings of the Fordham Corporate Law Institute, International Antitrust Law & Policy, (Barry E. Hawk, ed.), Juris Publishing Inc., 2006, p. 117. As stated in a OECD Report: '*combining the function of investigation and decision in a single institution*' may have the effect to '*dampen internal critique*' and raise '*concerns about the absence of checks and balances*' (OECD country studies – European Commission – Peer Review of Competition Law and Policy – 2005, p. 62; cited by SLATER D., THOMAS S., WAELBROECK D., *Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?*, Research Papers in Law/Cahiers juridiques, No. 5/2008, College of Europe, p. 2).

<sup>100</sup> See *infra* subsection 2.2 in Chapter 3.

<sup>101</sup> For a detailed overview of the internal mechanisms introduced as checks and balances to the exercise of the Commission's powers in the competition field, see *inter alia* GERADIN N. and PETIT N., *Judicial Review in European Union Competition Law*, in *The Role of the Court of Justice of the European Union in Competition Law Cases*, GCLC Annual Conferences Series (edited by MEROLA M. and DERENNE J.) Bruylant, 2010, pp. 42-44. Recently, on 17 October 2011, the Commission adopted various measures aimed at enhancing transparency and procedural guarantees, including issuing the final version of its best practices in antitrust proceedings, best practices on submission of economic evidence and a revised mandate of the Hearing Officer (Best Practices Package).

<sup>102</sup> GERADIN N. and PETIT N., *Judicial Review in European Union Competition Law*, in *The Role of the Court of Justice of the European Union in Competition Law Cases*, GCLC Annual Conferences Series (edited by MEROLA M. and DERENNE J.) Bruylant, 2010, p. 44. See also MACGREGOR A., GECIC B., *Due Process in EU Competition Cases*, Journal of European Competition Law & Practice, 2012, Vol. 3, No. 5, p. 437: '*Although there are some internal checks and balances, apart from the very limited role of the Hearing Officer, they do not constitute formal*

‘internal’ nature, thus a system of exhaustive review and control by an external and independent body remains all the more necessary.<sup>103</sup> According to certain commentators, only the introduction of a system of more intense or full judicial review would address all the concerns raised by this prosecutorial bias as the Commission would be obliged to ‘conduct proceedings in the shadow of full review’<sup>104</sup> and thus appear in front of the EU Courts on an equal footing with the other parties.

### ***3.2. The interests of parties to proceedings***

Another argument often raised to promote a change in the current system of judicial review is the need to take into account and to safeguard the interests and expectations of parties to proceedings. According to this argument, the circumstance that the EU Courts cannot exercise powers of review on the merits (except in relation to fines), or that, within the review of legality, they cannot exercise a comprehensive and exhaustive review of the Commission’s complex economical and/or technical assessments, is insufficient to effectively safeguard the interests of parties to proceedings.

The circumstance that under the current system of limited review the Courts cannot re-take a decision on the merits of a competition case and the matter is sent back to the Commission, is considered ineffective for the parties to the case from different standpoints. In particular, if, on the one hand, the Commission must draw the consequences of the EU Courts’ judgments, on the other, it is not always clear what measures the Commission must take to comply or whether it effectively complies with judgments. In any event, a fresh and possibly lengthy examination would still be required.<sup>105</sup> The circumstance that the EU Courts cannot substitute their judgment for that of the

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*proceedings followed by stringent procedural safeguards that would merit a decision that is fully compatible with due process requirements?*

<sup>103</sup> VESTERDORF B., *Judicial Review in EC Competition Law: Reflections on the Role of the Community Courts in the EC System of Competition Law Enforcement*, in *Competition Policy International*, Vol. 1, No. 2, 2005, available at <https://www.competitionpolicyinternational.com/file/view/4218>, pp. 6-7.

<sup>104</sup> GERARD D., *EU Antitrust Enforcement in 2025: «Why Wait? Full Appellate Jurisdiction, Now*, in *CPI Antitrust Journal*, December 2010 (1), p. 8.

<sup>105</sup> In the Solvay case (Joined Cases C-109/10 P and C-110/10 P *Solvay SA v Commission* [2011] ECR I-10329, it took the company more than 20 years to obtain a final closure of its case against the Commission for the violation of due process rights. The PVC cartel saga is another example of how the process of adoption, annulment and re-adoption of a decision may be lengthy and costly (Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, *Limburgse Vinyl Maatschappij (LVM) a.o. v Commission* [2002] ECR I-8618; see WILS P. J. W., *The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis*, in *Concurrences*, 2005, No. 3, p. 11 and footnote 36.

Commission and re-adopt the decision, *'impacts the effectiveness of the antitrust enforcement system as a whole, since a successful appellant may well have to wait for a considerable time until its legal situation is finally resolved'*.<sup>106</sup> From the parties' perspective, it could be considered more effective if closure to litigation could be achieved by allowing the EU Courts to take a final decision on the merits.

This is all the more relevant in the merger field in light of the length of the administrative procedure, of the judicial review phase (notwithstanding the possibility of using, in certain instances, an expedited procedure) and of the new examination eventually carried out by the Commission. The parties' interest in the transaction or the latter's chances of surviving or resurrecting following all these phases, are in most cases destined in fact to disappear.<sup>107</sup>

Even if the current separation between review of legality (for decisions) and review on the merits (for fines) were to remain unchanged, it is still argued that, in relation to the former, the circumstance that the EU Courts restrain themselves from conducting a comprehensive review of the Commission's complex economic and/or technical assessments is insufficient to guarantee effective judicial protection.<sup>108</sup> According to this argument, applicants to the EU Courts have the legitimate expectation that the EU judiciary verify the correctness of all the issues, whether matters of fact, law or complex

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<sup>106</sup> See MACGREGOR A., GECIC B., *Due Process in EU Competition Cases*, Journal of European Competition Law & Practice, 2012, Vol. 3, No. 5pp. 431-432. According to the authors this situation may impact another due process principle, the right to obtain a decision within a reasonable time and may thus trigger in the future new human rights criticism.

<sup>107</sup> GLAZENER P., *Strengthening External Checks and Balances in the EU Merger Control System*, in EC Merger Control: A Major Reform in Progress, edited by Götz Drauz and Michael Reynolds, Richmond Law & Tax, 2003; see also MARENCO G., *Judicial Review of the First Ten Years of the Merger Regulation*, EC Merger Control: Ten Years On, International Bar Association, 2000, p. 303. According to the author *'[i]t is true that firms intending to merge generally cannot await the outcome of court proceedings in case of a decision of the Commission blocking their plan. Their interest in the operation generally would not survive the years necessary to reach a judgment of the [General Court] or, worse, of the Court of Justice on appeal'*. See also WAELBROECK D. and FOSSELDARD D., *Should the Decision-Making Power in EC Antitrust Procedures be left to an independent judge? - The Impact of the European Convention on Human Rights on EC Antitrust Procedures*, in Yearbook of European Law, 1994, Vol. 14, p. 139: *'Undertakings dissatisfied with a Commission's decision can in theory appeal such a decision before the [General Court]. However, by the time the appeal procedure will be terminated, the [General Court] judgment is very likely to be deprived of any relevance, in violation to the right to a fair and public hearing by an independent and impartial tribunal as required by Article 6 of the ECHR'*. Similarly LANG J. T., *Do We Need a European Competition Court?*, in Liber Amicorum in honour of Bo Vesterdorf, Brussels, 2007, p. 2: *'Companies are rarely willing or able to keep deals alive for long periods of this kind, particularly in the case of hostile takeovers or merger prohibition decisions [...] Indeed, delay in itself may have significant adverse effects on the target of the takeover'*.

<sup>108</sup> See DERENNE J., *The Scope of Judicial Review in EU Economic Cases*, in The Role of the Court of Justice of the European Union in Competition Law Cases, GCLC Annual Conferences Series (edited by MEROLA M. and DERENNE J.) Bruylant, 2010, p. 80.

economic assessments, that are brought to their attention. As the argument goes, the applicants' demand for justice can only be satisfied by the EU Courts' attention that the Commission's decisions not be affected by any error at all, not just manifest errors. Sustainers of this thesis question in fact:

*'why it is still acceptable and compatible with a satisfactory level of "justice" for the Court to decide that a contested act is "not manifestly incorrect": should the applicant accept that the act it challenged, and which has had effect on it, was "not unreasonably wrongful"? There should be no such concept: the act is wrong or not, illegal or not. "Justice" should be done entirely, within the sole limit of the form of remedy that can be applied according to the rules governing the Court's competence, i.e. the ability of the Court to annul the act or dismiss the application for annulment'.*<sup>109</sup>

### ***3.3. Intense scrutiny and the quality of administrative decisions***

Another argument in favor of a more intense scrutiny of the Commission's decisions is that more scrutiny helps the decision-maker, rather than weakening it, and encourages rigor within the decision-making authority thereby sharpening its own internal decision-making process. The EU Court's case law supports this finding. For example the *Tetra Laval*<sup>110</sup> and *Airtours*<sup>111</sup> cases in the merger field, led to the introduction of peer review mechanisms inside the Commission, thus enhancing the quality of today's Commission decisions (*see supra* subsection 3.1 in Section II of this Chapter). This argument is all the more valid in a competition enforcement system where the Commission's decisions are applied in 28 different Member States and are of inspiration for national judges and national antitrust authorities. More intense scrutiny of the Commission's decisions would thus benefit the system by avoiding that incorrect assessments have negative consequences on firms or that they reverberate on the assessments of other public authorities. This view rests on the belief that judicial review of administrative decisions is the ultimate guarantor of

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<sup>109</sup> DERENNE J., *The Scope of Judicial Review in EU Economic Cases*, in *The Role of the Court of Justice of the European Union in Competition Law Cases*, GCLC Annual Conferences Series (edited by MEROLA M. and DERENNE J.) Bruylant, 2010, p. 85.

<sup>110</sup> Case C-12/03 P *Commission v Tetra Laval BV* [2005] ECR I-987.

<sup>111</sup> Case T-342/99 *Airtours plc v Commission* [2002] ECR II-02585.

transparency and accountability and is likely to improve the effective quality of the decisions adopted at the administrative level.<sup>112</sup>

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<sup>112</sup> OECD Reviews of Regulatory Reform: Regulatory Policies in OECD Countries, OECD 2002, p. 75; *see also* GERADIN D., PETIT N., *Judicial Review in European Competition Law: A Quantitative and Qualitative Assessment*, TILEC Discussion Paper No. 2011-008, Tilburg Law School Research Paper No. 01/2011, February 2011, pp. 7-8, available at [www.ssrn.com/abstract=1698342](http://www.ssrn.com/abstract=1698342), and authors cited therein; *see also* MONTI M., *Merger Control in the European Union: A Radical Reform*, European Commission/IBA Conference on EU Merger Control, Brussels, November 7, 2002 (Commission Press Release SPEECH/02/545), concerning the role played by the EU Courts in ‘*exerting constant pressure on the Commission to continuously improve its level of expertise*’.



#### 4. COMPATIBILITY OF THE CURRENT SYSTEM WITH FUNDAMENTAL RIGHTS

An issue often debated is whether the *status quo* of the current EU judicial review system meets the standards required for the protection of fundamental rights mandated by a number of international conventions to which the EU is or will soon be a party to. The following subsections will address the issue of the compatibility of the current system of judicial review (i) with the Charter of Fundamental Rights of the European Union (the “EU Charter”) and (ii) in light of the future accession of the EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the “ECHR”, “EU Convention” or “Convention”).

The current EU system of judicial review of competition decisions is inherently limited given the characteristics of the control EU judges exercise in actions for annulment under Article 263 TFEU (which does not extend to a full appellate review on the merits), and for the deferential treatment EU judges reserve within the exercise of their review of legality to the Commission’s complex political, economic and/or technical appraisals (*see supra* subsection 2 in Section I of this Chapter). In light of these limitations, several authors claim that a system of full or more intense judicial review is necessary in order to comply with the provisions of the EU Charter and the ECHR.<sup>113</sup> According to these theories, if the current system were kept unchanged, this could be interpreted as contradicting these international conventions as procedural fairness would not be guaranteed.<sup>114</sup> This argument has been developed on the basis of the possible ‘criminal’ nature of antitrust fines and in relation to the application of Article 47 of the EU Charter and Article 6(1) ECHR.<sup>115</sup> As recently

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<sup>113</sup> This issue has been raised, *inter alia*, by organisations and law firms commenting on the European Commission’s draft Best Practices in Antitrust Proceedings and the Hearing Officer’s Guidance Paper; *see* Comments submitted by the International Chamber of Commerce, *Due process in EU antitrust proceedings*, 8 March 2010. More generally, commentators also criticize possible violation of fundamental rights during the administrative proceedings before the Commission. These criticisms are beyond the scope of this research. For an overview *see, inter alia*, SCORDAMAGLIA A., *Cartel proof, imputation and sanctioning in European competition law: Reconciling effective enforcement and adequate protection of procedural guarantees*, in *The Competition Law Review*, Vol. 7, Issue 1, pp. 5-52.

<sup>114</sup> *See* Comments submitted by the International Chamber of Commerce, “*Due process in EU antitrust proceedings*”, March 8, 2010, pp. 1-2.

<sup>115</sup> The analysis of the ECHR system will focus on Article 6 ECHR and its implications for the intensity of EU judicial control in competition cases. It must be mentioned, however, that another provision of the ECHR is often invoked by commentators to criticize the current state of affairs in relation to judicial control. This is Article 7 ECHR which establishes the presumption of innocence (*nullum crimen, nulla poena sine lege*). According to this argument the circumstance that a criminal sanction is enforced without having been subject to full review could be considered incompatible with the presumption of innocence to the extent that it cannot be required that interested parties be able to anticipate and predict the effects of their conduct when

stated by the General Court in the *Areva* case, ‘[t]he requirement of judicial review constitutes one of the general principles of EU law stemming from the constitutional traditions common to the Member States and has also been enshrined in Articles 6 and 13 of the ECHR...The right to an effective remedy is, moreover, reaffirmed in Article 47 of the Charter of Fundamental Rights of the European Union’.<sup>116</sup> The debate on judicial review is however considered to have a more general outcome, as preserving the current system without any changes in all of the competition field, including also merger proceedings (not considered criminal in nature), may reduce the prestige of the EU system of competition enforcement.<sup>117</sup> This latter outcome, analyzed *infra* in subsection 4.2.4.3 in Section II of this Chapter, derives from the circumstance that Article 47 of the Charter does not distinguish between criminal and civil charges, thus the right to a fair trial in the EU constitutional framework is not limited to disputes relating to criminal or civil charges.<sup>118</sup>

The discussion on this matter has picked up momentum over the last years, not only in light of the negative effects that a finding of a violation of fundamental rights by the EU may have, but also in consideration of the improvements that could, in any event, be introduced in the system. As emphasized by one commentator ‘*I see this debate as mainly an implicit invitation to the judges to carry out a more thorough review, condition sine qua non, for the*

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‘certain key aspects of a fining decision become too complex for judicial review’. See, *inter alia*, BRONCKERS M, VALLERY A., *Fair and Effective Competition Policy in the EU: Which Role for the Authorities and Which Role for the Courts after Menarini (July 5, 2012)*, European Competition Journal, Vol. 8, No. 2, 2012, available at SSRN: <http://ssrn.com/abstract=2137524>, pp. 11-12. Against this argument see, *inter alia*, Castillo de la Torre, according to whom the Commission’s margin of assessment is not incompatible with the principle of the presumption of innocence as the Commission will not simply make the assessment it wishes, but the one that it deems to be the correct one and also most appropriate for the respect of the presumption of innocence; see CASTILLO DE LA TORRE F., *Evidence, Proof and Judicial Review in Cartel Cases*, in World Competition Law and Economics Review, No. 4, December 2009, p. 576. This issue was raised before the ECtHR years ago but not resolved as in the meantime the Commission’s fine had been annulled by the GC (see ECtHR decision of 10 March 2004, *Senator Lines v Austria and others*, Application No. 56672/00 and Joined Cases T-191/98, T-212/98 and T-214/98 *Atlantic Container Line* [2003] ECR II-3275).

<sup>116</sup> Joined Cases T-117 and 121/07 *Areva SA and Others v Commission* [2011] ECR II-633, para 224.

<sup>117</sup> See, *inter alia*, International Chamber of Commerce Commission, *Due process in EU antitrust proceedings*, Comments submitted on the European Commission’s draft Best Practices in Antitrust Proceedings and the Hearing Officers’ Guidance Paper, 8 March 2010, p. 1; and ANDREANGELI A., *EU Competition Enforcement and Human Rights*, Edward Elgar, 2008, pp. 29-39.

<sup>118</sup> This is spelled out in the Explanatory Memorandum which accompanies the Charter where in relation to Article 47 it is stated that this provision ‘corresponds to Article 6(1) ECHR [...] In Community law, the right to a fair hearing is not confined to disputes relating to civil law rights and obligations. That is one of the consequences of the fact that the Community is a community based on the rule of law [...]. Nevertheless, in all respects other than their scope, the guarantees afforded by the ECHR apply in a similar way in the Union’. See Explanations relating to the complete text of the Charter, December 2000, available at [http://ue.eu.int/uedocs/cms\\_data/docs/2004/4/29/Explanation%20relating%20to%20the%20complete%20text%20of%20the%20charter.pdf](http://ue.eu.int/uedocs/cms_data/docs/2004/4/29/Explanation%20relating%20to%20the%20complete%20text%20of%20the%20charter.pdf).

*advocates of that view, to render the system compatible with fundamental rights'*<sup>119</sup> [...However, c]*riticisms of the institutional system based on its alleged incompatibility with fundamental rights do not appear to find a robust basis in the existing case law of the ECtHR. This of course does not mean that the system is perfect and cannot be improved.*<sup>120</sup>

At present, firms wishing to raise pleas on the unfairness of EU competition proceedings and, in particular, on violations of their right to a fair trial, are able to do so in appeals before the EU Courts on the basis of the EU Charter and the ECHR, both incorporated in the EU legal framework through different Treaty provisions (*see infra* subsections 4.1 and 4.2 of Section II in this Chapter). Furthermore, once the EU accession to the ECHR is formalized, the EU will be directly bound by the fundamental rights enshrined in the ECHR. Given that the accession process will inevitably come to a successful end (the EU has undertaken to sign up to the Convention's system), soon enough EU acts, including EU Court judgments, will be subject to the external control exercised by the European Court of Human Rights (hereinafter "ECtHR"). Formal accession of the EU to the ECHR will in fact give the possibility to any physical or legal person to claim that his or her rights under the ECHR have been violated and to bring an application to this end in front of the ECtHR once all internal remedies have been exhausted. The above considerations have raised the issue, examined below in relation respectively to the EU Charter and the ECHR, of whether the current characteristics of the EU system of judicial review passes the scrutiny of fundamental rights.

#### ***4.1. Compatibility of the EU system of judicial review with the EU Charter of Fundamental Rights***

Article 6(1) TEU establishes that the Union recognizes the rights, freedoms and principles set out in the EU Charter, which has the same legal value as the Treaties. The EU Charter recognizes a range of personal, civil, political, economic and social rights of EU citizens and residents, enshrining them into EU law. The EU Charter was formally proclaimed in Nice in December 2000 by the European Parliament, Council and Commission. In December 2009, with the entry into force of the Lisbon Treaty, the EU

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<sup>119</sup> TORRE C., *Evidence, Proof and Judicial Review in Cartel Cases*, in *World Competition Law and Economics Review*, No. 4, December 2009, p. 571.

<sup>120</sup> TORRE C., *Evidence, Proof and Judicial Review in Cartel Cases*, in *World Competition Law and Economics Review*, No. 4, December 2009, p. 577.

Charter was given binding legal effect equal to the Treaties.<sup>121</sup> In the competition field, Regulation 1/2003 expressly recognizes the importance of the EU Charter by stating at Recital 37 that: ‘[t]his Regulation respects the fundamental rights and observes the principles recognized in particular by the Charter of Fundamental rights of the European Union. Accordingly, this Regulation should be interpreted and applied with respect to those rights and principles?’.

Among the various rights it proclaims, Article 47 of the EU Charter enshrines the right to an effective remedy before a Tribunal. This first two paragraphs of this provision establish that: ‘[e]veryone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.’ In light of Article 52(3) of the EU Charter, this right must be interpreted as providing as much protection as that provided by the ECHR. Article 52(3) establishes that: ‘[i]n so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection’. Accordingly, if any of the rights enshrined in the EU Charter correspond to rights guaranteed by the ECHR, the meaning and scope of those rights is to be the same as defined by the Convention, though EU law may provide for more extensive protection. According to the Explanatory Memorandum which accompanies the Charter, Article 47 ‘corresponds to Article 6(1) ECHR [...] and the guarantees afforded by the ECHR apply in a similar way in the Union’.<sup>122</sup> The analysis of the ECHR case law on the right to a fair trial is thus of particular importance, even withstanding the EU’s accession to the ECHR, because of its partial incorporation in EU law through the above provisions.<sup>123</sup> This incorporation occurs also through Article 6(3) TEU which establishes

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<sup>121</sup> See, *inter alia*, SANCHEZ S. I., *The Court and the Charter: The Impact of the Entry into Force of the Lisbon Treaty on the ECJ’s Approach to Fundamental Rights*, in CMLR, 2012, 49, pp. 1565-1612.

<sup>122</sup> See Explanations relating to the complete text of the Charter, December 2000, available at [http://ue.eu.int/uedocs/cms\\_data/docs/2004/4/29/Explanation%20relating%20to%20the%20complete%20text%20of%20the%20charter.pdf](http://ue.eu.int/uedocs/cms_data/docs/2004/4/29/Explanation%20relating%20to%20the%20complete%20text%20of%20the%20charter.pdf).

<sup>123</sup> The incorporation of the ECHR in EU law under Article 52(3) EU Charter is only partial as limited to those specific rights which have a corresponding twin provision in the EU Charter, as is the case with the right to a fair trial enshrined respectively in Article 47 EU Charter and Article 6(1) ECHR. For an in-depth analysis of the challenges that the partial incorporation of the ECHR into EU law has for the role of the Convention in the application of human rights by EU institutions see, *inter alia*, WEIß W., *Human rights in the EU: Rethinking the Role of the European Convention on Human Rights after Lisbon*, in *European Constitutional Law Review*, 2011, 7, pp. 64–95; WEIß W., *Human rights and EU antitrust enforcement: news from Lisbon*, in *ECLR*, 2011, Issue 4, pp. 186-195; and ANDREANGELI A., *Competition enforcement and human rights after the*

that fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.<sup>124</sup> Through the indirect references to the ECHR contained in the TEU, interested parties are entitled to the exercise of judicial review powers by the EU Courts in a manner compliant with Article 6(1) ECHR.<sup>125</sup> In practice, this entails that undertakings which have been the addressees of Commission fining decisions have the right to obtain in first instance before the General Court a 'full review' of the Commission's assessments, and then on appeal before the Court of Justice a review based on points of law apt to verifying that the General Court did ensure an effective judicial review as mandated by the EU Charter and the ECHR.<sup>126</sup> In light of the importance that the provisions of the TEU give to the interpretation and application of fundamental rights under the system of the ECHR, any discussion on the content of the right to a fair trial under the EU Charter must be made in light also of its content under the ECHR system, examined in the following subsection.<sup>127</sup>

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Treaty of Lisbon: the state of play and the (near) future prospects, in Eugene Buttigieg (eds) *Rights and remedies in a liberalised and competitive internal market*, Gutenberg Press, 2012, pp. 63-94.

<sup>124</sup> It follows from a consistent line of cases (*see* the judgments in Case C-177/94 *Perfili* [1996] ECR I-161, para 20, and Case C-309/96 *Annibaldi v Sindaco del Comune di Guidonia and Presidente Regione Lazio* [1997] ECR I-7493, para 12), that fundamental rights form an integral part of the general principles of law, the observance of which the Community judicature ensures. For that purpose, the Court of Justice and the Court of First Instance draw inspiration from the constitutional tradition principles common to the Member States and also from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. In that context, the Court of Justice has stated that the ECHR has special significance (Case 222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, para 18, and Case C-299/95 *Kremzow v Austria* [1997] ECR I-2629, para 14). As the Court has also stated, it follows that the Community 'cannot accept measures which are incompatible with observance of the human rights thus recognised and guaranteed' by the Community (*see*, in particular, Case C-260/89 *ERT* [1991] ECR I-2925, para 41).

<sup>125</sup> As will be examined *infra*, only with the EU's formal accession to the ECHR the compliance of EU measures with the Convention, including judgments, will be submitted to the external control of the ECtHR.

<sup>126</sup> The importance of the EU Charter has recently been confirmed by the EU Courts in the *KME* and *Chalkor* judgments of 8 December 2011, where the ECJ focused its analysis on the respect of the parties' fundamental rights on the EU Charter rather than on the ECHR (*see infra* subsection 2.2.2 of Chapter 2).

<sup>127</sup> However, as will be seen *infra* in subsection 2.2.2 of Chapter 2, in the *KME* and *Chalkor* cases the ECJ based its reasoning entirely on Article 47 of the EU Charter and made no reference to Article 6 ECHR. According to commentators this may be explained by the ECJ's willingness to develop its own case law on the right to a fair trial, still at its infancy, rather than borrowing the mature case law developed under the ECHR on the principle of effective judicial protection; *see, inter alia*, MUGUET-POULLENNEC G., *Sanctions prévues par le règlement no 1/2003 et droit à une protection juridictionnelle effective: les leçons des arrêts KME et Chalkor de la CJUE*, in *Revue Lamy de la Concurrence: droit, économie, regulation*, 2012, No. 32, p. 57-78. For an in-depth analysis of the origins and scope of the general principle of effective judicial protection in EU law, even before the adoption of the EU Charter and the current discussions on the ECHR, *see, inter alia*, ARNULL A., *The Principle of Effective Judicial Protection in EU Law: An Unruly Horse?*, in *European Law Review*, 2011, Vol. 36(1), pp. 51-70, and RAVO L. M., *The Role of the Principle of Effective Judicial Protection in the EU and Its Impact on*

## ***4.2. Compatibility of the current system with the European Convention of Human Rights***

### *4.2.1. The Convention and the European Court of Human Rights*

The ECtHR is an international court based in Strasbourg whose functioning is regulated by the European Convention, an international Treaty containing a list of fundamental civil and political rights and guarantees which a number of States have undertaken to respect.<sup>128</sup> The ECtHR's task is to ensure that the Member States respect the rights and guarantees set out in the Convention and does so by examining complaints, known as applications, lodged by individuals, legal entities or States. The ECtHR's function is not that of a court of appeal *vis-à-vis* national courts, thus it is not empowered to rehear cases, nor quash, vary or revise national decisions or annul national laws.

Where the ECtHR finds that one or more Member States have violated the Convention, it delivers a binding judgment which the countries concerned are under an obligation to comply with. If the ECtHR finds there has been a violation, it may also award 'just satisfaction', a sum of money in compensation for certain forms of damage.<sup>129</sup> In case of a violation, the ECtHR may also require the State or States concerned to refund the expenses incurred by the applicants in presenting the case. On the other hand, if the ECtHR finds that there has been no violation, the applicant will not have to pay any additional costs, such as those incurred by the respondent State/s.

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*National Jurisdictions*, in Sources of Law and Legal Protection (Triestine Lecture 1), EUT Edizioni Università di Trieste, 2012, pp. 101-125.

<sup>128</sup> Currently the parties to the Convention are 47. The rights and freedoms secured by the Convention include, among others, the right to life, the right to a fair hearing, the right to respect for private and family life, freedom of expression, freedom of thought, conscience and religion and the protection of property. The Convention prohibits, in particular, torture, and inhuman or degrading treatment or punishment, forced labour, arbitrary and unlawful detention, and discrimination in the enjoyment of the rights and freedoms secured by the Convention. For an overview of the ECHR system *see, inter alia*, REID K., *A Practitioner's Guide to the European Convention on Human Rights*, Sweet & Maxwell, 4<sup>th</sup> ed., 2012.

<sup>129</sup> The award of just satisfaction is not an automatic consequence of a finding by the ECtHR that there has been a violation of a right guaranteed by the Convention or its Protocols. The ECtHR shall award just satisfaction only if the domestic law does not allow complete reparation to be made, and even then only 'if necessary' and if this award is considered 'just'. Article 41 of the Convention states: '[i]f the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party'.

#### 4.2.2. *The EU Accession to the Convention*

Currently the EU is not a formal member to the Convention as the accession process is still on-going. The accession of the EU to the Convention has been made possible by the entry into force of the Treaty of Lisbon.<sup>130</sup> In its new formulation, Article 6(2) TEU now requires the EU to accede to the Convention's system.<sup>131</sup> On the side of the Council of Europe,<sup>132</sup> the legal basis for the EU's accession is provided for by Article 59 paragraph 2 of the Convention, as amended by Protocol No. 14 to the ECHR which entered into force on 1 June 2010.<sup>133</sup>

Official negotiations between the Council of Europe and the EU to elaborate the necessary legal instrument for the EU's accession to the ECHR started on 7 July 2010. In order to finalize the accession process, an agreement needed to be found between the EU and the 47 current members of the Convention. The draft accession agreement of the EU to the European Convention on Human rights was finalized by negotiators of the 47 Council of Europe member states and the EU on 5 April 2013.<sup>134</sup> A number of draft

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<sup>130</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ [2007] C306/1.

<sup>131</sup> Article 6(2) TEU states: '[t]he Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties'.

<sup>132</sup> The Council of Europe, based in Strasbourg (France), was founded on 5 May 1949 by 10 countries. Today, with its 47 member countries, it seeks to develop throughout Europe common and democratic principles based on the European Convention on Human Rights and other reference texts on the protection of individuals and legal persons.

<sup>133</sup> Article 59 of the Convention, as amended by Article 17 of Protocol 14, contains a new paragraph 2 which states that '[t]he European Union may accede to this Convention'.

<sup>134</sup> For an overview of the various steps of the negotiations between the Council of Europe member States and the EU, see the Council of Europe dedicated website: <http://hub.coe.int/en/web/coe-portal/what-we-do/human-rights/eu-accession-to-the-convention?dynLink=true&layoutId=22&dlgroupId=10226&fromArticleId=>. For an in-depth analysis of the complex issues raised by a supranational organization such as the EU signing up to an international system of human rights protection, in particular concerning the autonomy of the EU legal order see, *inter alia*, LOCK T., *Walking on a Tightrope: The Draft ECHR Accession Agreement and the Autonomy of the EU Legal Order*, in CMLR, 2011, 48, pp. 1025-1054; POTTEAU A., *Quelle adhésion de l'Union européenne à la CEDH pour quel niveau de protection des droits et de l'autonomie de l'ordre juridique de l'UE?*, in *Revue générale de droit international public*, 2011, No. 1, pp. 77-112; JACQUÉ J. P., *The Accession of the European Union to the European Convention of Human Rights and Fundamental Freedoms*, in CMLR, 2011, Vol. 48, pp. 995-1023; LOCK T., *EU Accession to the ECHR: Implications for Judicial Review in Strasbourg*, in *European Law Review*, 2010, Vol. 35; CALLEWAERT J., *The European Convention on Human Rights and European Union Law: a long way to harmony*, in *EHRLR*, 2009, 6, pp. 768-783; and MORGAN DE RIVERY E., *EU accession to the ECHR: Bringing about an aggiornamento for EU case law? Overview of ECHR and EU case law*, e-competitions No. 61327. On the importance of Article 6 ECHR see, *inter alia*, KUIJER M., *The Blindfold of Lady Justice: Judicial Independence and Impartiality in Light of the Requirements of Article 6 ECHR*, Nijmegen Wolf Legal Productions, 2004; PERROUD T., *The impact of Art. 6.1 ECHR on competition law enforcement in France and the United Kingdom*, in e-Competitions, No. 21954; and BAILLEUX A., *Le salut dans l'adhésion?: Entre Luxembourg et Strasbourg, actualités du respect des droits fondamentaux dans la mise en œuvre du droit de la concurrence*, in *RTD Eur.*, January-March 2010, 46(1), pp. 31-54.

revised agreements have since been discussed and negotiated. An opinion of the EU Court of Justice will be sought on the compatibility of the draft agreement with the EU Treaties.<sup>135</sup> Depending on the outcome of such an opinion, renegotiations might be necessary.

The final agreement, which will result in an accession Treaty, will have to be ratified by all 47 parties to the Convention as well as by the EU according to the procedure set out in Article 218 TFEU. According to this provision, the Council will have to decide unanimously, having obtained the consent of the European Parliament. In addition, each Member State will have to ratify the Treaty in accordance with its national constitutional provisions, a process which may prove time-consuming.

Although the EU is still not a formal party to the Convention, the EU is still required to take into account the interpretation of fundamental rights given by the ECtHR. In the past, it was sometimes stated by the EU Courts that they did not *'have to systematically take into account, as regards fundamental rights under Community law, the interpretation of the Convention given by the Strasbourg authorities'*.<sup>136</sup> However, this can no longer be considered the case. In light of Article 6(3) TEU, which establishes that ECHR fundamental rights constitute general principles of EU law; of Article 52(3) of the EU Charter, which establishes that the fundamental rights it recognizes must be interpreted equivalently to the identical rights enshrined in the ECHR; and of Article 6(2) TEU, with which the EU has committed to abide to the fundamental rights of the Convention, it is evident that the EU Courts increasingly have to take into account the interpretation of fundamental rights given by the ECtHR. In addition, with the EU's formal accession to the ECHR, the compliance of EU measures with the Convention, including court judgments, will be submitted to the external control of an external judicial entity, the ECtHR.

#### 4.2.3. *Article 6(1) ECHR and criminal charges*

In the debate on the compatibility of the current system of judicial review with fundamental rights, the main provision of the ECHR which is called into question is Article

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<sup>135</sup> In accordance with Article 218(11) TFEU, [a] Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.

<sup>136</sup> Opinion of Advocate General Darmon in Case 374/87 *Orkem v Commission* [1989] ECR 3283, para 140.



6(1) which provides that: '[i]n 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'. The consequence of the classification of a proceeding as criminal in nature is that the individual or legal person concerned should be afforded all the guarantees and protection offered by Article 6 ECHR. In light of the nature and level of fines imposed today by the Commission, competition law proceedings in the fields of Articles 101 and 102 TFEU are increasingly considered 'criminal' in nature. The following subsection will examine the notion of criminal charge under the ECHR case law, its application to EU competition proceedings and the EU Courts' position on the matter.

#### 4.2.3.1. *The notion of criminal charge*

Article 6(1) ECHR applies to proceedings involving the determination of civil rights or criminal charges. In order to assess the applicability of Article 6(1) ECHR to proceedings in the antitrust field, it must be first ascertained whether decisions adopted by the Commission under Articles 101 and 102 TFEU can be considered a criminal charge.

The concept of criminal charge has an autonomous meaning under the ECHR and is independent of the categorizations employed by national legal systems. This has been confirmed by the early case law of the ECtHR in order to avoid that the application of Article 6(1) ECHR could be circumvented by the domestic classification of penalties adopted by parties to the Convention.<sup>137</sup> Accordingly, although competition fining

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<sup>137</sup> See ECtHR judgment of 27 February 1980, *Deveer v Belgium*, Application No. 6903/75, para 44: 'the prominent place held in a democratic society by the right to a fair trial ... prompts the Court to prefer a "substantive", rather than a "formal", conception of the "charge" contemplated by Article 6 par. 1 (art. 6-1). The Court is compelled to look behind the appearances and investigate the realities of the procedure in question'; see also ECtHR judgment of 8 June 1976, *Engel and Others v the Netherlands*, Application No. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, para 81: '[t]he Convention without any doubt allows the States, in the performance of their function as guardians of the public interest, to maintain or establish a distinction between criminal law and disciplinary law, and to draw the dividing line, but only subject to certain conditions. The Convention leaves the States free to designate as a criminal offence an act or omission not constituting the normal exercise of one of the rights that it protects. This is made especially clear by Article 7 (art. 7). Such a choice, which has the effect of rendering applicable Articles 6 and 7 (art. 6, art. 7), in principle escapes supervision by the Court. The converse choice, for its part, is subject to stricter rules. If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a "mixed" offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Articles 6 and 7 (art. 6, art. 7) would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the purpose and object of the Convention. The Court therefore has jurisdiction, under Article 6 (art. 6) and even without reference to Articles 17 and 18 (art. 17, art. 18), to satisfy itself that the disciplinary does not improperly encroach upon the criminal'.

decisions are not considered criminal within the autonomous meaning of EU law,<sup>138</sup> proceedings in relation to antitrust infringements can be considered criminal within the autonomous meaning of Article 6(1) ECHR.<sup>139</sup> Prior to evidencing that competition sanctioning can be embodied in Article 6(1) ECHR, as has been confirmed by the ECtHR case-law, it is worth mentioning in which situations a sanction can be considered ‘criminal’ in nature under the Convention’s system.

In accordance with the ECtHR’s case law, a fine can be considered ‘criminal’ according to the following alternative criteria: (i) the classification of the offence under domestic law; (ii) the nature of the offence; and (iii) the degree of severity of the penalty.<sup>140</sup> These three conditions are often referred to as the ‘*Engel* criteria’,<sup>141</sup> are alternative and not cumulative, and are used to establish whether the sanctions imposed have a punitive and deterrent effect and whether the level of sanction and the stigma attaching to the offence is important.<sup>142</sup>

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<sup>138</sup> Article 23(5) of Regulation 1/2003 provides that the Commission’s antitrust fining decisions ‘*shall not be of a criminal law nature*’.

<sup>139</sup> For an overview of the ECtHR case law from which it emerges that classifications under domestic law have only a relative value and that the ECtHR will prefer a substantive rather than formal conception of what is a ‘criminal charge’, see SLATER D., THOMAS S., WAELBROECK D., *Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?*, Research Papers in Law/Cahiers juridiques, No. 5/2008, College of Europe, pp. 5-7. The authors also argue that even if EU antitrust fines were not considered criminal, this does not exclude the possibility under the ECHR to consider criminal the proceedings in relation to which they are adopted. This would be possible (i) relying on the *Engel* criteria that gives importance to the stigma attaching to offenses; and (ii) considering that Regulation 1/2003 foresees the possibility of a criminalization of such proceedings under national law (pp. 8-9). See also SCHWARZE J., *Judicial Review of European Administrative Procedure*, in Law and Contemporary Problems, 2004, Vol. 68, pp. 101-103; MÖSCHEL W., *Fines in European Competition Law*, in ECLR, 2011, Issue 7, pp. 369-375; and WILS P. J. W., *Is criminalization of EU competition law the answer?*, in Concurrences, 2006, No. 1.

<sup>140</sup> The ECtHR has also resorted to other criteria, such as considering whether: (i) the law is addressed to all citizens from a specific area; (ii) the fine is used as a punishment in order to deter re-offending; (iii) the general purpose of the fine is to be deterrent and punitive; and (iv) the amount of surcharge is substantial; see, *inter alia*, ECtHR judgment of 24 February 1994, *Bendenoun v France*, Application No. 12547/86. However, currently the ECtHR resorts consistently to the *Engel* criteria described above which take into account the criteria listed in the text.

<sup>141</sup> ECtHR judgment of 8 June 1976, *Engel and others v the Netherlands*, Application Nos. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72. In the recent *Menarini* case the ECtHR confirmed that a cumulative approach may be pursued when the separate analysis of each criterion does not lead to a conclusive outcome; see ECtHR judgment of 27 September 2011, *A. Menarini Diagnostics S.r.l. v. Italy*, Application No. 43509/08, para 38 (hereinafter, “*Menarini*”).

<sup>142</sup> Later ECtHR case law has confirmed the importance of the deterrent and punitive character of a sanction. In *Jussila v Finland* the ECtHR established that the deterrent and punitive character of the sanction determined the ‘*criminal nature of the offence*’ (see ECtHR judgment of 23 November 2006, *Jussila v Finland*, Application No 73053/01, para 38).

#### 4.2.3.2. *The criminal nature of antitrust sanctions*

The ECtHR case law supports the classification of EU competition proceedings as criminal in nature. In the *Société Stenuit*,<sup>143</sup> *Fortum*,<sup>144</sup> *Jussila*<sup>145</sup> and more recently in the *Menarini* case,<sup>146</sup> among others, the ECtHR held that Article 6(1) ECHR can effectively apply in the competition field. It emerges from these cases that national antitrust proceedings, despite being classified as administrative in their respective domestic laws, can be considered criminal in nature. Given the similarities with the EU system, it is considered that the same conclusion can be extended to antitrust proceedings before the Commission.

In the *Societe Stenuit* case,<sup>147</sup> the French company Stenuit appealed to the ECtHR after being held responsible by the French Ministry for Economic and Financial Affairs of sharing public contracts during tenders and submitting ‘higher tenders than its competitors on the understanding that agreements would be concluded on future occasions to ensure that it was awarded other contracts’.<sup>148</sup> The undertaking concerned was fined both by the Ministry and by the French Commission de la Concurrence. In dismissing Stenuit’s appeal, the French Conseil d’Etat contended that: (i) the fines imposed were not criminal in nature and (ii) administrative penalties were not contrary to the provisions of the ECHR.<sup>149</sup> Even though the case was settled,<sup>150</sup> in its concluding Report, the European Commission for Human Rights<sup>151</sup> considered that the Ministry’s decision to impose a penalty involved a criminal sanction and could imply a violation of Article 6(1) of the ECHR. The Commission for Human Rights took the view that in consideration of the objectives of the national legislation under examination and the nature and severity of the offence, ‘*le caractère pénal que l’affaire revêt au regard de la Convention ressort sans ambiguïté*’ (paragraph 65). The Commission for Human Rights concluded in the Report that the Conseil d’Etat had not exercised its full

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<sup>143</sup> European Commission of Human Rights Report of 30 May 1991, *Société Stenuit v France*, Application No. 11598/85.

<sup>144</sup> ECtHR judgment of 15 July 2003, *Fortum v Finland*, Application No. 32559/96.

<sup>145</sup> ECtHR judgment of 23 November 2006, *Jussila v Finland*, Application No. 73053/01.

<sup>146</sup> ECtHR judgment of 27 September 2011, *A. Menarini Diagnostics S.r.l. v. Italy*, Application No. 43509/08.

<sup>147</sup> See ECtHR judgment of 27 February 1992 *Société Stenuit case v France*, Application No. 11598/85 and the Report of the European Commission for Human Rights of 12 July 1991 issued in the same case.

<sup>148</sup> Para 5 of the *Société Stenuit* judgment.

<sup>149</sup> Para 5 of the *Société Stenuit* judgment.

<sup>150</sup> After the Report of the Commission of Human Rights, the ECtHR stroke out the case following the applicant’s decision to withdraw its application.

<sup>151</sup> From 1954 until the entry into force of Protocol 11 of the Convention, individuals did not have direct access to the ECtHR; they had to first apply to the Commission of Human Rights, which if it found the case to be well-founded would launch a case in Court on the individual’s behalf.

jurisdictional powers and thus the undertaking concerned had not benefited from the judicial review of an independent and impartial tribunal, as required by Article 6(1) ECHR.<sup>152</sup>

In the 2003 *Fortum* case, the parties to the proceedings had not contested the applicability of Article 6 ECHR to their case which concerned the application of Finnish competition law. Here the ECtHR had concluded that the applicant's right to a fair trial had been violated as it had not had the opportunity to be heard in front of the Finnish Supreme Administrative Court on a document of the Finnish Competition Office which had been presented to the Administrative Court and contained accusations against it.<sup>153</sup>

In the more recent *Jussila* case the ECtHR confirmed that competition law can fall under the criminal head of Article 6(1) ECHR and stated that: '[t]he autonomous interpretation adopted by the Convention institutions of the notion of a criminal charge by applying the Engel criteria have underpinned a gradual broadening of the criminal head to cases not strictly belonging to the traditional categories of the criminal law, for example [...] competition law'.<sup>154</sup> As will be examined *infra*, this judgment has also drawn an important distinction between hard-core criminal law and cases not strictly belonging to the traditional categories of criminal law, including administrative penalties, prison disciplinary proceedings, customs law and competition law.

In the recent *Menarini* case, the ECtHR had to ascertain whether the fining decision adopted by the Italian competition authority in a cartel case involving various companies could be considered a criminal charge. In doing so, it referred to its previous case law, in particular the *Engel* criteria,<sup>155</sup> and concluded that the authority's decision had to be considered criminal in nature and that Article 6(1) ECHR was applicable to the case under examination (*see in detail infra* subsection 4.2.5 in Section II of this Chapter).

The EU Courts have also shown an increased awareness of the criminal nature of competition proceedings within the meaning given to the concept of 'criminal charge' by the Strasbourg Court.<sup>156</sup> Over time, EU case law has recognised the direct link between

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<sup>152</sup> Para 72 of the Report

<sup>153</sup> ECtHR judgment of 15 July 2003, *Fortum v Finland*, Application No. 32559/96, paras. 44-45.

<sup>154</sup> ECtHR judgment of 23 November 2006, *Jussila v Finland*, Application No. 73053/01, para 32.

<sup>155</sup> ECtHR judgment of 8 June 1976, *Engel and others v. Netherlands*, Application Nos. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72.

<sup>156</sup> *See* Advocate General Vesterdorf's Opinion of 10 July 1991 in the polypropylene cartel, Case T-7/89 *SA Hercules Chemicals v Commission* [1991] ECR II-867, para I.3; and Advocate General Leger's Opinion of 3 February 1998 in Case C-185/95 P *Baustahlgebebe GmbH v Commission* [1998] ECR I-8417, para 31. *See also* the General Court's statements in *JFE v Commission* (Case T-67/00 [2004] ECR II-2501, para 178) where the

severe penalties and the rights of defence guaranteed by the ECHR (*see* more in detail *infra* subsection 2.2.1 in Chapter 2). As stated by Advocate General Vesterdorf: ‘*the fines which may be imposed on undertakings [...] have a criminal law character, it is vitally important that the Court should seek to bring about a state of legal affairs not susceptible of any justified criticism with reference to the European Convention for the Protection of Human Rights*’<sup>157</sup>. EU officials have also often highlighted the punitive and deterrent character of competition fines.<sup>158</sup>

#### 4.2.3.3. *The application of criminal charges by administrative authorities*

According to certain authors, under the Convention system the imposition of a fine considered criminal in nature by an administrative authority, as the European Commission, is not considered *per se* incompatible with the ECHR in so far as the measure in question is open to challenge before a court who can offer all the protections and guarantees enshrined in Article 6(1) ECHR, including independence, impartiality and the exercise of powers of full judicial review. This argument would derive from a distinction introduced by the ECtHR’s case law between hard-core criminal law and cases not strictly belonging to the traditional categories of criminal law.<sup>159</sup> In light of the ECtHR’s pronouncement in *Jussila*, competition law would belong to the second category.<sup>160</sup>

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Court held that ‘*given the nature of infringements [...] and the nature and degree of severity of the ensuing penalties, the principle of the presumption of innocence applies in particular to the procedures relating to infringements of the competition rules relating to undertakings that may result in the imposition of fines or periodic penalty payments*’. *See also* Case T-138/07 *Schindler Holding Ltd. and Others v Commission* ECR [2011] II-04819, paras. 52-59, where the GC found that EU competition law belonged to the periphery of Article 6 ECHR and was compatible with its requirements. *See contra* LEGAL H., *Le contentieux communautaire de la concurrence entre contrôle restreint et pleine juridiction*, in *Concurrences* No. 2-2005, No. 95, pp. 1-2: ‘[l]’*autorité régulatrice est la Commission; elle prend des décisions qui sont des actes administratifs, auxquels on prête un caractère quasi pénal tout-à-fait injustifié*’.

<sup>157</sup> Opinion of Advocate General Vesterdorf in Case T-1/89, *Rhone Poulenc SA v Commission* [1991] ECR II-867, p. 885.

<sup>158</sup> *See* [http://ec.europa.eu/competition/publications/cpn/2009\\_1\\_7.pdf](http://ec.europa.eu/competition/publications/cpn/2009_1_7.pdf); *see also* the Director General for Competition A. Italianer’s speech of April 2010, available at [http://ec.europa.eu/competition/speeches/text/sp2010\\_02\\_en.pdf](http://ec.europa.eu/competition/speeches/text/sp2010_02_en.pdf); *see also* speeches by former Competition Commissioner Neelie Kroes in October 2009, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/454&format=HTML&aged=0&language=EN&guiLanguage=en>, and March 2007, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/128&format=HTML&aged=0&language=EN&guiLanguage=en>.

<sup>159</sup> WILS P. J. W., *EU Antitrust Enforcement Powers and Procedural Rights and Guarantees: The Interplay between EU Law, National Law, the Charter of Fundamental Rights of the EU and the European Convention on Human Rights*, Paper presented at the 2<sup>nd</sup> Annual International Concurrences Conference ‘New Frontiers of Antitrust’ (Paris, 11 February 2011), pp. 22-23; WILS P. J. W., *The Increased Level of EU Antitrust Fines, Judicial Review, and the European Convention on Human Rights*, *World Competition*, Volume 33, No. 1, March 2010, pp. 15-17.

<sup>160</sup> ‘*The autonomous interpretation adopted by the Convention institutions of the notion of a criminal charge by applying the Engel criteria have underpinned a gradual broadening of the criminal head to cases not strictly belonging to the traditional*

According to this differentiation, when penalties belong to the ‘hard core’ category of criminal sanctions, an independent and impartial tribunal shall establish the criminal nature of charges. Therefore, ‘*in the criminal context [...] there must be at first instance a tribunal which fully meets the requirements of article 6.*’<sup>161</sup> When penalties do not belong to the category of ‘hard core’ criminal sanctions, as would be the case for antitrust fines, in order to comply with Article 6(1) ECHR, it is necessary that: or the administrative authority imposing the sanction in question is capable of offering all the guarantees enshrined therein, or, should the first solution not be applicable, the decision issued by the non-judicial body must be subject to the subsequent control of a judicial authority that does meet the requirements of Article 6(1) ECHR, including independence, impartiality and the possibility to exercise full judicial review powers.<sup>162</sup>

For some time, given the lack of case law on the point, it was debated whether competition proceedings should fall under the category of hard-core criminal law or under the category of non-hard core criminal offenses (with the fundamental distinction that in the latter case the first determination of the right can be made by an administrative body, followed by the possibility of appeal to an impartial and independent court with full jurisdiction). The issue was addressed for the first time in the *Jussila* judgment in favour of the second solution (*see supra* subsection 4.2.3.2 in Section II of this Chapter). In the *Menarini* judgment the ECtHR, although it did not delve on the question whether competition law belonged to the hard-core of criminal law, it took into account the distinction between hard-core and non-hard-core by stating that: ‘[p]ar ailleurs, la Cour

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*categories of the criminal law, for example [...] competition law*’, *see* ECtHR judgment of 23 November 2006, *Jussila v Finland*, Application No. 73053/01, paras. 32 and 43.

<sup>161</sup> ECtHR judgment of 23 November 2006, *Jussila v Finland*, Application No 73053/01, para 40.

<sup>162</sup> This distinction was elaborated for the first time by the ECtHR in the *LeCompte* case (ECtHR judgment of 23 June 1981, *Le Compte, Van Leuven and De Meyere v Belgium*, Application Nos. 6878/75; 7238/75, para 51). The ECtHR here considered acceptable a two-tier system when proceedings concerned disputes over civil rights and obligations. The two-tier system has been considered acceptable by the ECtHR also in the civil domain in the presence of disciplinary offences (*see* ECtHR judgment of 10 February 1983, *Albert and Le Compte v Belgium*, Application Nos. 7299/75; 7496/76, para 29). This case law has subsequently been extended to criminal proceedings concerning minor road traffic offenses in the *Ozturk* case (ECtHR judgment of 21 February 1984. Application No. 8544/79, para 56) and to criminal proceedings concerning tax surcharges in the *Bendenoun* case (ECtHR judgment of 24 February 1994, *Bendenoun v France*, Application No. 12547/86, para 46). According to several authors, this principle applies also where sanctions are of large amounts and not only to ‘minor offenses’. For example, in the *Bendenoun* case the ECtHR applied this principle ‘*even if the [penalties] are large ones*’ or ‘*very substantial*’ (paras. 46 and 47); *see, inter alia*, WILS P. J. W., *The Increased Level of EU Antitrust Fines, Judicial Review, and the European Convention on Human Rights*, World Competition, Volume 33, No. 1, March 2010, p. 17; *see also* CASTILLO DE LA TORRE F., *Evidence, Proof and Judicial Review in Cartel Cases*, in World Competition Law and Economics Review, No. 4, December 2009, p. 571.

rappelle que la nature d'une procédure administrative peut différer, sous plusieurs aspects, de la nature d'une procédures pénale au sens strict du terme. Si ces différences ne sauraient exonérer les Etats contractants de leur obligation de respecter toutes les garanties offertes par le volet pénal de l'article 6, elles peuvent néanmoins influencer les modalités de leur application'.<sup>163</sup> The ECtHR, after considering the national competition proceedings under examination criminal in nature, it did implicitly consider acceptable the Italian two-tier system where the competition 'criminal' charge was decided by an administrative authority and then subject to the subsequent review of national courts.<sup>164</sup>

Applying by analogy the ECtHR cases concerning national competition laws to the EU scenario,<sup>165</sup> the circumstance that the Commission combines its investigative and decision-making powers and cannot be qualified as an independent and impartial tribunal,<sup>166</sup> would not necessarily run counter to Article 6(1) ECHR. The establishment of criminal charges can be entrusted to administrative or non-judicial bodies as well, without the need of separating their internal functions, as long as their decisions can be challenged before a judicial body that respects all the requirements of Article 6(1) ECHR. Accordingly, Article 6(1) ECHR would allow for the imposition of antitrust fines by the Commission, provided

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<sup>163</sup> ECtHR judgment of 27 September 2011, *A. Menarini Diagnostics S.r.l. v. Italy*, Application No. 43509/08, para 62.

<sup>164</sup> This view is not shared by certain commentators who claim that '*Menarini does not settle this point, as Menarini's challenge [...] focused on the way the Italian Courts had exercised their review [...] not on the architecture of the Authority, or on the legality of criminal fines it inflicts. [...] No mention was made in the judgment of the Jussila-distinction between a 'hard core' and a 'periphery' within criminal heading of Article 6 ECHR*'. The circumstance that the ECtHR in *Menarini* did not address directly the distinction between hard-core and non-hard-core leads to speculation as this can be interpreted in the sense that or the ECtHR considers that competition law fines fall outside the 'hard-core' or that according to the ECtHR criminal sanctions must not always necessarily be imposed by a judge. Moreover, according to these commentators, '[w]ithout the *Menarini*-court having explicitly dealt with these arguments [...] it is difficult to draw any firm conclusions on where the law stands. [...] if the *Menarini* court had wanted to tackle the questions [...] on the characterization of competition law fines ('hard-core' or not, etc.) on its own motion, it probably could have done so. But the Court did not. Given the sensitivities of these issues, one should not draw implicit or a contrario conclusions from this judgment. They merit a full hearing, and proper, explicit consideration by the Court, and preferably (like *Jussila*) by the Grand Chamber'. See Bronckers and Vallery also citing Waelbroeck in BRONCKERS M, VALLERY A., *Fair and Effective Competition Policy in the EU: Which Role for the Authorities and Which Role for the Courts after Menarini* (July 5, 2012), in *European Competition Journal*, Vol. 8, No. 2, 2012, available at SSRN: <http://ssrn.com/abstract=2137524>, pp. 4-5.

<sup>165</sup> As recognized undisputedly, the importance of the *Menarini* judgment for the debate on the EU system 'lies in the fact that the Italian system of judicial review effectively mirrors the arrangements for the judicial review of the European Commission's decisions on competition taken pursuant to Articles 101 and 102 of the [...] TFEU'; see OLIVER P., '*Diagnosics*' – a Judgment Applying the Convention of Human Rights to the Field of Competition, in *Journal of European Competition Law & Practice*, 2012, Vol. 3, No. 2, p. 163.

<sup>166</sup> Past case law of the EU Courts has consistently held that the Commission cannot be considered as a 'tribunal' within the meaning of Article 6 ECHR; see, *inter alia*, Case T-348/94 *Enso Espanola v Commission* [1998] ECR II-1989, para 56, and Joined Cases 100/80, 101/80, 102/80 and 103/80 *Musique Diffusion Française and Others v Commission* [1983] ECR 1825, para 7.

that the EU Courts, before which the addressees of Commission fining decisions can bring appeal, offer all the protection and guarantees enshrined in Article 6(1) ECHR.<sup>167</sup> This view, however, is not unanimously shared, as a number of commentators believe that EU competition proceedings fall within the hard-core of criminal law in light of the nature of the offence (against free competition in the general interest of society), the stigma attached to competition sanctions, and their severity and deterrent nature.<sup>168</sup> Sustainers of this view therefore criticize the current antitrust architecture and consider that respect of Article 6(1) ECHR requires that ‘criminal’ charges in EU competition cases be adopted only by the EU Courts. The following subsections are based on the premise that EU competition proceedings do not belong to ‘hard-core’ criminal law but to the periphery of Article 6(1) ECHR, and will examine the characteristics of the EU system of judicial review in light of the requirements of this provision.

#### 4.2.4. *The characteristics of the EU system of judicial review in competition cases in light of the requirements of Article 6(1) ECHR*

It is necessary to examine whether the EU system of judicial review complies with the requirements set out in Article 6(1) ECHR, first in relation to the conditions of independence and impartiality established in Article 6(1) ECHR, then, in relation to the scope and standards governing the EU Courts’ powers of judicial review in competition cases. The EU and ECHR standards of review will be confronted with a view to establishing if the EU rules, and the manner in which they are concretely applied by the EU

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<sup>167</sup> At the EU level, cases are pending which might shed some light with reference to the issue of the combination of investigative and decision-making powers of the Commission. By way of example, this matter was recently discussed in the action brought by Saint Gobain against the Commission in which it relied, *inter alia*, on the ‘infringement of the right of an independent and impartial tribunal [...] in so far as the fine was imposed by an administrative authority which holds simultaneously powers of investigation and sanction and that Regulation 1/2003 is unlawful in so far as it does not provide for that right to an independent and impartial tribunal’; see Case T-56/09 *Saint - Gobain Glass France and Others v Commission*, currently pending in front of the General Court.

<sup>168</sup> BRONCKERS M, VALLERY A., *No Longer Presumed Guilty? The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law*, in *World Competition*, 2011, No. 4, pp. 540-542. For an overview of the arguments raised in favour of considering competition proceedings part of the hard-core of criminal law see, *inter alia*, SLATER D., THOMAS S., WAELBROECK D., *Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?*, Research Papers in Law/Cahiers juridiques, No. 5/2008, College of Europe, pp. 17-21’ and INTERNATIONAL CHAMBER OF COMMERCE COMMISSION, *Due process in EU antitrust proceedings*, Comments submitted on the European Commission's draft Best Practices in Antitrust Proceedings and the Hearing Officers’ Guidance Paper, 8 March 2010, pp. 3-5. See *contra* TORRE C., *Evidence, Proof and Judicial Review in Cartel Cases*, in *World Competition Law and Economics Review*, No. 4, December 2009, pp. 571-577.



Courts, are compliant with the requirement of full judicial review set out in Article 6(1) ECHR.

As to the requirement of independence and impartiality, Article 6(1) ECHR establishes the right to a fair trial by an ‘independent and impartial tribunal’. It emerges from the ECHR case law that these two notions are often treated together, a lack of independence often coinciding with a lack of objective impartiality.<sup>169</sup> As to the requirement of independence, this necessitates that the tribunal or court be independent of the legislative and executive powers and of the parties. The criteria the ECtHR will consider to this end are the manner of appointment of the members, duration of office, guarantees against external pressures and appearance of independence.<sup>170</sup> As to the requirement of impartiality, a distinction is normally made between subjective and objective impartiality. The first relates to the actual existence of a prejudice on the part of a tribunal or court, or any of its members, the second refers to the existence of sufficient guarantees to exclude any legitimate doubt in this matter.<sup>171</sup> In light of the characteristics of the General Court and the Court of Justice, there is no doubt that they satisfy the requirements of independence and impartiality set out in Article 6(1) ECHR.<sup>172</sup>

As to the requirement of full judicial review, the approach advocated by the ECtHR demands that the court competent for reviewing administrative measures aimed at, in the case of competition infringements, the determination of a criminal charge, enjoy ‘full jurisdiction’. The ECtHR case law is not straightforward on what this requirement entails under Article 6(1) ECHR. From an overview of the case law, it is possible to make a first distinction between the standard of review applied in criminal cases and in civil cases. The judgments examined further justify the conclusion that, where criminal matters are concerned, the competent court should be able to access the validity of the measure both in fact and in law. On the other hand, it is considered still controversial whether the ECtHR mandates only the power to quash in all respects the decision under examination,

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<sup>169</sup> REID K., *A Practitioner's Guide to the European Convention on Human Rights*, Sweet & Maxwell, 4<sup>th</sup> ed., 2012, p. 159.

<sup>170</sup> ECtHR judgment of 1 October 1982, *Piersack v Belgium*, Application No. 8692/79, para 27.

<sup>171</sup> REID K., *A Practitioner's Guide to the European Convention on Human Rights*, Sweet & Maxwell, 4<sup>th</sup> ed., 2012, p. 162.

<sup>172</sup> See, *inter alia*, Case T-348/94 *Enso Espanola v Commission* [1998] ECR II-1989, para 62: ‘[f]irst, the Court of First Instance is an independent and impartial court, established by Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 [...] As is apparent from the third recital in the preamble to that decision, the Court was established in order particularly to improve the judicial protection of individual interests in respect of actions requiring close examination of complex facts’ (emphasis added).

or whether it also requires the power to decide and reform under all aspects the decision in question.

#### 4.2.4.1. *The ECtHR case law in criminal cases*

In *Albert and LaCompte* the ECtHR emphasized that the tribunal competent for reviewing administrative measures aimed at the determination of the individual's civil rights must enjoy 'full jurisdiction', while in the specific case '[t]he Court of Cassation does not take cognisance of the merits of the case, which means that many aspects of "contestations" (disputes) concerning "civil rights and obligations", including review of the facts and assessment of the proportionality between the fault and the sanction, fall outside its jurisdiction'.<sup>173</sup> In this case the ECtHR did not consider it necessary to decide whether, in the specific circumstances, there was a 'criminal charge', as it considered the two aspects, civil and criminal, not necessarily mutually exclusive, however it considered that paragraph 1 of Article 6, violation of which was alleged by the applicants, applied in civil matters as well as in the criminal sphere.

In *Belilos* the ECtHR held that the proceedings before the French Criminal Cassation Division did not satisfy the standards laid down by Article 6(1) ECHR, as recourse to that court did not allow for a 'ruling on the merits but solely for review of (...) [the] lawfulness'.<sup>174</sup>

In *Stenuit*, the European Commission for Human Rights held that the French Conseil d'Etat, which according to national law had the power to exercise full judicial control, had not exercised such powers in practice, thus the undertaking concerned had not benefited from the intervention of a tribunal with full judicial review powers, as required by Article 6(1) ECHR.<sup>175</sup> Interestingly, and contrary to what is provided under EU law, under French legislation the Conseil d'Etat's full judicial review powers entailed the possibility to 'substituer sa propre décision a celle qui lui est déferée, exerçant sur cette dernière un entier control. [...] Le Conseil d'Etat était ainsi appelé a contrôler la matérialité des faits retenus pour sanctionner la personne concernée, la qualification juridique des faits (et donc la base légale de la décision), la régularité de la

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<sup>173</sup> ECtHR judgment of 10 February 1983, *Albert and Le Compte v Belgium*, Application Nos. 7299/75; 7496/76, paras. 30, 36-37.

<sup>174</sup> ECtHR judgment of 29 April 1988, *Belilos v Switzerland*, Application No. 10328/83, para 70. Moreover, the French court did not have full competence to re-examine the facts. These various factors led to the conclusion that the jurisdiction of the Criminal Cassation Division was not in the instant case sufficient for the purposes of Article 6(1) of the Convention.

<sup>175</sup> Report of the European Commission of Human Rights, para 72.

*procédure suivie, ainsi que la proportionnalité entre les manquements commis et le montant de l'amende infligée (en réduisant au besoin cette dernière)*' (emphasis added).<sup>176</sup>

Similarly in *Schmautzer*, a case relating to an administrative decision concerning motoring offences (an Austrian citizen was imposed a fine with 24 hours imprisonment in default of payment), a violation of Article 6(1) ECHR was found in the lack on the part of the competent administrative court of the power to annul the final decision in all respects, on questions of fact and law. Here the ECtHR stated that '[t]he powers of the Administrative Court must be assessed in the light of the fact that the court in this case was sitting in proceedings that were of a criminal nature for the purposes of the Convention. It follows that when the compatibility of those powers with Article 6 para. 1 (art. 6-1) is being gauged, regard must be had to the complaints raised in that court by the applicant as well as to the defining characteristics of a "judicial body that has full jurisdiction". These include the power to quash in all respects, on questions of fact and law, the decision of the body below. As the Administrative Court lacks that power, it cannot be regarded as a "tribunal" within the meaning of the Convention'.<sup>177</sup>

In *Janosevic*, the ECtHR restated that full jurisdiction entails '*the power to quash in all respects, on questions of fact and of law, the challenged decision*'.<sup>178</sup> Here the ECtHR concluded that there had been no violation of Article 6(1) ECHR because the Swedish courts reviewing the Swedish Tax Authority's findings had '*jurisdiction to examine all aspects of the matters before them. Their examination is not restricted to points of law but may also extend to factual issues, including the assessment of evidence. If they disagree with the findings of the Tax Authority, they have the power to quash the decisions appealed against*'.<sup>179</sup>

In *Kyprianou*, a Cypriot case concerning a contempt of Court falling under the criminal head of Article 6 ECHR, the ECtHR stated: '*[t]he Court notes that the decision of the Assize Court was subsequently reviewed by the Supreme Court. According to the Court's case-law, it is possible for a higher tribunal, in certain circumstances, to make reparation for an initial violation of the Convention (see the De Cubber v. Belgium judgment of 26 October 1984, Series A no. 86, p. 19, § 33). However, in the present case, the Court observes that the Supreme Court agreed with the approach of the first instance court, i.e. that the latter could itself try a case of criminal contempt committed in its face, and rejected the applicant's complaints which are now before this Court. There was no retrial of the case by the Supreme*

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<sup>176</sup> Report of the European Commission of Human Rights, para 41.

<sup>177</sup> ECtHR judgment of 23 October 1995, *Schmautzer v Austria*, Application No. 15523/89, para 36.

<sup>178</sup> ECtHR judgment of 21 May 2003, *Janosevic v Sweden*, Application No. 34619/97, para 81.

<sup>179</sup> ECtHR judgment of 21 May 2003, *Janosevic v Sweden*, Application No. 34619/97, para 82.

Court. As a court of appeal, the Supreme Court did not have full competence to deal *de novo* with the case, but could only review the first instance judgment for possible legal or manifest factual errors. It did not carry out an *ab initio*, independent determination of the criminal charge against the applicant for contempt of the Assize Court. Furthermore, the Supreme Court found that it could not interfere with the judgment of the Assize Court, accepting that that court had a margin of appreciation in imposing a sentence on the applicant. Indeed, although the Supreme Court had the power to quash the impugned decision on the ground that the composition of the Assize Court had not been such as to guarantee its impartiality, it declined to do so. The Court also notes that the appeal did not have a suspensive effect on the judgment of the Assize Court. In this connection, it observes that the applicant's conviction and sentence became effective under domestic criminal procedure on the same day as the delivery of the judgment by the Assize Court, i.e. on 14 February 2001. [...] In these circumstances, the Court is not convinced by the Government's argument that any defect in the proceedings of the Assize Court was cured on appeal by the Supreme Court' (emphasis added).

In the recent *Menarini* case, the ECtHR emphasized that among the most important features of a system of full judicial review, the ECtHR recalls the authority to examine all questions of fact and law relevant to the dispute and the power of modifying the contested decision: '[p]armi les caractéristiques d'un organe judiciaire de pleine juridiction figure le pouvoir de réformer en tous points, en fait comme en droit, la décision entreprise, rendue par l'organe inférieur. Il doit notamment avoir compétence pour se pencher sur toutes les questions de fait et de droit pertinentes pour le litige dont il se trouve saisi' (emphasis added).<sup>180</sup> Notwithstanding this definition, the ECtHR in the *Menarini* case considered acceptable a system whereby the national courts exercised an (exhaustive) review of legality coupled by unlimited review only in relation to the fine (for a detailed examination *see infra* subsection 4.2.5 of this Chapter).

Finally in the 2012 *Bouygues Telecom* case, the ECtHR considered that the Paris Court of Appeal had unlimited jurisdiction over the decisions of the French Competition Council as it was able to assess the merits of the case and in particular to engage in a review of the proportionality between the misconduct and the penalty: '[I]a Cour souligne, à cet égard, que la cour d'appel de Paris statuant sur les recours formés à l'encontre des décisions du Conseil de la concurrence a la compétence de pleine juridiction (article L. 464-8, alinéa 1 du code de commerce, voir « droit interne

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<sup>180</sup> ECtHR judgment of 27 September 2011, *A. Menarini Diagnostics S.r.l. v. Italy*, Application No. 43509/08, para 59.

*pertinent »), qu'elle était donc en mesure d'apprécier le bien-fondé de la cause et notamment de se livrer à un contrôle de proportionnalité entre la faute et la sanction'.<sup>181</sup>*

In light of the ECtHR case law, a number of authors claim that the current EU judicial review system ‘does not pose any legal problems, as it appears fully compatible with Article 6 ECHR, as interpreted by the European Court of Human Rights’,<sup>182</sup> and that the ‘[c]riticisms of the institutional system based on its alleged incompatibility with fundamental rights do not appear to find a robust basis in the existing case law of the ECtHR’.<sup>183</sup> On the other hand, a number of other commentators believe that the ECHR requirements are strict and require full appellate judicial review, *i.e.* a full *de novo* review of the case. This view can be summarized as follows:

*‘In light of the ECtHR case-law, it is clear that judicial review by the GC in antitrust cases should not be limited to questions of law and to the determination of the appropriate level of the fine, but should also extend to a full reassessment of the facts and to the expediency of the Commission’s decision. The GC cannot limit its analysis to “manifest errors of appraisals or misuses of power” but should in every case reassess fully the facts and the choice of the appropriate legal and economic tests applied to these facts. The “unlimited jurisdiction” that the Community Courts are entitled to exercise should not be limited to altering the amount of the fines imposed on companies but should also extend to the very determination of the infringement giving rise to these sanctions’.*<sup>184</sup>

This argument is supported, *inter alia*, by the circumstance that in the French versions of the ECtHR judgments, the expression ‘*the power to quash*’ the decision below uses the verb ‘*reformer*’ (the power to substitute one assessment for another) rather than the word ‘*quash*’

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<sup>181</sup> ECtHR judgment of 13 March 2012, *Société Bouygues Telecom v France*, Application No. 2324/08, para 71. In this case, Bouygues Telecom had claimed, *inter alia*, that its right to a fair trial under Article 6 ECHR had been violated as it had not benefited from a public hearing in proceedings in front of the French Competition Council. The ECtHR rejected this claim and stated that the absence of a public hearing at the administrative stage was counterbalanced by the double judicial review of its decision by the Court of Appeal and the *Cour de Cassation*. See THEOPHILE D. and SIMIC I., *Can Human Rights Help? Bouygues’ Claim that its Procedural Rights were Infringed*, in *Journal of European Competition Law and Practice*, Vol. 3, No. 4, 2012, p. 345.

<sup>182</sup> WILS P. J. W., *The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis*, in *Concurrences*, 2005, No. 3, p. 11.

<sup>183</sup> CASTILLO DE LA TORRE F., *Evidence, Proof and Judicial Review in Cartel Cases*, in *World Competition Law and Economics Review*, No. 4, December 2009, pp. 577. See also the comments of the Director General for Competition Mr. Italianer in the aftermath of the *Menarini* judgment where he stated that given the resemblances between the EU and Italian system, the EU system of review would also comply with the ECHR standards of judicial review; see ITALIANER A., *Best Practices for antitrust proceedings and the submission of economic evidence and the enhanced role of the Hearing Officer*, Speech at the OECD Competition Committee Meeting, Paris, 18 October 2011, available at [http://ec.europa.eu/competition/speeches/text/sp2011\\_12\\_en.pdf](http://ec.europa.eu/competition/speeches/text/sp2011_12_en.pdf).

<sup>184</sup> SLATER D., THOMAS S., WAELBROECK D., *Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?*, *Research Papers in Law/Cahiers juridiques*, No. 5/2008, College of Europe, p. 34.

(*i.e.* annul). If this were the scope of judicial review mandated by the ECtHR, in light of the characteristics of the EU system of judicial review in competition cases (*see supra* subsections 1 and 2 of Section I in this Chapter), the EU system could be considered inadequate and insufficient.

This view is contested by those authors who claim that Article 6(1) ECHR does not require the judicial body to conduct *de novo* trials, being sufficient that it review the contested decision (examining all pleas, factual and legal, raised by the applicant) and that it quash the decision when it disagrees with its findings.<sup>185</sup> This debate must now take into account the recent case law of the ECtHR, in particular the *Menarini* judgment, which has held not contrary to Article 6 ECHR, a system of judicial review of administrative charges considered criminal in nature which did not provide for full appellate judicial review but only for a review of legality for the finding of the infringement, combined with full appellate review for the determination of the fine.<sup>186</sup> Given the importance that the *Menarini* judgment has for the present debate, this case has been examined in detail in order to understand its effects (*see infra* subsection 4.2.5 of this Chapter).

A more nuanced view is that of those authors who consider that the ECtHR case law does not mandate full appellate judicial review, but does require that *within* the framework of the review of legality, there should be no limitations concerning the assessments the judicial authority can review.<sup>187</sup> This argument refers to the intensity of the judicial review exercised and considers that under the ECHR system it must be full, excluding standards which give space to discretion or that correct only manifest errors. As indicated by one author:

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<sup>185</sup> See WILS P. J. W., *The Increased Level of EU Antitrust Fines, Judicial Review, and the European Convention on Human Rights*, in *World Competition*, Volume 33, No. 1, March 2010, pp. 20-21. The author bases this argument, *inter alia*, on the ECtHR *Kyprianou* judgment of December 15, 2005 (*Kyprianou v Cyprus*, Application No. 73797/01), which would not contradict this conclusion as the case concerned a hard-core criminal measure and not the requirements of judicial review outside the hard-core of criminal law.

<sup>186</sup> Interestingly, in the *Menarini* judgment the ECtHR used the verb '*reformer*'. For an analysis of the criticisms raised by the findings of the ECtHR in this judgment *see infra* subsections 4.2.7 and 2.2.3 respectively in Chapters 1 and 2.

<sup>187</sup> See, *inter alia*, ANDREANGELI A., *EU Competition Enforcement and Human Rights*, Edward Elgar, 2008, p. 232: '*the "restrained" scrutiny of the "complex economic assessments" contained in decisions applying Articles 81 and 82 EC Treaty appears to be at variance vis-à-vis the standards laid down by the European Court of Human Rights as regards appeals against administrative decisions determining a criminal charge, such as minor motoring offences*'. See also WAELBROECK D., FOSSELARD D., *Should the Decision-Making Power in EC Antitrust Procedures be left to an independent judge? - The Impact of the European Convention on Human Rights on EC Antitrust Procedures*, in *Yearbook of European Law*, 1994, Vol. 14 p. 133: '*[i]t may therefore still be doubted whether the control carried out by the Court of First Instance, as long as it will be limited to manifest errors of fact, will be sufficient to meet the requirements of Article 6 of the ECHR*'.

*‘if two-tier systems with deferential judicial review are admissible, there may be issues that are never fully determined by an independent and impartial decision-maker whenever the first instance body is not independent and impartial and the reviewing court exercises deferential judicial review. This is prohibited by Article 6(1) ECHR, which does not allow any derogation from the right to an independent and impartial tribunal.’*<sup>188</sup>

Accepting that this is the correct interpretation of ‘full review’ under the Convention’s system, and considering the Commission does not satisfy the requirements of independence and impartiality, raises the issue of the incompatibility of the ‘limited’ or ‘marginal’ standard of review exercised by EU judges *vis à vis* complex economic and/or technical assessments of the Commission in competition cases. This view is however not shared by certain authors who claim that a parallelism can be made between criminal and civil charges, both covered by Article 6(1) ECHR. According to this argument, examined more in detail in the following subsection, in civil cases judicial review can be limited to a control of manifest errors and the same conclusion could be transposed to criminal cases.

#### 4.2.4.2. *The ECtHR case law in civil cases*

Over time the ECtHR case law has clarified the intensity of judicial review that is required for compliance with Article 6(1) ECHR in cases concerning the determination of civil rights and obligations. By way of example, in the *Tsfayo* case, the ECtHR stated that judicial review can be limited to a control of manifest errors ‘*where the issues to be determined [require] a measure of professional knowledge or experience and the exercise of administrative discretion pursuant to wider policy aims.*’<sup>189</sup> Certain authors argue that the ECtHR case law relating to civil rights and obligations could be extended to ‘criminal’ charges.<sup>190</sup> Accordingly, the ECtHR would have accepted both in the civil and criminal domain that judicial review can be limited to a control of manifest errors where the issues to be determined require a measure of professional knowledge or experience and the exercise of administrative discretion pursuant to wider policy aims. This view of a continuum between the two categories of proceedings is described by one particular commentator as follows:

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<sup>188</sup> NAZZINI R., *Administrative enforcement, judicial review and fundamental rights in EU competition law: A comparative contextual-functionalist perspective*, in CMLR, 2012, Vol. 49(3), p. 990.

<sup>189</sup> ECtHR judgment of 14 November 2006, *Tsfayo v United Kingdom*, Application No. 60860/00, para 46, referring to ECtHR judgment of 22 November 1995, *Bryan v United Kingdom*, Application No. 19178/91.

<sup>190</sup> See WILS P. J. W., *The Increased Level of EU Antitrust Fines, Judicial Review, and the European Convention on Human Rights*, in World Competition, Volume 33, No. 1, March 2010, p. 24.

*‘I am not sure that the ECtHR would necessarily consider that showing some deference towards the views of the public institution supposed to have superior knowledge and means to carry out technical assessments when it comes to assessing what are perceived to be technical matters, once the facts supporting that assessment are well-established (which Community Courts can obviously review), is something which would be contrary to Article 6(1), especially in view of the more nuanced approach expressed in Jussila as regards areas which are not the ‘core’ of criminal law. The case law of the ECtHR which refers to certain deference to technical assessments has developed in the area of civil rights, but the fundamental rights concerned is the same for civil and criminal law. Moreover, the difference between civil rights and criminal charges is sometimes puzzling (disciplinary proceedings implying that somebody cannot practice a profession is seen as a civil matter, whereas a tax surcharge is seen as criminal), and there is clearly a continuum between the two categories’.*<sup>191</sup>

The validity of such an interpretation of the ECHR is however questioned in light of the fundamental differences which exist between civil and criminal cases. The *Bryan v United Kingdom* case,<sup>192</sup> often cited to sustain this thesis, occurred in the context of proceedings in the sphere of civil rights and obligations, more specifically a town planning dispute in which the applicant had challenged an order requiring him to demolish two buildings because in violation of planning law. Here the ECtHR considered various factors before concluding that deferential judicial review was sufficient, including (i) the safeguards that applied in proceedings before the administrative authority; (ii) the absence of disputes on the primary facts; and (iii) the subject matter of the measure which was a specialized area of the law.<sup>193</sup> It can be argued that it is difficult to extend these findings to the domain of antitrust infringements, given that it can be contended that sufficient safeguards are not guaranteed during the administrative procedure where, although in the presence of a

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<sup>191</sup> CASTILLO DE LA TORRE F., *Evidence, Proof and Judicial Review in Cartel Cases*, in *World Competition Law and Economics Review*, No. 4, December 2009, p. 575.

<sup>192</sup> ECtHR judgment of 22 November 1995 in Case of *Bryan v United Kingdom*, Application No. 19178/91.

<sup>193</sup> For an overview of why the ECtHR *Bryan* and *Tsyfayo* cases cannot be invoked in the criminal domain to justify limited review when the issues to be determined require a measure of professional knowledge or experience and the exercise of administrative discretion pursuant to wider policy aims; see NAZZINI R., *Administrative Enforcement, Judicial Review and Fundamental Rights in EU Competition Law: A Comparative Contextual-functional Perspective*, in *CMLR*, 2012, Vol. 49(3), p. 998. According to this author, ‘the better interpretation of these cases is ... that deferential review is admissible when two conditions are present: (1) the subject-matter is such that it is appropriate for the case to be decided at first instance by an administrative authority subject to deferential judicial review; and (2) the first instance decision-maker complies with the requirements of independence and impartiality albeit taking into account its administrative nature. To read these cases differently would be to accept that a central issue in a case may never be decided by an independent and impartial tribunal, which is against the text of Article 6(1) ECHR’.



specialised area of law, ‘criminal charges’ would still be involved and not mere local governmental issues such as town planning.<sup>194</sup> Furthermore, to date, the ECtHR case law has continued to require a stricter approach in criminal cases, independently of whether hard-core or non-hard-core, as described in subsection 4.2.4.1 above.

#### 4.2.4.3. *The peculiarities of merger control cases*

A separate discussion must be made for the field of merger control. To date the ECtHR has not rendered any judgment concerning the nature of these proceedings that could shed light on the applicability of Article 6 ECHR under its criminal or civil head. However, a number of commentators argue that these proceedings can be decisive for the freedom of undertakings to carry on their business and lead to the ‘*determination of civil rights and obligations*’ and are thus subject to the civil head of Article 6 ECHR.<sup>195</sup>

Other commentators argue that the concept of ‘*civil rights and obligations*’ in the ECHR system should be interpreted broadly and that there are thus ‘*no reasons why Article 6 should not equally apply to competition procedures resulting in the authorization of a joint venture, merger*’,<sup>196</sup> etc.

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<sup>194</sup> In the *Bryan* case the ECtHR found there had not been a violation of Article 6(1) ECHR as, although the review by the inspector did not meet the safeguards associated with ‘an independent and impartial tribunal’, the review by the High Court did satisfy the requirements enshrined in Article 6(1) ECHR. According to the Court, ‘*while the High Court could not have substituted its own findings of fact for those of the inspector, it would have had the power to satisfy itself that the inspector’s findings of fact or the inferences based on them were neither perverse or irrational*’. The Court added that ‘*such an approach by an appeal tribunal on questions of fact “can be reasonably expected in specialised areas of law, particularly where the facts have already been established in the course of a quasi-judicial procedure governed by many of the safeguards required by Article 6”*’. The Court further explained that, ‘*in assessing the sufficiency of the review...it is necessary to have regard to matters such as the subject matter of the decision appealed against, the manner in which that decision was arrived at, and the content of the dispute, including the desired and actual grounds of appeal*’. In the judgment, the Court states ‘*indeed, the present case, the subject matter of the contested decision by the inspector was a typical example of the exercise of discretionary judgment in the regulation of citizen’s conduct in the sphere of town and country*’, ECtHR judgment of 22 November 1995, *Bryan v United Kingdom*, Application No. 19178/91, paras. 45 and 47. Moreover, even if it were accepted that these findings could be applied in competition matters, it must be noted that in the *Bryan* case, other important factors contributed to limit the review of the High Court. In particular, the facts had already been established in the course of a quasi-judicial procedure governed by many of the safeguards required by Article 6(1) ECHR. It is contended that it would be hard to conceive the Commission’s combination of investigative and decision-making powers in antitrust proceedings as a full-fledged ‘quasi-judicial procedure’.

<sup>195</sup> ANDREANGELI A., *EU Competition Enforcement and Human Rights*, Edward Elgar, 2008, p. 29; see also WILS W. P. J., *Principles of European Antitrust Enforcement*, Hart Publishing, 2005, p. 159: ‘[a]s to proceedings under the EC Merger Regulation, they are in all likelihood to be regarded as relating to the determination of civil rights or obligations within the meaning of Article 6(1) ECHR, in that the result of these proceedings is decisive for the parties’ right to merge or make an acquisition’.

<sup>196</sup> WAELBROECK D., FOSSELARD D., *Should the Decision-Making Power in EC Antitrust Procedures be left to an independent judge? - The Impact of the European Convention on Human Rights on EC Antitrust Procedures*, in *Yearbook of European Law*, 1994, Vol. 14, p. 124. The authors refer to a number of ECtHR judgments which allegedly prove the broad scope of application of the civil head of Article 6 ECHR.

Accordingly, merger proceedings shall also benefit from all the safeguards and guarantees enshrined in Article 6 ECHR and it can be considered that all EU competition proceedings are covered by this provision of the ECHR. Within the EU framework this is all the more true given that Article 47 of the EU Charter (the twin provision of Article 6 ECHR) enshrines the right to an effective remedy before a Tribunal without distinguishing between a criminal and a civil head.<sup>197</sup>

#### 4.2.5. *The ECtHR's judgment in case A. Menarini Diagnostics S.r.l.*

In September 2011 the ECtHR handed down an important ruling for the debate on judicial review and on the right to a fair trial in the *Menarini* case. This dispute concerned an Italian case but the similarities of the Italian situation with the EU system of judicial review triggered reactions and debates that went well beyond the national boundaries. In particular, the ECtHR clarified a number of issues concerning judicial review of competition decisions in light of the requirements of Article 6(1) ECHR that are potentially equally applicable, and thus of valuable interest, to the debate concerning the EU system. The relevance of this ruling for the discussion on the compatibility of the EU system of judicial review with fundamental rights is such to necessitate an in-depth analysis of the ECtHR's findings.

On 27 September 2011, the ECtHR dismissed the action brought by the company A. Menarini Diagnostics S.r.l. ("Menarini"), with which it challenged the compatibility of the Italian system of judicial review of decisions adopted by the national competition authority (the Autorità Garante della Concorrenza e del Mercato, "AGCM") with Article 6(1) of the ECHR.<sup>198</sup> The ECtHR's ruling analyses the powers of judicial review exercised by Italian

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<sup>197</sup> The first two paragraphs of Article 47 of the EU Charter establish that: '[e]veryone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.'

<sup>198</sup> ECtHR judgment of 27 September 2011, *A. Menarini Diagnostics S.r.l. v. Italy*, Application No. 43509/08. See SIRAGUSA M., RIZZA C., *Violazione delle norme antitrust, sindacato giurisdizionale sull'esercizio del potere sanzionatorio da parte dell'autorità di concorrenza e diritto fondamentale a un equo processo: Lo "Stato dell'arte" dopo le sentenze Menarini, KME e Posten Norge*, in *Giurisprudenza Commerciale*, Anno XL, Fasc. 2-2013, pp. 408-456; BOMBOIS T., *L'arrêt Menarini c. Italie de la Cour européenne des droits de l'homme. Droit antitrust, champ pénal et contrôle de pleine juridiction*, in *Cahiers de Droit Européen*, 2011, No. 2, p. 541; BRONCKERS M., VALLERY A., *Business as usual after Menarini?*, in *M-Lex Magazine*, January-March (2012), p. 43; BOSCO D., *Du Contrôle De Pleine Jurisdiction Exercé Sur Les Décisions Des Autorités De Concurrence, À Propos De Cour Edb, 27 Septembre 2011, Menarini, October 1, 2011*, available at <http://ssrn.com> [Accessed October 3, 2012]; BELLAMY C., *ECHR and competition law post Menarini: An overview of EU and national case law*, (2012) No. 47946 *e Competitions*; BRONCKERS M., VALLERY A., *Fair and effective competition policy in the EU: Which role for authorities and which role for the Courts after Menarini?*, speech at the 19th International Competition Forum in St Gallen, 8 June 2012;

administrative courts over decisions adopted by the AGCM pursuant to national competition law.<sup>199</sup> In particular, it establishes that the Italian judicial review system of antitrust decisions, as implemented by the Italian judges in Menarini's case, was compliant with Article 6(1) ECHR and, thus, that there had been no breach of the applicants' right to a fair trial. Such conclusion has important repercussions at the EU level, as the Italian judicial review system is modeled to a great extent against the European one.

#### 4.2.5.1. Background

On 20 April 2003, the AGCM adopted a decision imposing a fine of six million euro on Menarini for having operated with other four pharmaceutical firms, between 1997 and 2001, a complex price fixing and market-sharing arrangement in the market for diagnostic tests for diabetes. Subsequently, Menarini challenged the decision, without success, in front of the competent Italian courts (*i.e.* the Regional Administrative Tribunal of Latium, the Council of State and the Court of Cassation). Having exhausted all national remedies, the applicant brought its case before the ECtHR. Menarini's main contention was that the Italian system of judicial review of the AGCM's antitrust decisions infringed its right to a fair trial under Article 6(1) ECHR, in so far as it did not allow the company to have access to a Court with powers of full judicial review nor to obtain a judicial re-examination of the authority's decision. The ECtHR's judgment first examines the issue of the applicability of Article 6(1) ECHR and of the admissibility of Menarini's application, then turns to analyze the merits of the applicant's arguments and, thus, whether the Italian courts had exercised their powers of judicial review of the AGCM's antitrust decision in a manner compatible with Article 6(1) ECHR.

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ANDERSSON H., *Judicial review after Menarini – any need for reform of the EU system?*, Paper for the Conference: General Principles of EU Law and European Private Law - Stockholm, November 8-9, 2012; ABENHAIM M., *Quel droit au juge en matière de cartels? Commentaire de l'arrêt Menarini Diagnostics c/Italie*, in *Revue Trimestrielle de Droit Européen*, No. 1, janvier-mars (2012); CARDONNEL P., *Art. 6, § 1 CEDH: The European Court of Human Rights rules on standard of judicial review on cartel decisions by national competition authorities (Menarini Diagnostics v. Italy)*, in *Concurrences*, 2011 No. 4, pp. 166-168; BASILICO A. E., *Il controllo del giudice amministrativo sulle sanzioni antitrust e l'art. 6 CEDU*, AIC, 2011 (available online at [http://www.associazionedeicostituzionalisti.it/sites/default/files/rivista/articoli/allegati/Basilico\\_0.pdf](http://www.associazionedeicostituzionalisti.it/sites/default/files/rivista/articoli/allegati/Basilico_0.pdf)); and COUTRELIS N., *Amendes, procédures antitrust et CEDH, l'harmonie plutôt que la confrontation*, in *Revue Lamy de la Concurrence*, 2011, No. 29, p. 108.

<sup>199</sup> Law No 287 of October 10, 1990, '*Norme per la Tutela della Concorrenza e del Mercato*', in Italian Official Journal No. 240 of October 13, 1990.

#### 4.2.5.2. *The applicability of Article 6(1) ECHR to antitrust decisions adopted by the AGCM*

Under Article 6(1) ECHR, '[i]n the determination [...] 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'. In order to assess the admissibility of Menarini's action, the ECtHR had to ascertain whether the fining decision adopted by the AGCM could be considered a criminal charge. In doing so, it referred to its previous case law, in particular the *Engel* judgment,<sup>200</sup> which provides for three alternative criteria: (i) the legal qualification of the measure under national law; (ii) the nature of the measure, independently of its domestic classification; and (iii) the nature and severity of the penalty imposed on the basis of such measure. Additionally, it clarified that a cumulative approach may be pursued when the separate analysis of each criterion does not lead to a conclusive outcome. In Menarini's case, the ECtHR found that the anti-competitive practices recriminated to the applicant were not sanctioned under criminal law but on the basis of Italian competition law, which is administrative in nature, thus the first criterion was not met. As to the second criterion, concerning the nature of the infringement, the ECtHR held that the competition rules whose violation was recriminated were designed to preserve competition on the market. It also stated that the AGCM's activity aimed to defend general interests of society normally protected by criminal law. In addition, the fine adopted was based on legal provisions which had contemporarily a punitive and preventive scope. The ECtHR then turned to the nature and severity of the sanction and found that it presented a punitive purpose, the punishment of an illegal conduct, and a preventive scope, deterring the interested company and third parties from reiterating the conduct in question. The ECtHR argued that in light of these considerations and the high amount of the sanction, the latter had to be considered criminal in nature. The ECtHR however did not clearly settle the question of whether competition law belonged to the hard-core or non-hard core criminal head of Article 6(1) ECHR.<sup>201</sup> The ECtHR concluded that Article 6(1) ECHR was applicable to the case under examination and Menarini's application admissible.

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<sup>200</sup> ECtHR judgment of 8 June 1976, *Engel and other v Netherlands*, Application Nos. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72.

<sup>201</sup> According to certain commentators, the ECtHR's findings in this case '*puts an end to the debate as to whether or not (European) competition law has a criminal law nature – insofar as that debate was not already previously concluded*'; see WESSELING R., VAN DER WOUDE M., *The Lawfulness and Acceptability of Enforcement of European Cartel Law*, in *World Competition*, 35, No. 4, 2012, p. 577. This view however is not shared by all commentators as the ECtHR did not expressly state if this was the case thus '[I]l'observateur en est donc réduit aux conjectures'; see, *inter*

4.2.5.3. *The compatibility of the judicial review exercised in Menarini's case with Article 6(1) ECHR*

The ECtHR first clarified that the imposition of a fine, which is criminal in nature, by an administrative authority is not *per se* incompatible with the ECHR in so far as this decision is open to challenge before a court who can offer all the guarantees afforded by Article 6(1) ECHR and can exercise powers of full judicial review over the measure in question. Among the most important features of a system of full judicial review, the ECtHR recalls the authority to examine all questions of fact and law relevant to the dispute and the power of modifying the contested decision.<sup>202</sup>

Next, the ECtHR acknowledged that, in the framework of the Italian system of judicial review, no administrative court can substitute its own legal qualification of the facts and technical evaluation to that of the AGCM. However, it observed that in the case under examination the Italian administrative courts did not carry out a simple review of the legality of the AGCM decision, but thoroughly reviewed Menarini's claims in law and in fact, the evidence upon which the adoption of the decision was based and the soundness and proportionality of the AGCM's choices, thus verifying its technical assessments. Additionally, it noted that the Italian courts reviewing the contested decision had full jurisdiction with regard to the level of the fine imposed on Menarini, thus could have modified the latter had they found it to be inadequate in relation to the infringement in question. In light of the above, the ECtHR concluded that the AGCM's decision was subject to the scrutiny of judicial authorities enjoying powers of full judicial review and, consequently, no infringement of Article 6(1) ECHR could be detected.

4.2.5.4. *Dissenting and concurring opinions*

One of the most remarkable features of ECtHR judgments lies in the possibility for judges, in case of disagreement, to attach their own dissenting or concurring opinion to the final decision of the court. In the case at hand, Judge Pinto de Albuquerque provided a

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*alia*, BOMBOIS T., *L'arrêt Menarini c. Italie de la Cour européenne des droits de l'homme. Droit antitrust, champ pénal et contrôle de pleine juridiction*, in Cahiers de Droit Européen, 2011, No. 2, p. 559.

<sup>202</sup> ECtHR judgment in *Menarini*, para 59: '[p]armi les caractéristiques d'un organe judiciaire de pleine juridiction figure le pouvoir de réformer en tous points, en fait comme en droit, la décision entreprise, rendue par l'organe inférieur. Il doit notamment avoir compétence pour se pencher sur toutes les questions de fait et de droit pertinentes pour le litige dont il se trouve saisi?'

dissenting opinion containing a detailed analysis of the Italian judicial system in which he concluded that the judicial review exercised by the Italian administrative courts, being limited to a review of legality, did not satisfy the requirements of a system of full judicial review. In particular, he underlines that the Italian administrative courts could only annul a decision when affected by an irregularity but could not substitute their own technical evaluations to that of the AGCM. Hence, they could not exercise a thorough review of the discretionary choices of the AGCM which are at the very heart of the imposition of competition law sanctions. In that regard, the Judge stresses that the Italian administrative courts merely adhered to the technical evaluations of the AGCM and did not carry out a new assessment. Conversely, the classical concept of full jurisdiction entails the possibility of reassessing all factual and legal aspects that relate to the attribution of liability. According to the Judge, the applicant did not thus have the possibility to formulate its contentions in front of a judicial authority offering the guarantees enshrined in Article 6(1) ECHR.

A concurring opinion was also delivered by Judge Sajó. The opinion which shared the considerations exposed by Judge Pinto de Albuquerque but sided with the majority's conclusions that the Italian judges had exercised a judicial review which satisfied the requirements of Article 6(1) ECHR. According to Judge Sajó, the Italian legal framework only provided for a formal review (a review of legality or a 'weak' judicial control). However, in the case at hand, the Council of State had effectively conducted an in-depth analysis of the merits of the case which satisfied the requirements of Article 6(1) ECHR. In addition, national judges had the power to annul the administrative decision imposing the sanction. Judge Sajó went on by noting that if, on the one hand, in exercising this control on the merits the Council of State used a terminology which could have led to think it was exercising a weak review, on the other hand, it didn't act accordingly and performed a meticulous review. What matters, according to Judge Sajó, is that the rights enshrined in the ECHR had been effectively protected by the judges, and not the terminology used or provided for in the national legislation. In other words, national judges should in any case perform a full review (in case even ignoring legal constraints to their powers).

4.2.6. *The EFTA judgment in the Posten Norge case and the repealing of the ‘manifest error’ of assessment standard*

2011 and 2012 were two landmark years for the discussions on the standard of review as judgments relevant to this debate were rendered not only by the EU Courts and the ECtHR but also by the EFTA Court in Luxembourg. Although the EFTA Court has only jurisdiction with regard to the three EFTA States, namely Iceland, Liechtenstein and Norway, which are parties to the European Economic Area (“EEA”) Agreement,<sup>203</sup> its case law is highly taken into consideration and often referred to by the EU Courts in order to preserve homogeneity and the uniform interpretation of EU and EEA law. As EEA law mirrors EU law and EFTA judgments are often of inspiration for the EU Courts, it is worth analysing the EFTA Court’s judgment in *Posten Norge* delivered on 18 April 2012, which extensively addresses the issue of the necessary and adequate standard of judicial control in competition cases.<sup>204</sup>

The judgment concerned abuse of dominance allegations against the company Posten Norge in the market for business-to-consumer parcel services with over-the-counter delivery in Norway. In 2010 the EFTA Surveillance Authority had found that the company had abused its dominant position and imposed a fine of almost € 13 million. On appeal by Posten Norge, the decision was upheld by the EFTA Court, whose judgment is particularly relevant for the present debate in light of its findings on the application of Article 6 ECHR and on the right to a fair trial. In particular, Posten Norge argued that the EFTA Court was required to exercise full jurisdiction in order to comply with Article 6 ECHR. On the contrary, the EFTA Surveillance Authority argued that judicial review could be limited *vis à vis* complex economic and/or technical assessments as competition law fell outside the ‘hard core’ criminal head of Article 6 ECHR. The issues the EFTA Court was called upon to decide concerning the scope and intensity of judicial review were similar to those

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<sup>203</sup> The EEA Agreement was concluded in 1992 with the aim of extending the EU single market to the EFTA States. It is built on two pillars, a EU pillar and an EFTA pillar. The EFTA Surveillance Authority exercises a surveillance role comparable to that of the EU Commission, while the EFTA Court exercises a jurisdiction comparable to that of the ECJ.

<sup>204</sup> EFTA judgment of 18 April 2012 in Case E-15/10 *Posten Norge v ESA*. See, *inter alia*, BARBIER DE LA SERRE E., *A Lesson of Judicial Review from the other European Court in Luxembourg*, in Kluwer Competition Law Blog, 27 April 2012; LANG J. T., *Judicial Review of Competition Decisions under the European Convention on Human Rights and the Importance of the EFTA Court: The Norway Post Judgment*, in E.L. Rev., August 2012; BRONCKERS M., VALLERY A., *Fair and Effective Competition Policy in the EU: Which Role for the Authorities and Which Role for the Courts after Menarini (July 5, 2012)*, European Competition Journal, Vol. 8, No. 2, 2012, available at SSRN: <http://ssrn.com/abstract=2137524>; CROFTS L., *Fundamental rights in focus as Posten Norge disputes dominance fine before EFTA court*, M-lex, 5 October 2011.

addressed by the ECJ in *KME* and by the ECtHR in *Menarini*, the latter repeatedly referred to in the judgment.

The EFTA Court first found that the scope of the guarantees enshrined in Article 6 ECHR do not always apply in full stringency, this depending on the weight of the criminal charge at issue. In the circumstances of the case, the EFTA Court considered that the amount of the fine was ‘substantial’ and that ‘the stigma attached to being held accountable for an abuse of a dominant position is not negligible’.<sup>205</sup> However the EFTA Court did not expressly conclude that the charge fell under the ‘hard core’ criminal head of Article 6 ECHR. It did instead recognize that ‘the form of administrative review [...] may influence [...] the way in which the guarantees provided by the criminal head of Article 6 ECHR are applied’ however, ‘this cannot detract from the necessity to respect these guarantees in substance’.<sup>206</sup> According to the EFTA Court, criminal penalties such as those at issue can be imposed at first instance by an administrative authority that does not comply with the requirements of Article 6 ECHR, provided that the decision of that body is subject to subsequent control by a judicial body that complies with those requirements and has full jurisdiction.

The most interesting statements made by the EFTA Court concerned however complex economic appreciations and the ‘limited’ review standard. After having essentially reiterated the EU *Tetra Laval* formula on the standard of review,<sup>207</sup> the EFTA Court went on to state that, in its review of complex economic assessments, the EFTA Court must not limit itself to intervene only when an assessment is ‘manifestly wrong’.<sup>208</sup> The EFTA Court must be able to quash in all respects, on questions of fact and of law, the challenged decision, and when the Surveillance Authority imposes fines for infringements of competition rules, it cannot be regarded as having ‘any margin of discretion in the assessment of complex economic matters which goes beyond the leeway that necessarily flows from the limitations inherent in the system of legality review’.<sup>209</sup> The EFTA Court went on to clarify that, although the EFTA Court may not

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<sup>205</sup> EFTA judgment of 18 April 2012 in Case E-15/10 *Posten Norge v ESA*, para 90.

<sup>206</sup> EFTA judgment of 18 April 2012 in Case E-15/10 *Posten Norge v ESA*, para 90.

<sup>207</sup> The EFTA Court first stated that ‘[n]ot only must the Court establish, among other things, 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’ (para 99).

<sup>208</sup> EFTA judgment of 18 April 2012 in Case E-15/10 *Posten Norge v ESA*, para 102.

<sup>209</sup> EFTA judgment of 18 April 2012 in Case E-15/10 *Posten Norge v ESA*, para 100.



replace the authority's assessment with its own, '*the Court must nonetheless be convinced that the conclusions drawn by [the authority] are supported by the facts*'.<sup>210</sup>

What is most interesting of the EFTA Court's statements is that it reaches a conclusion that the EU Courts never upheld, *i.e.* that in the exercise of their jurisdiction in the competition field, in the presence of complex economic and/or technical appreciations, judges must intervene not only when an error is 'manifestly wrong' but also when they consider it simply wrong, thus introducing a 'correctness' standard which does not leave any room to the competition authority's discretion and represents a novelty in the field of judicial control of competition cases.

#### 4.2.7. *Implications of the Menarini and Posten Norge judgments for the EU system of judicial control of competition cases*

As anticipated, the ECtHR and EFTA judgments have a number of interesting implications for the EU antitrust system of judicial review. At the EU level, Article 261 TFEU enables the granting of unlimited jurisdiction to the European Courts with regards to the determination of penalties. In antitrust matters, this power is further specified by Article 31 of Regulation 1/2003 in relation to fines and periodic penalty payments. This entails that the EU Courts can cancel, reduce or increase fines imposed by the Commission and in doing so they can substitute their own assessment for that of the Commission. Conversely, Article 263 TFEU allows the European Courts to review only the legality of acts adopted by the Institutions, *i.e.*, the Courts are only able to annul an act on the basis of specific grounds of appeal and to refer the case to the competent institution for reexamination, without, however, having the power to examine that measure on the merits. Additionally, the European Courts' power of review is limited when it comes to policy choices, complex economic assessments and complex technical appraisals, as they confine themselves to verifying whether the Commission has committed a manifest error. In such instances, the intensity of their scrutiny is significantly softened and results, according to the most critical commentators, in a form of judicial self-restraint.

As previously mentioned, over the years, in light of these features, a growing number of experts and scholars have expressed serious doubts as to the compatibility of the EU antitrust judicial review system with Article 6(1) ECHR. In particular, it has been

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<sup>210</sup> EFTA judgment of 18 April 2012 in Case E-15/10 *Posten Norge v ESA*, para 101.

questioned whether the review provided in the EU judicial system is broad and intense enough to ensure the degree of protection required by Article 6(1) ECHR. Accordingly, firms have become increasingly interested in challenging the EU system before the ECtHR. However, the EU is not yet a formal member of the ECHR, as the accession process is still ongoing, thus, to date, acts adopted by the EU Institutions cannot be challenged before the Strasbourg Court. Only once the EU formally accedes to the ECHR, firms will be able to resort directly to the ECtHR to challenge measures adopted by the EU Institutions, including the EU Courts' judgments, once all internal remedies have been exhausted.

In the antitrust field, the ECtHR's recent judgment in *Menarini* has indicated that a sufficiently extensive review by an independent court of an administrative competition decision may satisfy the requirements of Article 6(1) ECHR. Should the ECtHR have to assess in the future the compatibility of the architecture of the EU judicial review system with Article 6(1) ECHR, it is argued that it could reach similar, if not identical, conclusions to those upheld in *Menarini's* case, *i.e.* that a sufficiently extensive review by an independent court of an administrative competition decision may satisfy the requirements of Article 6(1) ECHR. In addition, it must be taken into account that in the future the ECtHR would most probably adopt a cautious stance in its pronouncements concerning the EU as it is aware that: (i) its rulings may require for compliance a modification of the EU framework and architecture, with all the negative criticism this may raise, all the more in a context where its decisions will be closely scrutinized to verify whether the best choice was made to ensure the delicate balance between two different judicial orders; and (ii) its decisions could expose it to an overwhelming amount of actions filed against the EU judicial review system.

However, it can also be contended that in the antitrust field, the ECtHR's judgment in *Menarini* does not necessarily provide a clean bill of health to judicial review systems that closely resemble that of the EU. On the one hand, what emerges from this case is that for compatibility with Article 6(1) ECHR, judicial review systems in the competition field should at least foresee unlimited jurisdiction in relation to fines; on the other hand, 'full judicial review' under the Convention's system does not require that judges deciding a controversy must necessarily have the power to substitute their own assessments for those of the administrative authority imposing a 'criminal charge'.

In the *Menarini* case the ECtHR considered sufficient and acceptable that national courts exercise an (exhaustive) review of legality coupled by unlimited jurisdiction in relation to

finer. In light of this, those theories which advocate for a change of the EU system in the direction of extending the EU Courts' powers of review also to a review on the merits, on the basis of Article 6(1) ECHR, lose force and relevance.<sup>211</sup>

On the other hand, the *Menarini* case still leaves space for discussion concerning the intensity of the review that courts appraising criminal charges must exercise within the framework of their review of legality. In its ruling, the ECtHR indicated that, in the specific circumstances of the case, the Italian judges had carried out a sufficiently extensive review of the administrative decision that satisfied the requirements of Article 6(1) ECHR. The ECtHR did not thus content itself of a 'weak' review, but verified whether the courts had exercised exhaustive and full control over all the elements pertinent to the qualification of the infringement.

As indicated by certain commentators, '[t]he finding that the Italian system, as applied in the *Menarini* case, complied with Article 6 ECHR, does not mean that all administrative enforcement systems within which competition rules are being enforced do so as well. And even if such a system theoretically complies with these requirements, it cannot be automatically concluded that this also applies to the application thereof in a specific case'.<sup>212</sup> Accordingly, actions raised in the future by companies in front of the ECtHR once the EU accession is completed, in order to safeguard their rights, will not remain necessarily without use, as the question may none the less arise whether, in any particular case, the EU Courts have adequately exercised their jurisdiction and thus have effectively complied with the ECHR. In light of the above, applications to the ECtHR would have to focus on demonstrating how the judicial review exercised by the EU Courts in a particular case, being limited to a review of legality, did not satisfy the requirements of a system of full judicial review. In particular, interested parties would have to demonstrate that the EU Courts could not, and effectively did not, substitute their own technical evaluations to those of the Commission, and could only annul the decision if they had found it to be affected by an irregularity. Hence, the EU Courts did not exercise a thorough review of the discretionary choices of the Commission which were at the very heart of the imposition of the competition sanction. In that regard, it would have to be proven that the CFI merely adhered to the technical evaluations of the Commission and

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<sup>211</sup> For an overview of the main arguments advocating that the EU Courts should be given powers of 'full appellate review' see *infra* subsection 2.1 in Chapter 4.

<sup>212</sup> See WESSELING R., VAN DER WOUDE M., *The Lawfulness and Acceptability of Enforcement of European Cartel Law*, in *World Competition*, 35, No. 4, 2012, pp. 577-578.

did not carry out a new assessment and that the ECJ failed to detect this deficiency in a manner not compliant with the ECHR.

It is worth mentioning that the *Menarini* judgment has been subject to a number of criticisms, ranging from the complaint that the ECtHR's reasoning is too short and poor to give an exhaustive and final answer to the questions raised by this case, to more substantial attacks against the merits of the Strasbourg judges' reasoning, as demonstrated by the dissenting opinion. In *Menarini's* case there was no further appeal to the ECtHR's Grand Chamber although, given the importance of the matter, its intervention would have been welcomed. In light of the above, it is considered that nor the *Menarini* judgment, nor the other judgments cited *supra*, can be regarded as finally settling the debate.

Finally, The EFTA Court's judgment in *Posten Norge* and the novelty of its conclusions on the need for judicial control, within the boundaries of the review of legality, to be full and exhaustive, leaving no margin for space to the Commission's discretion *vis à vis* complex economic and technical appreciations, has also contributed to the debate, and may lead the EU Courts to re-think their powers of review and their current exercise. Given the novelty of the EFTA Court's statements, commentators have '*hoped that this judgment will significantly influence the EU Courts thinking on their judicial review of the Commission's decisions*'<sup>213</sup> or have stated that '*the EFTA Court has stated a general principle that is likely to be accepted by the other three European courts*'.<sup>214</sup> The main expectation is that EU judges will be brought to follow the example of the EFTA Court and to engage more openly with the jurisprudence from Strasbourg.

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<sup>213</sup> BARBIER DE LA SERRE E., *A Lesson of Judicial Review from the other European Court in Luxembourg*, in Kluwer Competition Law Blog, April 27, 2012, p. 3.

<sup>214</sup> LANG J. T., *Judicial Review of Competition Decisions under the European Convention on Human Rights and the Importance of the EFTA Court: The Norway Post Judgment*, in E.L. Rev., August 2012, p. 467.

**CHAPTER**

**2**

**THE STANDARD OF JUDICIAL REVIEW IN ARTICLE  
101 AND 102 TFEU CASES**



## 1. INTRODUCTION

The effectiveness of judicial review in EU competition cases has been the object of intense scholarly debate. In the previous Chapter the characteristics of the EU judicial review system in antitrust matters have been described and the controversial factors that continue to be the object of criticism have been identified and analysed. The theories that have been developed in the literature that criticize the characteristics of the present system of judicial review have also been illustrated and confronted with the theories of those authors who believe no changes are needed nor warranted. Any analysis of the controversies raised by the current scope and intensity of the judicial review exercised by the EU Courts would be incomplete if not accompanied by a detailed case law analysis concerning the nature and standard of review applied by the EU judges, with particular attention to the intensity with which the EU Courts are willing to scrutinize and review ‘complex economic and/or technical matters’. This analysis is altogether more useful if accompanied by an examination, not only of the scope and intensity of the review currently carried out, but also of how the standard of review was initially exercised at the origins of the EU construction of competition policy and of how its application has evolved over time. This Chapter is thus dedicated to a closer analysis of the EU Courts case law in the fields of Articles 101 and 102 TFEU<sup>215</sup> and proceeds to do so in a chronological order in order to put into historical perspective the evolutions occurred in the EU jurisprudence on

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<sup>215</sup> The first provision prohibits as incompatible with the internal market ‘*all 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*’ (Article 101, paragraph 1, TFEU). These agreements and decisions are also considered ‘*automatically void*’ (Article 101, paragraph 2, TFEU). The second provision prohibits as incompatible with the internal market ‘*[a]ny abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it [...] in so far as it may affect trade between Member States*’ (Article 102, paragraph 1, TFEU). On Articles 81 and 82 EC (now 101 and 102 TFEU) see *inter alia*: BELLAMY&CHILD, *European Union Law of Competition*, edited by ROTH P., ROSE V., 7<sup>th</sup> edition, Oxford University Press, 2013; WHISH R., *Competition Law*, Oxford University Press, 2012; KERSE C., KHAN N., *EC antitrust procedure*, Sweet & Maxwell, 2012; FAULL J., NIKPAY A., *The EC law of competition*, Oxford University Press, New York 2007; HIRSCH G., SÄCKER F.-J., MONTAG F. (edited by), *Competition law: European Community practice and procedure: article-by-article commentary*, Sweet & Maxwell, 2008; JONES A., SUFRIN B., *EC competition law: texts, cases, and materials*, Oxford University Press, 2008; PAPPALARDO A., *Il diritto comunitario della concorrenza: profili sostanziali. La disciplina delle intese, gli accordi orizzontali, gli accordi verticali, l’abuso di posizione dominante, le concentrazioni di imprese, il trasferimento di tecnologia, regole di concorrenza e poteri pubblici, i settori speciali*, UTET giuridica, 2007; TESAURO G., *Diritto Comunitario*, CEDAM 2008.

the standard of review. From this analysis it will be possible to draw conclusions on the main factors, internal or external to the EU system, that have contributed to stimulate changes in the intensity of the judicial control exercised by EU judges in antitrust cases.

## 2. THE EVOLUTION OF THE STANDARD OF REVIEW IN ARTICLE 101 TFEU CASES

As examined in detail in Chapter 1, the EU system provides for a specific system of judicial review of decisions adopted by the Commission in the competition field which finds its original inspiration in the legal systems and traditions of the founding Member States.<sup>216</sup> While the provisions of the TFEU provide guidance on the contours of the review exercised by the EU Courts, distinguishing between review of legality under Article 263 TFEU and unlimited jurisdiction with regard to penalties under Article 261, very little is said on the intensity with which EU judges review antitrust matters.

On the basis of the case law of the EU Courts in Article 101 and 102 TFEU cases, it is possible to operate a distinction between the intensity with which EU judges review matters of fact and law, which is full and leaves no room for the Commission's discretion, and the intensity with which so-called 'complex economic' and/or 'technical' assessments are reviewed. In the latter case, over the years, the EU Courts have developed the practice of recognizing a certain discretion to the Commission's assessments and have exercised a certain deference by restraining their control to the so-called manifest error test (*see supra* subsection 2.1.3 in Section I of Chapter 1). As will emerge from the analysis of the case law in the following subsections, the Courts initially elaborated and applied the manifest error test in relation to cases decided under Article 85 EEC (now Article 101 TFEU). Over the years, the EU Courts have progressively increased their use of the manifest error test by applying it also to new domains. While initially the test was meant to leave a certain discretion to the Commission when it made complex economic assessments conducive to value judgments for the balancing test under Article 85(3) EEC (now Article 101(3) TFEU), after a number of years its application was extended also to similar assessments made under Article 85(1) EEC (now Article 101(1) TFEU). It is only after the contours of the manifest error test were well defined in the case law under Article 101 TFEU that the test makes its

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<sup>216</sup> GERADIN N. and PETIT N., *Judicial Review in European Union Competition Law*, in *The Role of the Court of Justice of the European Union in Competition Law Cases*, GCLC Annual Conferences Series (edited by MEROLA M. and DERENNE J.) Bruylant, 2010, p. 44.



appearance in abuse of dominance cases under Article 102 TFEU. The EU Courts however did not only expand the use of the test to new heads of Article 101 TFEU and to Article 102 TFEU, but also intervened to increase the categories of assessments that could be caught by this test and thus be subject to more limited review (for example the expansion from ‘complex economic’ to ‘complex technical’ assessments). Interestingly, this last intervention occurred in the field of abuse of dominance cases under Article 102 TFEU which, as mentioned, for a long time were not at the forefront of the debate on the standard of review.

According to certain authors, the EU case law ‘*has been showing a worrying expansion*’ of the judicial deference doctrine<sup>217</sup> and ‘*light judicial review in competition cases has expanded more than desirable*’, the ‘*deference language [appearing] too frequently in judgments of the Community Courts, in matters not calling for deference*’.<sup>218</sup> For this reason, the EU Courts’ approach to complex economic and technical assessments of the Commission in competition cases has become the object of more or less intense criticism. Chapter 1 contains a detailed analysis of the various censures raised. Among the various considerations that will be made in the following analysis of the case law, particular attention will be dedicated to ascertaining if, how, and to what extent, the EU Courts have taken account of these criticisms and even attempted to modify the intensity of the review exercised in order to address particular ones among them. It can preliminarily be anticipated that a unique answer to these questions does not exist, as the EU Courts’ attitude has varied greatly depending on the issue and specific criticism at stake. By way of example, the EU Courts’ attitude has ranged from strongly defending the EU institutional balance and the Commission’s discretion

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<sup>217</sup> SIRAGUSA M., *Annulment proceedings in Antitrust Cases (Articles 101 and 102 TFEU) – Standard of Judicial Review Over Substantive Issues*, in *The Role of the Court of Justice of the European Union in Competition Law Cases*, GCLC Annual Conferences Series (edited by MEROLA M. and DERENNE J.) Bruylant, 2010, p. 132.

<sup>218</sup> FORRESTER I. S., *A Bush in Need of Pruning: The Luxuriant Growth of Light Judicial Review*, European University Institute, Robert Schuman Centre for Advanced Studies, EU Competition Law and Policy Workshop/Proceedings, 2009, pp. 18 and 42. According to MACFREGOR and GECIC: ‘*If one steps back and peruses the current state of EU judicial review, although it may be developing in the right direction, it still seems inconsistent, fragmented and limited. In addition, a number of human rights concerns are yet to be dealt with. It is submitted that, presently, the quality of EU judicial review is not robust enough to effectively countervail the broad effects that Commission decisions have on alleged infringers*’; MACGREGOR A., GECIC B., *Due Process in EU Competition Cases*, *Journal of European Competition Law & Practice*, 2012, Vol. 3, No. 5, p. 432. *See contra* CASTILLO DE LA TORRE F., *Evidence, Proof and Judicial Review in Cartel Cases*, in *World Competition Law and Economics Review*, No. 4, December 2009, p. 577: ‘*too much noise is made, in my view, about the alleged limited review of complex economic assessments. Situations where this issue is crucial may not be as common as some appear to believe. Not only does the Commission often work with a safety margin, using calculations which, if anything, tend to favour the applicant in order to have a “robust” case, but very often the real difference with the applicant in litigation is about the legal test, and not so much about complex economic assessments*’.

deriving therefrom in relation to certain assessments (comprising over time both complex economic *and* technical appraisals), to adopting an increasingly attentive stance towards the criminalization of antitrust procedures and the effects this may have on the intensity of the judicial review required.

In the following subsections of this Chapter a distinct analysis will be made for Article 101 and 102 TFEU cases. The reason for this is that Article 101 cases were the first where the issue of limited review was addressed, followed much later by Article 102 cases.<sup>219</sup> As will be seen *infra*, the contours of the limited standard of review were first defined in this area of law, elaborated in depth, and then transposed to Article 102 cases and merger cases (the latter dealt with *infra* in Chapter 3).

## ***2.1. The early case-law on the standard of review in Article 101 TFEU cases***

### *2.1.1. The limited standard of review under Article 101(3) TFEU: the first appearance of this standard in the Consten and Grundig judgment and subsequent case law*

The first formulation of a deferential standard of review for complex economic assessments in competition cases goes back to the ECJ's judgment in *Consten and Grundig*.<sup>220</sup> This judgment established the principle that agreements which prohibit exports within the internal market restrict competition within the meaning of Article 85(1) EEC (now Article 101(1) TFEU), irrespective of their actual effects. In this case the ECJ was called upon to examine an agreement of indefinite duration between the German company Grundig and the French company Consten which granted the latter the exclusive right to sell Grundig's products in France, Saar and Corsica. Under the contract's terms, Consten was prohibited from selling competing products and from exporting Grundig's products to other territories. The grant of exclusive rights to Consten also meant that Grundig had to refrain from marketing its products directly or indirectly to other entities established in the territories covered by Consten's exclusivity. Grundig also agreed to insert clauses in its agreements with other distributors in other Member States which forbid them from

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<sup>219</sup> The first Article 102 case where the 'manifest error test' was mentioned is the 2000 judgment in Case T-65/96 *Kish Glass&Co Ltd v Commission* [2000] ECR II-1885 (*see infra* subsection 3.1 in this Chapter).

<sup>220</sup> Joined Cases 56 and 58/64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission* [1966] ECR 429.

exporting to Consten's territories. These arrangements were meant to compensate Consten for the high investments it undertook to market Grundig's products in France.

In its judgment, the ECJ first examined whether the agreement, by prohibiting parallel imports, restricted competition between Grundig's distributors in a way contrary to Article 85(1) EC (now Article 101(1) TFEU). In this regard, the ECJ condemned the contractual elements of the agreement that aimed at, or had as their effect, absolute territorial protection, and stated that there was no need for economic analysis as the agreement had as its object the restriction of competition, since it isolated the French market for Grundig products and artificially separated national markets.<sup>221</sup> According to the Court: '*[f]or the purpose of applying Article 85(1) (now Article 81(1)), there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition. Therefore the absence in the contested decision of any analysis of the effects of the agreement on competition between similar products of different makes does not, of itself, constitute a defect in the decision.*'<sup>222</sup>

Whether the agreement could have favourable effects, such as improving the production or distribution of the goods in question or increase competition, could be considered only under Article 85(3) EEC (now Article 101(3) TFEU). It is in the examination of the application of this particular head of Article 85 EEC, which calls for a balancing exercise between the pro-competitive and anti-competitive effects of an agreement, that the ECJ stated for the first time that its judicial examination would be limited or restricted, in order to take into account the fact that the Commission's decision implied complex evaluations of economic matters. As indicated by the ECJ:

*'...the exercise of the Commission's powers necessarily implies complex evaluations on economic matters. A judicial review of these evaluations must take account of their nature by confining itself to an examination of the relevance of the facts and of the legal consequences which the Commission deduces therefrom.'*<sup>223</sup>

That the balancing test under Article 101(3) TFEU calls for complex assessments by the Commission that justify a restriction on judicial review has been confirmed by a number of

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<sup>221</sup> HILDEBRAND D., *The Role of Economic Analysis in the EC Competition Rules*, Kluwer Law International, 2009, pp. 200-203.

<sup>222</sup> Joined Cases 56 and 58/64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission* [1966] ECR 299, p. 342.

<sup>223</sup> Joined cases 56 and 58-64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission* [1966] ECR 299, p. 347.

subsequent opinions and judgments. Advocate General Reischl's 1977 Opinion in *Metro I*,<sup>224</sup> which refers to the *Consten and Grundig* judgment, illustrates clearly the EU's originary attitude on this point:

*'[f]irst, it should not be forgotten that the assessment of a [selective distribution] system such as this involves difficult economic judgments. In particular, the question whether the restriction on competition which is linked thereto is counterbalanced by certain advantages calls for complex assessments. This necessarily means that the Commission has a margin of discretion in this respect and this means at the same time that there is a corresponding restriction on judicial review. This notion was also said to be correct with regard to competition law under the EEC Treaty in the judgment in... Consten and Grundig... According to those judgments, the Court of Justice cannot examine all the details of an evaluation: basically, it has only to determine whether the decision of the Commission resulting therefrom was justifiable as a whole or whether serious objections may be raised against it' (emphasis added).*<sup>225</sup>

Descriptions of the manifest error standard in relation to Article 101(3) TFEU in the early case law of the EU Courts can be found also in the 1994 *Europay* case,<sup>226</sup> in the 1995 *SPO* case,<sup>227</sup> in the 1997 *SCK* case<sup>228</sup> and in the 2002 *Shaw* case,<sup>229</sup> where the CFI (now GC) stated in almost identical terms that:

*'[r]eview by the Community judicature of the complex economic appraisals made by the Commission when it exercises the discretion conferred on it by Article 85(3) of the Treaty, with regard to each of the four conditions laid down in that provision, must be limited to verifying whether the rules on procedure and on the giving of reasons have been complied with, whether the facts have been accurately stated, and whether there has been any manifest error of assessment or a misuse of powers.'*<sup>230</sup>

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<sup>224</sup> Case 26/76 *Metro SB-Großmärkte GmbH & Co. KG v Commission* [1977] ECR 1875. The case concerned a Commission decision approving, subject to certain changes, the terms and conditions of SABA's selective distribution system for consumer electronics. Metro, a distributor which had not been admitted to the system because it did not meet certain marketing criteria, had appealed the decision and invited the ECJ to decide whether the terms of the selective distribution system violated Article 101 TFEU. The ECJ upheld the decision, however, while the Advocate General's Opinion contained a discussion on the scope of judicial review of the Court, the final judgment made no reference to such matters.

<sup>225</sup> Case 26/76 *Metro SB-Großmärkte GmbH & Co. KG v Commission* [1977] ECR 1875, p. 1924.

<sup>226</sup> Joined Cases T-39/92 and T-40/92 *CB and Europay v Commission* [1994] ECR II-49, para 109.

<sup>227</sup> Case T-29/92 *SPO and Others v Commission* [1995] ECR II-28, para 288.

<sup>228</sup> Joined Cases T-213/95 and T-18/96 *SCK and FNK v Commission* [1997] ECR II-1739, para 190.

<sup>229</sup> Case T-131/99 *Michael Hamilton Shaw and Timothy John Falla v Commission* [2002] ECR II-2023, para 38.

<sup>230</sup> Case T-131/99 *Michael Hamilton Shaw and Timothy John Falla v Commission* [2002] ECR II-2023, para 38; see almost identical wording in *Europay*, para 109; *SPO*, para 288; and *SCK*, para 190.

In this early case law, originally, the margin of appreciation test and the Court's 'limited' review was thought to be relevant only for the application of Article 101(3) TFEU, and not also for Article 101(1) TFEU, as its application was confined to the balancing test between pro and anti-competitive effects foreseen in the last head of that Article. The ECJ in fact recognised in *Consten and Grundig* that the application of the last paragraph of Article 101 TFEU necessarily implied complex economic assessments of economic matters, which had a consequence on the intensity of judicial review of the Commission's decision. However, progressively and over time, the EU case law has applied the same test referring to the need for a 'manifest error of assessment' also in relation to the first stage of the application of Article 101 TFEU.<sup>231</sup> This is what occurred in the *Remia* judgment examined below.<sup>232</sup>

2.1.2. *The extension of the application of the limited standard of review to Article 101(1) TFEU: the Remia judgment and subsequent case law*

In the *Remia* case the ECJ was called upon to examine a decision of the Commission that declared that a 10-year non-compete clause in a business agreement was restrictive of competition under Article 81 EC (now Article 101 TFEU) after the end of the first four years. The ECJ had to assess the legality of the decision considering also that the Commission had refused to apply the exemption within Article 81(3) EC (now Article 101(3) TFEU) to the final six years of the agreement.<sup>233</sup>

In his Opinion, Advocate General Lenz clarified the scope of judicial review of the Commission's assessments under Article 81(1) EC. First, it questioned '*whether it is possible for the prohibition in Article [81](1) not to be applied to agreements in restraint of competition which in theory fall within its scope without adopting the exemption procedure under Article [81](3)*'.<sup>234</sup> It concluded that the non-application of Article 85(1) EC outside the terms of Article 85(3) EC was admissible and was '*governed by criteria similar to those contained in Article 85(3)*'. This had direct consequences on the intensity of judicial review. If the Commission is carrying out a balancing test and evaluations under Article 81(1) EC, similar to those normally

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<sup>231</sup> ROSE V., *Margins of Appreciation: Changing Contours in Community and Domestic Case Law*, April 30, 2009, available at [globalcompetitionpolicy.com \(https://www.competitionpolicyinternational.com/margins-of-appreciation-changing-contours-in-community-and-domestic-case-law\)](https://www.competitionpolicyinternational.com/margins-of-appreciation-changing-contours-in-community-and-domestic-case-law), p. 6.

<sup>232</sup> Case 42/84 *Remia BV and Others v Commission* [1985] ECR 2545.

<sup>233</sup> BAILEY D., *Scope of Judicial Review Under Article 81 EC*, in CMLR, 41 (2004), pp. 1341-1345.

<sup>234</sup> Opinion of Advocate General Lenz of 14 May 1985, in Case 42/84 *Remia BV and Others v Commission* [1985] ECR 2545, p. 2558.

carried out under Article 81(3) EC, then the discretion the Commission enjoys in carrying out these assessments has to be the same, and the same has to be the intensity of judicial review carried out by the Courts at a later stage. In the Advocate General's words:

*'[i]f this is right and the principles regarding exemption from the prohibition of restrictive agreements may be applied to this case by analogy, a further consequence will follow regarding the scope for judicial review of the Commission's decision. Since the conditions for an exemption are outlined only in a general manner, the Commission enjoys a wide discretion even in the case of a straightforward application of Article 85 (3). The Court of Justice has recognized that Article 85 (3) necessarily implies complex assessments of economic matters. Similarly, where such assessments are made in the case of prohibitions of competition agreed in connection with transfers of undertakings, the judicial review must take that fact into account and therefore confine itself to determining the correctness of the facts on which the assessments are based and the applicability to those facts of the relevant legal principles. As the Court of Justice has stated, judicial review must in the first place be carried out in respect of the reasons given for the Commission's decision, which must set out the facts and considerations on which the said assessments are based and the applicability to those facts of the relevant legal principles'* (emphasis added).

The ECJ followed the Advocate General's reasoning and concluded that where the Commission has to carry out complex economic assessments under Article 81(1) EC, similarly to Article 81(3) EC, it will enjoy the same discretion, thus affecting the intensity of the judges' later review that will be limited by the 'manifest error' standard. According to the Court:

*'[a]lthough as a general rule the Court undertakes a comprehensive review of the question whether or not the conditions for the application of article 85(1) are met, it is clear that in determining the permissible duration of a non-competition clause incorporated in an agreement for the transfer of an undertaking the commission has to appraise complex economic matters. The court must therefore limit its review of such an appraisal to verifying whether the relevant procedural rules have been complied with, whether the statement of the 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'* (emphasis added).<sup>235</sup>

Certain commentators consider that there is a contradiction between the full review of the act, the 'comprehensive review' the ECJ mentions in the first part of this statement,

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<sup>235</sup> Case 42/84 *Remia BV and Others v Commission* [1985] ECR 2545, para 34.

and the ‘limited review’ mentioned in the final part, in the sense that the Court would have ‘the power to undertake a comprehensive review but limits itself to mere verifications’.<sup>236</sup> The Court in any event upheld the Commission’s position and stated that there was nothing that suggested that ‘the Commission based its decision on incorrect findings of fact or committed a manifest error in its appraisal of the facts of the case as a whole’.<sup>237</sup>

With the *Remia* case the ECJ circumscribed the boundaries of judicial review under Article 101(1) TFEU in identical terms to the ones it used in the context of Article 101(3) TFEU. The judicial deference doctrine was this way extended from policy and opportunity choices made under Article 101(3) TFEU to cover more general situations where the Commission conducted complex economic analysis.<sup>238</sup> The expansion of the application of the limited review test to Article 101(1) TFEU has been criticized by certain authors who believe that while the limited review standard may be justified under Article 101(3) TFEU, which calls also for value judgments, the same does not apply to assessments under Article 101(1) TFEU, which, not requiring such evaluations, should not be left to the Commission’s discretion.<sup>239</sup> Notwithstanding these criticisms, the ‘manifest error’ formula laid down in this judgment will find its way in a number of subsequent 101(1) TFEU cases. By way of example, in the *British-American Tobacco* judgment (*‘BAT and Reynolds’*)<sup>240</sup> the ECJ literally cited *Remia* stating that:

*‘it should be recalled that in its judgment of 11 July 1985 in case 42/84 Remia v Commission ... the Court held that although as a general rule it undertakes a comprehensive review of the question whether or not the conditions for the application of article 85(1) are met, its review of such appraisals made by the commission is necessarily limited to verifying whether the relevant rules on procedure and on the statement of reasons have been complied with, whether the*

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<sup>236</sup> See, *inter alia*, DERENNE J., *The Scope of Judicial Review in EU Economic Cases*, in *The Role of the Court of Justice of the European Union in Competition Law Cases*, GCLC Annual Conferences Series (edited by MEROLA M. and DERENNE J.) Bruylant, 2010, p. 76.

<sup>237</sup> Case 42/84 *Remia BV and Others v Commission* [1985] ECR 2545, para 36.

<sup>238</sup> DERENNE J., *The Scope of Judicial Review in EU Economic Cases*, in *The Role of the Court of Justice of the European Union in Competition Law Cases*, GCLC Annual Conferences Series (edited by MEROLA M. and DERENNE J.) Bruylant, 2010, p. 83.

<sup>239</sup> FORWOOD N., *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*, European University Institute, Robert Schuman Centre for Advanced Studies, EU Competition Law and Policy Workshop/Proceedings, 2009, pp. 6-8.

<sup>240</sup> Joined Cases 142 and 156/84 *British-American Tobacco Company Ltd and R. J. Reynolds Industries Inc. v Commission* [1987] ECR 4487.

*facts have been accurately stated and whether there has been any manifest error of appraisal or a misuse of powers*<sup>241</sup> (emphasis added).

Although *Remia* extended the application of the manifest error standard to complex assessments under Article 101(1) TFEU, the Court's findings in this case have subsequently continued to be cited also with reference to complex Commission assessments made under Article 101(3) TFEU, further proving that the boundaries of the manifest error test are equivalent under both heads of Article 101 TFEU. A demonstration of this can be seen in the *Matra-Hachette* judgment:

*'[i]t must first be borne in mind that the Commission may only grant an individual exemption decision if, in particular, the four conditions laid down by Article 85(3) of the Treaty are all met by the agreement, with the result that an exemption must be refused if any of the four conditions is not met; secondly, it is incumbent upon notifying undertakings to provide the Commission with evidence that the conditions laid down by Article 85(3) are met...; thirdly, where complex economic facts are involved, judicial review of the legal characterization of the facts is limited to the possibility of the Commission having committed a manifest error of assessment (judgment of the Court of Justice in Case 42/84 Remia BV and Others v Commission [1985] ECR 2545).'*<sup>242</sup>

Over time, the EU Courts have extended the application of the manifest error standard also to Commission decisions rejecting complaints. This can be seen in the *Asia Motor France* case,<sup>243</sup> where the CFI was called upon to decide on the legality of the grounds on which the Commission rejected the complaints of the applicants alleging they had been victims of an unlawful cartel between importers of Japanese cars into France. The CFI, having to decide whether the Commission's reasoning in the decision was well founded, referred to the above mentioned *BAT and Reynolds* and *Matra-Hachette* cases, and restated the formula according to which *'judicial review of Commission measures involving an appraisal of complex economic matters must be limited to verifying whether the relevant rules on procedure and on the*

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<sup>241</sup> Joined Cases 142 and 156/84 *British-American Tobacco Company Ltd and R. J. Reynolds Industries Inc. v Commission* [1987] ECR 4487, para 62. For an identical citation from the *Remia* and *Bat and Reynolds* cases see Case C-7/95 P *John Deere v Commission* [1998] ECR I-3111, para 34.

<sup>242</sup> Case T-17/93 *Matra Hachette SA v Commission* [1994] ECR II-595, para 104.

<sup>243</sup> Case T-7/92 *Asia Motor France SA, Jean-Michel Cesbron, Monin Automobiles SA, Europe Auto Service SA and SOMACO SA v Commission* [1993] ECR II-669.



*statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or a misuse of powers?*<sup>244</sup>

The EU Courts have also extended the application of the manifest error test to refusals by the Commission to adopt interim measures in competition cases. In the *La Cinq* case, by way of example, when verifying the condition regarding the probability of serious and irreparable damage, the Court of Justice stated that this condition could involve appraisals of complex economic situations and, recalling *Remia* and *BAT and Reynolds*, that ‘*judicial review must be limited to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or a misuse of powers?*’<sup>245</sup>

### 2.1.3. *The application of the limited standard of review to both Articles 101(1) and 101(3) TFEU: the relevant case law*

The manifest error of assessment test and the formula referring to the Commission’s discretion in relation to complex evaluations has been used by the EU Courts also when considering the application, in the same case, of both Articles 101(1) and 101(3) TFEU.<sup>246</sup> This evolution confirms the original approach of the ECJ in *Remia*, which was meant to set the same limits and boundaries to judicial review when complex economic assessments are involved, irrespective of which head of Article 101 TFEU was under examination.

In the *Van den Bergh Foods* case,<sup>247</sup> the GC had to examine whether there had been an infringement of Article 85(1) EC (now Article 101(1) TFEU), thus whether the Commission had adequately proved that an exclusivity clause relating to freezer cabinets in reality imposed exclusivity on some sales outlets, and whether the Commission had quantified correctly the degree of foreclosure. In deciding whether the degree of foreclosure was sufficient to constitute an infringement of Article 85(1) EC, the GC referred to the manifest error formula indicating that ‘*[j]udicial review of Commission measures involving an appraisal of complex economic matters must be limited to verifying whether the relevant rules on*

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<sup>244</sup> Case T-7/9 *Asia Motor France SA, Jean-Michel Cesbron, Monin Automobiles SA, Europe Auto Service SA and SOMACO SA v Commission* [1993] ECR II-669, para 33.

<sup>245</sup> Case T-44/90 *La Cinq SA v Commission* [1991] ECR I, para 85.

<sup>246</sup> ROSE V., *Margins of Appreciation: Changing Contours in Community and Domestic Case Law*, 30 April 2009, available at [globalcompetitionpolicy.com \(https://www.competitionpolicyinternational.com/margins-of-appreciation-changing-contours-in-community-and-domestic-case-law\)](https://www.competitionpolicyinternational.com/margins-of-appreciation-changing-contours-in-community-and-domestic-case-law), p. 7.

<sup>247</sup> Case T-65/98 *Van den Bergh Foods Ltd v Commission* [2003] II-4653.

*procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers?*<sup>248</sup>

In the same judgment, the GC referred to the same manifest error test when having to consider the applicant's challenge to the Commission's refusal to grant an exemption under Article 85(3) EC (now Article 101(3) TFEU). The GC, in relation to the Commission's discretion over complex economic assessments made under Article 85(3) EC, restated the formula according to which '*the review carried out by the Court...must be limited to ascertaining whether the procedural rules have been complied with, whether proper reasons have been provided, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of powers?*'<sup>249</sup> It concluded that it is not for the GC to substitute its own assessment for that of the Commission.

Similarly, in the *GlaxoSmithKline* case,<sup>250</sup> the GC, in relation to the application of both Article 81(1) EC and Article 81(3) EC considered that when dealing with an application for annulment of a decision, it carries out only a restricted review of the merits of the case.<sup>251</sup> The GC also considered that it was not for it to substitute its economic assessment for that of the Commission. According to certain commentators, interestingly, in the *GlaxoSmithKline* case, the GC, notwithstanding the restatement of the 'manifest error standard', scrutinized very closely the Commission's decision. The GC in fact overturned the Commission's finding that the contested agreement was contrary to Article 81(1) EC by reason of its object alone, and annulled the Commission's refusal to grant an exemption under Article 81(3) EC.<sup>252</sup>

Interestingly, in the *GlaxoSmithKline* judgment the GC also formulated for the first time in a 101 case a more extended definition of the 'limited judicial review standard'. This new application of the manifest error standard occurred for the first time in 2005 in a merger

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<sup>248</sup> Case T-65/98 *Van den Bergh Foods Ltd v Commission* [2003] II-04653, para 80.

<sup>249</sup> Case T-65/98 *Van den Bergh Foods Ltd v Commission* [2003] II-04653, para 135.

<sup>250</sup> Case T-168/01 *GlaxoSmithKline Services Unlimited v Commission* [2006] ECR II-2969. In May 2001, the Commission adopted a decision finding that GlaxoSmithKline's Spanish subsidiary had infringed Article 81 EC by entering into an agreement with Spanish wholesalers which operated a distinction between the prices charged for medicines sold to pharmacies and hospitals in Spain and the higher prices charged in the case of exports to Member States. The Commission had also rejected the request for exemption under Article 81(3) EC and had ordered to bring the infringement to an end (Case COMP/36.957/F3 - *Glaxo Wellcome*).

<sup>251</sup> See respectively paras. 57 and 241 of the GC's judgment.

<sup>252</sup> ROSE V., *Margins of Appreciation: Changing Contours in Community and Domestic Case Law*, April 30, 2009, available at [globalcompetitionpolicy.com \(https://www.competitionpolicyinternational.com/margins-of-appreciation-changing-contours-in-community-and-domestic-case-law\)](https://www.competitionpolicyinternational.com/margins-of-appreciation-changing-contours-in-community-and-domestic-case-law), p. 8.

case, *Tetra Laval*,<sup>253</sup> and was then ‘transposed’ to the Article 101 domain with the *GlaxoSmithKline* judgment. As to its content, the GC clarified the extent of its duties of judicial review by stating that it has to verify ‘*whether the facts have been accurately stated, whether there has been any manifest error of appraisal and whether the legal consequences deduced from those facts were accurate...[and that it is for it] to establish not only whether the evidence relied on is factually accurate, reliable and consistent, but also whether it contains all the information which must be taken into account for the purpose of assessing a complex situation and whether it is capable of substantiating the conclusions drawn from it.*’<sup>254</sup>

On appeal, the ECJ in 2009, in dismissing the Commission’s claim that the GC had applied the wrong standard of review, confirmed the legality of the manifest error test and reiterated that the EU Courts exercise only a limited power of review over complex economic assessments made by the Commission.<sup>255</sup> The ECJ thus confirmed its position concerning the existence of a limited standard of review, which it had already stated in identical terms in the earlier 2004 *Aalborg* case.<sup>256</sup>

## ***2.2. The recent case-law of the EU Courts on the standard of review in Article 101 TFEU cases***

Over the years, in light of the characteristics of the EU antitrust judicial review system, a growing number of experts and scholars have expressed serious doubts as to the

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<sup>253</sup> Case C-12/03 P *Commission v Tetra Laval BV* [2005] ECR I-987, para 39.

<sup>254</sup> Case T-168/01 *GlaxoSmithKline Services Unlimited v Commission* [2006] ECR II-2969, paras. 241-242. This ‘expanded’ application of the test has been used and re-formulated consistently in Article 101 cases thereafter; *see, inter alia*, Case T-446/05 *Amann & Söhne GmbH & Co. KG and Cousin Filterie SAS v Commission* [2010] ECR II-01255, para 131: ‘*although it is true that where such a finding involves complex economic or technical appraisals, the case-law recognises that the Commission has a certain discretion, that discretion is never unlimited. The existence of such a discretion does not mean that the Court must refrain from reviewing the Commission’s interpretation of economic or technical data. The Community judicature must not only establish whether the evidence put forward is factually accurate, reliable and consistent, but must also determine whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it.*’

<sup>255</sup> Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services Unlimited and Others v. Commission* [2009] ECR I-9291, paras. 85, 146 and 163. The ECJ dismissed the appeals against the CFI’s judgment although it considered that the CFI had erred in its assessment of the agreement as an effects-based restriction rather than an object-based restriction. The ECJ considered that the operative part of the judgment, which confirmed the Commission’s finding that the agreement infringed Article 81(1) EC, did not need to be set aside. The ECJ also confirmed the CFI’s findings in relation to the assessment of the Article 81(3) EC criteria.

<sup>256</sup> Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland A/S and Others v Commission* [2004] ECR I-123, para 279: ‘[e]xamination by the Community judicature of the complex economic assessments made by the Commission must necessarily be confined to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of powers.’

compatibility of the system with fundamental rights, in particular with the EU Charter and with the ECHR. As analyzed in Chapter 1, the debate has mainly focused on the so-called ‘manifest error’ or ‘limited’ judicial review standard that the EU Courts apply when reviewing the legality of Commission’s decisions in annulment proceedings brought on the basis of Article 263 TFEU. When the EU Courts are reviewing the Commissions’ so-called ‘complex economic assessments’ or ‘complex technical appraisals’<sup>257</sup> they exercise a form of judicial deference in relation to the Commission’s choices. The EU Courts limit themselves to verifying whether the relevant rules on procedure and on stating reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers. According to the most critical commentators, this amounts to a form of judicial self-restraint that is unwarranted and in violation of fundamental rights, in particular the right to a fair hearing in front of an independent and impartial tribunal.<sup>258</sup>

This debate has progressively found its way in the opinions of Advocate Generals and in the judgments of the EU Courts. Until very recently, it was very rare to find statements in opinions or judgments discussing the criminal or quasi-criminal nature of antitrust proceedings, and the effects on the issue of the compatibility of the limited standard of review with the right to a fair trial. This situation radically changes at the time of adoption and entry into force in 2009 of the Lisbon Treaty, which gives to the EU Charter binding legal effect equal to the Treaties and partially incorporates the ECHR in EU law (*see supra* subsection 4.1 in Section II of Chapter 1).

In the following subsections, the EU’s more recent case law concerning Article 101 TFEU will be examined in order to understand the EU judiciary’s position in relation to these topics. It will be shown how progressively the case law has been more attentive concerning the discussions on the ‘criminal’ nature of antitrust sanctions and, in particular, on the consequences this may have for the required intensity of judicial review. Particular attention will then be given to the analysis of the *KME* and *Chalkor* judgments of December 2011,<sup>259</sup> considered the first rulings in which the ECJ openly adopts a position

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<sup>257</sup> As will be examined in subsection 3.1.3 of this Chapter, dedicated to abuse of dominance cases, the extension of the manifest error test occurred in the *Microsoft* judgment (para 88).

<sup>258</sup> *See supra* subsection 4 in Section II of Chapter 1.

<sup>259</sup> Case C-272/09 P *KME Germany and Others v Commission*, not yet reported; Case C-389/10 P *KME Germany and Others v Commission*, not yet reported; and Case C-386/10 P *Chalkor AE Epexergasias Metallon v Commission*, not yet reported.

in relation to the compatibility of the current system of EU judicial review of antitrust decisions with the fundamental right to a fair trial. Finally, the case law following the *KME* and *Chalkor* judgments will be examined in order to analyze the current application of the principles enshrined in these rulings to Article 101 matters, in order to verify the current standard of judicial review applied by the EU Courts.

2.2.1. *The increased attention in EU case law to the criminal nature of antitrust proceedings and to the compatibility of the EU Courts' powers of judicial review with fundamental rights*

While the ECtHR case law supports the finding that competition proceedings in which fines are imposed can be considered criminal in nature under Article 6(1) ECHR (*see supra* subsection 4.2.3.2 in Section II of Chapter 1), the EU case law has not always been straightforward in this regard. Initially the EU Courts have been reluctant to address the question of the nature of antitrust sanctions, rarely adopting a conclusive stance in this regard, sometimes denying the criminal nature, sometimes recognizing only the 'quasi-criminal' nature of proceedings and sanctions.<sup>260</sup> This position, however, has progressively changed over time.

One of the rare instances in the earlier case law where the EU Courts gave particular attention to the nature of antitrust violations and the degree of severity of the sanctions imposed is in the *Hüls* judgment where the ECJ observed, in relation to the application of the fundamental right to be presumed innocent, that '*given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, the principle of the presumption of*

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<sup>260</sup> See Opinion of Advocate General Mayras in Case 26/75 *General Motors v Commission* [1975] ECR 1367, p. 1388: '[a]lthough in the strict sense of the term the fines prescribed by Regulation No 17 are not in the nature of criminal-law sanctions, I do not consider it possible, in interpreting the term 'intentionally', to disregard the concepts which are commonly accepted in the penal legislation of the Member States'; and of Advocate General Darmon in Case 347/87 *Orkem v Commission* [1989] ECR 3301, para 137: '*it does not seem to me to be blindingly clear that the [ECtHR] Ozturk judgment should be seen as being so far-reaching that the concept of "charged with a criminal offence" within the meaning of the Convention should be taken to extend to undertakings which are the subject of administrative proceedings intended to determine whether or not they have committed an infringement of competition rules*'. In the *Orkem* case the ECJ did however follow a more careful approach stating that: '[a]s far as Article 6 of the European Convention is concerned, although it may be relied upon by an undertaking subject to an investigation relating to competition law, it must be observed that neither the wording of that article nor the decisions of the European Court of Human Rights indicate that it upholds the right not to give evidence against oneself' (Case 347/89 *Orkem v Commission* [1989] ECR 3301, para 30). However in a 2003 case, and again in 2008, the ECJ and the GC excluded the criminal nature of antitrust charges; *see* Case C-338/00 P *Volkswagen v Commission* [2003] ECR I-9189, para 96; and Case T-276/04 *Compagnie maritime belge v Commission* [2008] ECR II-1277, para 66.

*innocence applies to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments.*<sup>261</sup>

Over the years, a number of Advocate Generals have proposed to treat antitrust sanctions as criminal in light of their characteristics, however without specifically discussing the consequences this may have on the intensity of judicial review carried out by the EU Courts. The Advocate General's discussions mainly focused on the consequences of the criminal nature of antitrust sanctions on the Commission's handling of competition cases.<sup>262</sup>

By way of example, in the *Polypropylene* case the Advocate General, after having recognized the criminal law character of antitrust fines, made a general statement on the necessity to bring the EU framework in line with what is mandated by the ECHR:

*'[i]n view of the fact - in my view confirmed to some extent by the judgment of the Court of Human Rights in the Ozturk case - that the fines which may be imposed on undertakings pursuant to Article 15 of Regulation No 17/62 do in fact, notwithstanding what is stated in Article 15(4), have a criminal law character, (11) it is vitally important that the Court should seek to bring about a state of legal affairs not susceptible of any justified criticism with reference to the European Convention for the Protection of Human Rights. At all events, within the framework formed by the existing body of rules and the judgments handed down hitherto it must therefore be sought to ensure that legal protection within the Community meets the standard otherwise regarded as reasonable in Europe.'*<sup>263</sup>

In the *Baustablgewebe* case, Advocate General Léger considered that the case involved a 'criminal charge', the issue in the appeal being whether judicial proceedings before the CFI respected the right to legal process within a 'reasonable time', as requested under Article 6 ECHR.<sup>264</sup> Interestingly the Advocate General also pointed out that the Commission '*does not dispute - that, in the light of the case-law of the European Court of Human Rights and the opinions of*

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<sup>261</sup> Case C-199/92 P *Hüls AG v Commission* [1999] ECR I-4287, para 149. However, in later cases the EU Courts were less receptive to recognizing the criminal nature of antitrust sanctions; see *Volkswagen* and *Compagnie maritime belge* cases mentioned in the footnote above.

<sup>262</sup> See Advocate General Mayras in Case 7/72 *Boehringer v Commission* [1972] ECR 1281, p. 1302; Advocate General Vesterdorf in Joined Cases T-1/89 to T-4/89, T-6/89 to T-15/89 *Rhone Poulenc and Others v Commission* [1991] ECR II-867, '*Polypropylene case*', p. 885.

<sup>263</sup> Joined Cases T-1/89 to T-4/89, T-6/89 to T-15/89 *Rhone Poulenc and Others v Commission* [1991] ECR II-867, '*Polypropylene case*', p. 885.

<sup>264</sup> Opinion of Advocate General Léger of 3 February 1998 in Case C-185/95 P *Baustablgewebe GmbH v Commission* [1998] ECR I-8417, para 31.

the European Commission of Human Rights, the present case involves a “criminal charge”. The ECJ followed him on this point, and stated that ‘[t]he general principle of Community law that everyone is entitled to fair legal process, which is inspired by those fundamental rights [...] and in particular the right to legal process within a reasonable period, is applicable in the context of proceedings brought against a Commission decision imposing fines on an undertaking for infringement of competition law’.<sup>265</sup> Advocate General Kokott in the *ETI* case, in recognizing the application of the principle of personal responsibility to cartel offences also stated that ‘[t]he consequence of the sanctionative nature of measures imposed by competition authorities for punishing cartel offences – in particular fines – is that the area is at least akin to criminal law’.<sup>266</sup>

To date, applications alleging the incompatibility in antitrust cases of the EU judicial review system with the right to a fair trial have so far been unsuccessful. In 1998, 1999 and 2000, three interesting and exemplary cases were decided by the EU Courts in which they consistently rejected pleas arguing the infringement of Article 6 ECHR by the EU system of judicial review of antitrust decisions. In *Enso Espanola*, the applicants main contention in this regard was that ‘as Community law currently stands, bias by the Commission cannot be redressed by means of an action brought to contest the Commission’s decision before a court that has full jurisdiction and that this is contrary to the obligations imposed by the ECHR’.<sup>267</sup> The Court however rejected this argument stating that the ‘requirement for effective judicial review of any Commission decision that finds and punishes an infringement of those Community competition rules is a general principle of Community law which follows from the common constitutional traditions of the Member States [and in the present case] that general principle of Community law has not been infringed’.<sup>268</sup> It based its conclusion on the consideration that (i) ‘the Court was established in order particularly to improve the judicial protection of individual interests in respect of actions requiring close examination of complex facts’<sup>269</sup>; (ii) ‘the review of the legality of a Commission decision finding an infringement of the competition rules and imposing a fine in that respect on the natural or legal person concerned must be regarded as effective judicial review of the measure in question. The pleas on which the natural or legal person concerned may rely in

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<sup>265</sup> Case C-185/95 P *Baustalgbewebe GmbH v Commission* [1998] ECR I-8417, para 21. This has been confirmed by later case law; see Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others v Commission* [2003] ECR I-8375, para 179; Case C-194/99 P *Thyssen Stahl v Commission* [2003] ECR I-10821, para 154; and Joined Cases C-403/04 P and C-405/04 P *Sumitomo Metal Industries and Nippon Steel v Commission* [2007] ECR I-729, para 115.

<sup>266</sup> Case C-280/06 *Autorità Garante della Concorrenza e del Mercato v Ente Tabacchi Italiani – ETI Spa* [2007] ECR I-10893, para 71.

<sup>267</sup> Case T-348/94 *Enso Espanola v Commission* [1998] ECR II-1989, para 57.

<sup>268</sup> Case T-348/94 *Enso Espanola v Commission* [1998] ECR II-1989, paras. 60-61.

<sup>269</sup> Case T-348/94 *Enso Espanola v Commission* [1998] ECR II-1989, para 62.

support of his application for annulment are of such a nature as to allow the Court to assess the correctness in law and in fact of any accusation made by the Commission in competition proceedings<sup>270</sup>; and (iii) considering the Court's unlimited jurisdiction in relation to fines, '[i]t follows that the Court has jurisdiction to assess whether the fine or penalty payment imposed is proportionate to the seriousness of the infringement found'.<sup>271</sup> The GC therefore concluded that EU judicial review of competition decisions was compatible with Article 6(1) ECHR.

Similarly, one year later in the *Aristrain* case,<sup>272</sup> the GC replied once more to pleas alleging that the EU system of judicial review was incompatible with the requirement to a fair trial enshrined in Article 6(1) ECHR. The GC concluded that the applicant's complaint had to be rejected in so far as it called into question 'the legality of the system of judicial review of acts of the administration'.<sup>273</sup> The GC stated, without making a conclusive finding in this regard, that 'even supposing that fines imposed under Article 65 of the Treaty have the nature of penal fines', the complaint could be upheld only if 'the Commission's decisions imposing those fines cannot form the subject-matter of an appeal to a judicial authority with unlimited jurisdiction, within the meaning of the ECHR'.<sup>274</sup> In that regard, the GC continued stating that '[t]he requirement of effective judicial review of any decision of the Commission establishing and penalising an infringement of the Community competition rules mentioned above is a general principle of Community law which follows from the constitutional traditions common to the Member States [and that there] has been no breach of that general principle of Community law in the present case'.<sup>275</sup> Recalling the *Epso Espanola* ruling, the GC considered that 'review of the legality of a decision of the Commission establishing an infringement of the competition rules and imposing a fine in that respect on the natural or legal person concerned must be regarded as an effective judicial review of the measure in question [in particular since the] pleas on which the natural or legal person concerned may rely in support of the application for annulment or amendment of a pecuniary penalty are of such a kind as to enable the Court to assess the correctness both in law and in fact of any accusation made by the Commission in the field of competition'.<sup>276</sup> The applicant's alternative argument, to the effect that the sole object of the control exercised in an action in which the Court has unlimited jurisdiction was to amend the economic penalty imposed,

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<sup>270</sup> Case T-348/94 *Enso Espanola v Commission* [1998] ECR II-1989, para 63.

<sup>271</sup> Case T-348/94 *Enso Espanola v Commission* [1998] ECR II-1989, para 63.

<sup>272</sup> Case T-156/94 *Siderurgica Aristrain Madrid SL v Commission* [1999] ECR II-645.

<sup>273</sup> *Ibid.*, para 19.

<sup>274</sup> *Ibid.*, para 27.

<sup>275</sup> *Ibid.*, paras. 29-30.

<sup>276</sup> *Ibid.*, para 34.



and did not extend to the other elements of the contested decision, such as the legal basis of the penalty, which remains subject only to the control of legality was also to be rejected. The GC here stated that *'its unlimited jurisdiction to review the penalty [...] in conjunction, where necessary, with a review of the legality of the other elements of the decision [...] is consistent with the principle enshrined in Article 6 (1) of the ECHR'*.<sup>277</sup> It went on to say that, in addition to unlimited jurisdiction in relation to fines, the EC Treaty empowers the EU judicature, in reviewing errors of law and of fact, to carry out an exhaustive examination of the legality of the decisions referred to it. The GC considered that this was particularly true in the case of the control exercised in practice over the accuracy and relevance of the facts established by the Commission.<sup>278</sup>

Finally, in 2000, in the *Cimenteries* case, the GC rejected also the arguments put forward by several applicants based on the alleged limits to the EU judicature's review of legality. It substantiated its conclusion on the consideration that *'[w]hen the [General Court] reviews the legality of a decision finding an infringement of Article 85(1) and/or Article 86 of the, the applicants may call upon it to undertake an exhaustive review of both the Commission's substantive findings of fact and its legal appraisal of those facts. Furthermore, so far as concerns the fines, it has unlimited jurisdiction under Article 172 of the EC Treaty (now Article 229 EC) and Article 17 of Regulation No 17'*.<sup>279</sup>

The year 2009 has also been particularly interesting for the debate on the compatibility of the EU system of antitrust judicial review with fundamental rights. This does not come as a surprise as in this period there's an increased attention for fundamental rights in the EU framework (given the changes introduced or soon to be introduced by the Lisbon Treaty). Against this background, a series of opinions and judgments were rendered on the issue of the criminal or quasi-criminal nature of antitrust proceedings and, in particular, on the consequences that from this must be derived on the intensity of the judicial review carried out by EU judges in antitrust matters. 2009 is effectively the first year in which the EU judiciary, also solicited by the increasing criticism against the limited judicial review standard, is called upon to reflect even more thoroughly on the characteristics of its review powers in light of the stringent requirements of fundamental rights, all the more pertinent with the recognition of the binding force of the EU Charter and the partial incorporation of the ECHR in the EU framework.

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<sup>277</sup> *Ibid.*, para 38.

<sup>278</sup> *Ibid.*, para 39.

<sup>279</sup> Joined Cases T-25/95 et al. *Cimenteries CBR and Others v Commission* [2000] ECR II 491, para 719.

The legal reflection on these matters surfaces initially in the legal opinions of Advocate General's in the exercise of their advisory role. Advocate General Bot, in his Opinion of 26 March 2009 in the *Erste* case, reflects on the nature of antitrust fines considering them comparable to criminal penalties.<sup>280</sup> According to him, the criminal nature of antitrust investigations leads to the obligation for the Commission to respect the principles of criminal law when setting fines. In his own words:

*'[i]t appears to me that the fines referred to in Article 15 of Regulation No 17 are, by their nature and their size, comparable to a criminal penalty, although they are, in the strict sense of the term, in the nature of an administrative penalty. The Commission's intervention, which is primarily in the nature of a criminal investigation, must therefore comply, in both procedural and substantive terms, with the principles of criminal law and the Commission must therefore prove the factors on which it relies when calculating the amount of the penalty.'*<sup>281</sup>

One week later, on 2 April 2009, the same Advocate General, Mr. Bot, in his Opinion in the *Bolloré* judgment,<sup>282</sup> pushed his reasoning further and applied the consequences of his finding of the criminal or quasi-criminal nature of antitrust proceedings to the EU's judiciary powers of review. The Advocate General in fact stated that *'judicial review must be all the stricter because the infringement of the rights of the defence is committed by the Commission in quasi-criminal proceedings which may fall within the provisions of Article 6(1) of the ECHR'*.<sup>283</sup> The Advocate General recognizes that the *'[a]pplication of Article 6 of the ECHR to a proceeding pursuant to Article 81 EC has raised a number of questions'*<sup>284</sup> and examines these at length in his Opinion. In the first place, he considers antitrust fines *'by their nature and size, be likened to a criminal penalty (although strictly speaking they are an administrative penalty) and in view of the Commission's investigation, inquiry and decision-making functions, a proceeding pursuant to Article 81 EC is quasi-criminal in nature [and] must also comply with the requirements laid down in Article 6(1) of*

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<sup>280</sup> Opinion of Advocate General Bot of 26 March 2009 in Joined Cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P *Erste Group Bank AG (C-125/07 P), Raiffeisen Zentralbank Österreich AG (C-133/07 P), Bank Austria Creditanstalt AG (C-135/07 P) and Österreichische Volksbanken AG (C-137/07 P) v Commission* [2009] ECR I-8681.

<sup>281</sup> *Ibid.*, para 306. This issue was not further dealt with by the ECJ in its judgment.

<sup>282</sup> Opinion of Mr Advocate General Bot of 2 April 2009 in Joined Cases C-322/07 P, C-327/07 P and C-338/07 P *Papierfabrik August Koehler AG, Bolloré SA and Distribuidora Vizcaína de Papeles SL v Commission* [2009] ECR I-7191.

<sup>283</sup> Joined Cases C-322/07 P C-327/07 P and C-338/07 P *Papierfabrik August Koehler AG, Bolloré SA and Distribuidora Vizcaína de Papeles SL v Commission* [2009] ECR I-7191, para 128.

<sup>284</sup> Joined Cases C-322/07 P C-327/07 P and C-338/07 P *Papierfabrik August Koehler AG, Bolloré SA and Distribuidora Vizcaína de Papeles SL v Commission* [2009] ECR I-7191, para 131.

the ECHR'.<sup>285</sup> Although Advocate General Bot's intervention on this issue concerned specifically the observance by the Commission of the rights of defense of parties in what can be considered 'quasi-criminal' proceedings, the importance of the rights at stake did bear consequences also on the intensity of the judicial review subsequently carried out, which had to be 'all the stricter' and 'very detailed'.<sup>286</sup> The ECJ in its subsequent judgment did not make any express finding in this regard or statement concerning the characteristics of the EU antitrust judicial review system. However, it did expressly recognize, citing again the case law seen *supra*, that the right to a fair hearing is a 'general principle of Community law...inspired by Article 6(1) of the ECHR...applicable in the context of proceedings brought against a Commission decision imposing fines on an undertaking for infringement of competition law'.<sup>287</sup>

The year after, in 2010, the ECJ, in an appeal by the company Lafarge against a Commission decision, expressly faced the issue of the effects of the recognition of the criminal nature of antitrust proceedings on the CFI's powers of judicial review.<sup>288</sup> The ECJ however only briefly addressed the matter and did not make any conclusive statement in this regard. Lafarge had in fact claimed that the Commission's sanctions had to be considered a 'criminal offence' for the purposes of Article 6 ECHR, but did not explain how his rights under that provision had allegedly been violated. The ECJ thus avoided making a conclusive finding on the nature of antitrust penalties and stated that '[e]ven if a penalty imposed by the Commission under competition law were to be regarded as coming within the ambit of a 'criminal offence' for the purposes of Article 6 of that convention, Lafarge has not shown how the General Court infringed its right to a fair hearing as required by that article'.<sup>289</sup>

Finally, as will be seen *infra*, in 2011 the ECJ renders the long awaited judgments in the *KME* and *Chalkor* cases. In these rulings the ECJ took a clear position on the characteristics of the EU antitrust judicial review system and its compatibility with the fundamental right to a fair trial. These judgments were particularly awaited as they were delivered following the decision of the *Menarini* case by the ECtHR which had resolved similar issues in relation to national competition rules (*see supra* subsection 4.2.5 in Section II of Chapter 1).

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<sup>285</sup> Joined Cases C-322/07 P C-327/07 P and C-338/07 P *Papierfabrik August Koehler AG, Bolloré SA and Distribuidora Vizcaína de Papeles SL v Commission* [2009] ECR I-7191, paras. 132-133.

<sup>286</sup> Joined Cases C-322/07 P C-327/07 P and C-338/07 P *Papierfabrik August Koehler AG, Bolloré SA and Distribuidora Vizcaína de Papeles SL v Commission* [2009] ECR I-7191, paras. 128 and 134.

<sup>287</sup> Joined Cases C-322/07 P, C-327/07 P and C-338/07 P *Papierfabrik August Koehler AG, Bolloré SA and Distribuidora Vizcaína de Papeles SL v Commission* [2009] ECR I-7191, para 143.

<sup>288</sup> Case C-413/08 P *Lafarge SA v Commission* [2010] ECR I-5361.

<sup>289</sup> Case C-413/08 P *Lafarge SA v Commission* [2010] ECR I-5361, para 75.

For this reason, the following subsections are dedicated to the in-depth analysis of these cases and to the relevance they have for the present debate, followed by the analysis of the subsequent case law of the EU Courts, in order to ascertain how the EU Courts have implemented the formulas of judicial review elaborated in these cases and to understand whether the principles enshrined in these judgments have been crystallized in EU jurisprudence.

2.2.2. *The compatibility of the current limited standard of review over complex economic assessments with the fundamental right to a fair trial: the KME and Chalkor judgments*

The *KME* and *Chalkor* judgments are not, as seen above, the first rulings in which the EU Courts express their views on the characteristics, including the intensity, of EU judicial review in competition cases. However, the relevance that they have for the current debate on the compatibility with the right to a fair trial is without precedent, in particular due to their timing, having been adopted only three months after the ECtHR's *Menarini* judgment. Moreover, while the ECJ's findings in these cases have to some extent clarified the position of the EU Courts on the required intensity of judicial review of Commission antitrust decisions, on the other hand, they have also left open a certain number of unresolved issues which has led to consider that these cases have not '*put an end to the discontent and criticism of the system in which European competition law is applied [...and] mark the start rather than the end of a debate on the reassessment of the current enforcement system*'.<sup>290</sup> Certain commentators have gone in so far as stating that the *KME* judgments are '*a significant but somewhat disappointing contribution to the discussion regarding the compatibility of the EU regime for the public enforcement of competition law with the fundamental right to a fair trial*'.<sup>291</sup> The following subsections are dedicated to the analysis of these judgments, their findings and their implications, before reviewing the EU judges subsequent case law in order to verify the extent to which the principles enshrined in these rulings have been applied thereafter.

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<sup>290</sup> See WESSELING R., VAN DER WOUDE M., *The Lawfulness and Acceptability of Enforcement of European Cartel Law*, in *World Competition*, 35, No. 4, 2012, pp. 574-575.

<sup>291</sup> See SIBONY A., *Case C-272/09 P, KME Germany and Others v. Commission, Judgment of the Court of Justice (Second Chamber) of 8 December 2011*, in *CMLR*, 2012, p. 1977.

### 2.2.2.1. *The KME cases: facts and General Court judgment*

The *KME* judgments of 8 December 2011 concerned respectively two different cartel decisions adopted by the Commission in 2003 and 2004, the *Industrial Tubes*<sup>292</sup> and *Plumbing Tubes* decisions.<sup>293</sup> In these decisions the Commission held that a number of companies, including the KME group, had participated in a complex of restrictive agreements and concerted practices consisting of price fixing and market sharing and had imposed on the KME group a fine totaling € 106.89 million.<sup>294</sup> On the same date a third judgment was rendered always by the ECJ in the *Chalkor* case.<sup>295</sup> The *Chalkor* judgment mirrors almost in identical terms the findings of the two *KME* judgments, which is why authors often refer only to the *KME* judgments in their commentaries. The same will be done in the following sections for simplification purposes.

In the *KME* cases, disagreeing with the Commission's findings, KME made separate applications to the GC for the partial annulment of the decisions insofar as they related to the Commission's calculation of the fines imposed on them, and the reduction of the amount of these fines. The GC, in 2009 and 2010 respectively, rejected KME's

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<sup>292</sup>In the *Industrial Tubes* decision, the Commission found that KM Europa Metal AG (now KME AG), Tréfinmétaux SA (now KME France SAS), Europa Metalli S.p.A. (now KME Italy S.p.A.), Outokumpu Oyj and Outokumpu Copper Products Oy ("Outokumpu") and Wieland Werke AG ("Wieland") violated Articles 81 of the EC Treaty and 53(1) EEA by participating, for the periods respectively indicated for each company in the decision, in a complex of restrictive agreements and concerted practices, which affected the EEA market for industrial copper tubes supplied in level wound coils; see Commission Decision C(2003) 4820 final of 16 December 2003, relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-1/38.240).

<sup>293</sup>In the *Plumbing Tubes* decision, the Commission found that KME – as well as Boliden AB, Outokumpu Copper Fabrication AB, Outokumpu Copper BCZ S.A., Austria Buntmetall AG, Buntmetall Amstetten Ges.m.b.H., Halcor S.A., HME Nederland BV, IMI plc, IMI Kynoch Ltd., Yorkshire Copper Tube Ltd., Mueller Industries, Inc., WTC Holding Company, Inc., Mueller Europe Ltd., DENO Holding Company, Inc. DENO Acquisition EURL, Outokumpu Oyj, Outokumpu Copper Products Oy, and Wieland Werke AG – violated Articles 81 of the EC Treaty and 53(1) EEA by participating, for the periods respectively indicated for each company in Article 1 of the Decision, in a complex of restrictive agreements and concerted practices consisting of price fixing and market sharing, which affected the EEA market for copper plumbing tubes; see Commission Decision C(2004) 2826 final of 3 September 2004, relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-1/38.069).

<sup>294</sup>For purposes of simplification, we will refer generically to the company 'KME' even if the Commission's decisions concerned different addressees and different companies part of the KME group that underwent various forms of restructuring during the litigation phase.

<sup>295</sup>Case C-386/10 P *Chalkor AE Epexergias Metallon v Commission*, not yet reported. On the *Chalkor* judgment see MACGREGOR A., GECIC B., *Due Process in EU Competition Cases*, in *Journal of European Competition Law & Practice*, 2012, Vol. 3, No. 5, available at [http://awards.concurrences.com/IMG/pdf/due\\_process\\_in\\_eu\\_competition\\_cases\\_following\\_the\\_introduction\\_of\\_the\\_new\\_best\\_practices\\_guidelines\\_on\\_antitrust\\_proceedings.pdf](http://awards.concurrences.com/IMG/pdf/due_process_in_eu_competition_cases_following_the_introduction_of_the_new_best_practices_guidelines_on_antitrust_proceedings.pdf), pp. 431-432.

applications.<sup>296</sup> KME appealed both judgments in front of the ECJ seeking to have the GC judgments set aside and the Commission's decision partially annulled. On 8 December 2011 the ECJ delivered its two final rulings on the matter, dismissing KME's appeals.<sup>297</sup>

2.2.2.2. *The KME cases: The Advocate General's conclusions on the limited scope for deference by the EU Courts over the Commission's assessments*

In her Opinion of 10 February 2011 in one of the *KME* cases<sup>298</sup>, Advocate General Sharpston examined whether the judicial review exercised by the GC was adequate, not only in principle but also in the concrete circumstances of the case, in light of the right to a fair trial enshrined in Article 6(1) ECHR. In her Opinion, the debate concerning the manifest error standard and its limits surfaced with great clarity. In the first place, she recognized and re-stated the uncertainties concerning the boundaries and definition of this

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<sup>296</sup> In the *Industrial Tubes* decision, by judgment delivered on 6 May 2009, in Case T-127/04, *KME Germany AG, KME France SAS and KME Italy SpA v Commission* [2009] ECR II-01167, the Eighth Chamber of the CFI rejected KME's application. In July 2009 KME Germany AG (formerly KM Europa Metal AG), KME France SAS (formerly Tréfinmétaux SA) and KME Italy S.p.A. (formerly Europa Metalli S.p.A.) jointly appealed to the ECJ, seeking to have the CFI judgment in Case T-127/04 set aside and the decision partially annulled. In the *Plumbing Tubes* case, by judgment delivered on 19 May 2010, in Case T-25/05, *KME Germany AG, KME France SAS and KME Italy SpA v Commission* [2010] II-91, the Eighth Chamber of the GC rejected KME's application. In August 2010 KME Germany AG (formerly KM Europa Metal AG), KME France SAS (formerly Tréfinmétaux SA) and KME Italy S.p.A. (formerly Europa Metalli S.p.A.) jointly appealed to the ECJ, seeking to have the GC judgment in Case T-25/05 set aside and the decision partially annulled.

<sup>297</sup> Case C-272/09 P *KME Germany and Others v Commission*, not yet reported and Case C-389/10 P *KME Germany and Others v Commission*, not yet reported. See NIKOLIC I., *Full Judicial Review of Antitrust Cases after KME: A New Formula of Review?*, in ECLR, 2012, Issue 12, pp. 583-588; SIBONY A., *Case C-272/09 P, KME Germany and Others v. Commission, Judgment of the Court of Justice (Second Chamber) of 8 December 2011*, in CMLR, 2012, pp. 1977-2002; MUGUET-POULLENNEC G., *Sanctions prévues par le règlement no 1/2003 et droit à une protection juridictionnelle effective : les leçons des arrêts KME et Chalkor de la CJUE*, in *Revue Lamy de la Concurrence : droit, économie, regulation*, 2012, No. 32, pp. 57-78; TUOMINEN N., *La jurisprudence de la Cour de justice et du Tribunal de l'Union européenne. Chronique des arrêts. Arrêt « KME c. Commission »*, in *Revue du droit de l'Union européenne*, 2011, No. 4, pp.753-758; DE LONGIS C., *Sull'effettività della tutela giurisdizionale nel diritto europeo della concorrenza*, in *Giustizia civile*, 2012, I, pp. 279-284; SARRAZIN C., *Amendes: La CJUE rejette les pourvois et examine de manière détaillée les éléments pris en considération pour fixer le montant de l'amende dans l'affaire des tubes industriels en cuivre et tubes sanitaires en cuivre (KME Germany c/ Commission)*, in *Concurrences: revue des droits de la concurrence*, 2012, No. 1, pp. 89-91; LACRESSE A., *Recours juridictionnel effectif: La CJUE confirme l'exercice par le Tribunal d'un contrôle de pleine juridiction sur les sanctions infligées par la Commission en matière de concurrence (KME Germany c/ Commission, Chalkor c/ Commission)*, in *Concurrences: revue des droits de la concurrence*, 2012, No. 1, pp. 181-182.

<sup>298</sup> Opinion of Advocate General Sharpstone of 8 December 2011 in Case C-272/09 P, not yet published. On Advocate General Sharpston's Opinion see GERARD D., *AG Sharpston's Opinion in KME: a new step toward full appellate jurisdiction in antitrust cases*, in *Kluwer Competition Law Blog*, 12 February 2011; DEBROUX M., *Amendes: L'Avocat général Sharpston passe en revue les critères pris en compte pour déterminer le montant d'une sanction pécuniaire et détaille l'étendue du contrôle que doit exercer le Tribunal de l'UE (Conclusions AG Sharpston, KME Germany)*, in *Concurrences*, 2011 No. 2, p. 103; GERARD D., *The ECJ Advocate General Sharpston addresses the scope of the EU Courts' jurisdiction over antitrust cases and fines (KME Germany)*, in *e-Competitions*, 2011, No. 35160; and DAWES A., FORRESTER I., TROUCHE A., SAKELLARIOU S., *The ECJ Advocate General Sharpston voices opinion on the standard of judicial review over fines in cartel cases (KME)*, in *e-Competitions*, 2011, No. 47909.

standard and emphasized that: ‘*the case-law has never clarified the exact meaning, scope of rationale of the margin of discretion accorded to the Commission, having regard to the institutional balance between the [Commission and the EU judiciary]*’.<sup>299</sup> She also acknowledged the increased criminalization of competition proceedings and concluded that in light of the *Engel* criteria, she had ‘*little difficulty*’ in concluding that cartel fines were criminal in nature.<sup>300</sup> She also stated her view on the necessity to ensure that there is only a very limited degree of deference by EU Courts when reviewing the Commission’s application of competition rules.<sup>301</sup> In her own words:

*‘it is arbitrary, dangerous and unfair to apply the same “judicial deference” to the Commission’s discretion in the context of the current EU competition law enforcement regime, characterized by increasingly large fines having inevitable economic and financial impact on companies, shareholders and employees, and leading to de facto “criminalization” of competition law. EU competition rules are directly applicable provisions which leave no room for policy-based discretion in their interpretation and application, so that there is scope for only a very limited degree of deference by the Courts when reviewing their application by the Commission in a specific case’ (emphasis added).*<sup>302</sup>

As to the substance of the case, KME’s main contention was that the GC infringed its fundamental right to a fair trial by failing to examine its arguments closely and thoroughly and by deferring, to an excessive and unreasonable extent, to the Commission’s discretion. As a result, KME alleged to have failed to obtain full and effective judicial review, as required by Article 6(1) ECHR. Since the GC’s judicial review in the *KME* cases was restricted to the Commission’s exercise of its sanctioning powers, the Advocate General was able to narrow down the issue to the characteristics of the unlimited jurisdiction in relation to fines, leaving aside the issue of review of legality, and avoiding to have to take an open position on the compatibility in general of judicial review in competition proceedings with Article 6(1) ECHR. For the Advocate General it was hardly debatable that the EU Courts’ unlimited jurisdiction pursuant to Article 261 TFEU is consistent ‘*at*

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<sup>299</sup> *KME* Opinion, para 44.

<sup>300</sup> *KME* Opinion, para 64.

<sup>301</sup> According to certain authors, Advocate General Sharpston’s Opinion in *KME* represents another step in the line of Advocate General Opinions advocating for a reduction in the use of the deference doctrine; see DERENNE J., *The Scope of Judicial Review in EU Economic Cases*, in *The Role of the Court of Justice of the European Union in Competition Law Cases*, GCLC Annual Conferences Series (edited by MEROLA M. and DERENNE J.) Bruylant, 2010, p. 85.

<sup>302</sup> *KME* Opinion, para 44.

least in theory' with Article 6(1) of the ECHR insofar as it enables the Court 'to cancel, reduce or increase the amount, with no restriction as to the type of grounds (of fact or law) on which it can be exercised'.<sup>303</sup> However, KME's claim before the ECJ was also based on the manner in which the GC actually reviewed the decisions being challenged. As opined by Advocate General Sharpston, it is a legitimate question 'whether, in any particular case, the General Court has in fact adequately exercised' its unlimited jurisdiction, proposing a case by case approach. She stated to this end that:

*'I consider that what is of greatest importance is the way in which the General Court actually carried out its review, the way in which it described that review being less relevant. Thus, it cannot necessarily be concluded from references to the degree of discretion, choice or latitude available to the Commission that the General Court failed in its duty to assess, in response to KME's arguments, the way in which the fine was set. Nor, conversely, can it be concluded from the use of the words 'in the exercise of its unlimited jurisdiction' that that Court did indeed adequately exercise its powers of assessment. Each instance must be examined on the basis of its actual content.'*<sup>304</sup>

Advocate General Sharpston noted that 'the General Court did request the Commission to produce a number of documents in its administrative file, and that the Commission produced well over 500 pages in response'. This suggested that the thoroughness of the GC's review was 'sufficient to satisfy the requirements of the ECHR and the Charter. However, it remains to be verified, from the judgment itself, whether that review was of the requisite kind. In other words, was it confined to verifying that the Commission had not exceeded the bounds of its discretion, or was there also consideration (when called for by KME) of the assessment made within those bounds?'.<sup>305</sup>

Interestingly, the ECJ in its judgment adopted an entirely different approach and, as will be seen *infra*, departed from the Advocate General's reasoning on why the review was compatible with fundamental rights and based its entire reasoning on Article 47 of the EU Charter rather than on Article 6(1) ECHR.

#### 2.2.2.3. *The KME cases: The ECJ's judgment*

As mentioned, in front of the ECJ KME submitted, *inter alia*, that the GC had infringed Article 6(1) of the ECHR and the EU Charter by failing to carry out an adequate review of the *Industrial Tubes* and the *Plumbing Tubes* decisions and by deferring, to an excessive and

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<sup>303</sup> KME Opinion, para 70.

<sup>304</sup> KME Opinion, paras. 71 and 73.

<sup>305</sup> KME Opinion, para 75.



unreasonable extent, to the Commission's discretion. The ECJ rejected these arguments and made a number of statements that are of particular interest for the present discussion as the EU Court adopted a clear position on the compatibility of the current EU system of judicial review of competition decisions with the fundamental right to a fair trial.<sup>306</sup> Rather than basing its reasoning on Article 6(1) ECHR, as done by the Advocate General, the ECJ based its analysis entirely on Article 47 of the EU Charter, which allowed it to avoid any discussion on the possible criminal nature of antitrust sanctions and on the implications of any such classification under Article 6(1) ECHR.<sup>307</sup>

In the first place, the ECJ recalled that the principle of effective judicial protection is a general principle of EU law, to which expression is now given by Article 47 of the Charter. Then, rather than concentrating its analysis on the unlimited jurisdiction in relation to fines, as done by the Advocate General, it focused on the review of legality under Article 263 TFEU and made a number of interesting statements. It indicated that in areas giving rise to complex economic assessments, the Commission has a margin of discretion with regard to economic matters, which does not, however, mean that the EU Courts must refrain from reviewing the Commission's interpretation of economic information. The Courts must in any event establish whether the evidence relied on is factually accurate, reliable and consistent, and 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 sustaining the conclusions drawn from it.<sup>308</sup> The ECJ thus emphasized that the Commission's discretion, which is not in any event called into question, cannot dispense from conducting an in-depth review of the law and of the facts.

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<sup>306</sup>As previously mentioned in Chapter 1, the ECJ's statements substantially mirrored the statements made by the Strasbourg judges in *Menarini*, creating an interesting dialectic between the two Courts.

<sup>307</sup>It has been claimed that this choice was made by the ECJ not only to avoid having to 'engage in this complex and politically charged discussion' but also to give a clear framework to the right to a fair trial under the EU Charter. According to this view, '[b]y making Article 47 of the Charter rather than Article 6 ECHR its point of reference, the Court may have reserved itself the possibility of not classifying competition law sanctions under any particular heading, as well as the liberty to consider that the annulment of a decision, even without a *de novo* review, qualifies as an effective remedy'. This may also be explained by the need to raise the ECHR standard of protection which after *Menarini* seemed disappointing as it watered down the requirements of effective judicial review in competition cases. See SIBONY A., *Case C-272/09 P, KME Germany and Others v. Commission, Judgment of the Court of Justice (Second Chamber) of 8 December 2011*, in CMLR, 2012, pp. 1991-1993.

<sup>308</sup>Case C-272/09 P *KME Germany and Others v Commission*, not yet reported, para 94; and Case C-389/10 P *KME Germany and Others v Commission*, not yet reported, para 121. The standard is the same which has been formulated in the *Tetra Laval* case (see *infra* subsection 2.2.3 in Chapter 3) and was then transposed in Article 101 TFEU case law (see *supra* subsection 2.1.3 in this Chapter).

As to the EU Courts' unlimited jurisdiction in relation to penalties, the ECJ stated that *'the review of legality is supplemented by the unlimited jurisdiction'*,<sup>309</sup> which empowers the Courts, in addition to carrying out a mere review of the lawfulness of the penalty, to substitute their own appraisal for the Commission's and, consequently, to cancel, reduce or increase the fine or penalty payment imposed. The exercise of unlimited jurisdiction in relation to penalties however does not amount to a review of the Court's own motion. The ECJ in fact recalled that judicial proceedings have an *inter partes* nature. With the exception of pleas involving matters of public policy, which the Courts are required to raise of their own motion (such as the failure to state reasons), it is for the applicant to raise pleas in law against that decision and to adduce evidence in support of those pleas.<sup>310</sup>

The ECJ concluded that the EU system of review is *in principle* compatible with the right to a fair trial as the review provided by the Treaties involves a review by the Courts of both the law and the facts, that they have the power to assess the evidence, to annul the Commission's decision and to alter the amount of a fine. Therefore, the judicial review provided under EU law is not contrary to the requirements of the principle of effective judicial protection. As to the compliance, *in practice*, with this right, the ECJ held that the GC conducted the full and unrestricted review, in law and fact, which was required of it. In the ECJ's own words: *'although the General Court repeatedly referred to the "discretion", the "substantial margin of discretion" or the "wide discretion" of the Commission [...] such references did not prevent the General Court from carrying out the full and unrestricted review, in law and in fact, required of it'*.<sup>311</sup>

### 2.2.3. Implications of the *KME* and *Chalkor* judgments

It is considered that the *KME* and *Chalkor* judgments are to be welcomed as: (i) it is apparent that the ECJ acknowledges that the GC has in the past given excessive deference

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<sup>309</sup> Case C-272/09 P *KME Germany and Others v Commission*, not yet reported, para 103; and Case C-389/10 P *KME Germany and Others v Commission*, not yet reported, para 130.

<sup>310</sup> For an in-depth analysis of the importance of parties' submissions as a fundamental pre-condition for comprehensive judicial review, see VAN CLEYNENBREUGEL P., *Constitutionalizing Comprehensively Tailored Judicial Review in EU Competition Law*, in *The Columbia Journal of European Law*, 2012, pp. 519-545.

<sup>311</sup> Case C-389/10 P, para 136; Case C-272/09 P, para 109 and Case C-386/10 P, para 82. According to certain commentators it is in any event *'unfortunate that the appearance of a less than full review by the General Court was not criticized by the Court of Justice. Justice must not only be done, but also be seen to be done'*; see BRONCKERS M, VALLERY A., *Fair and Effective Competition Policy in the EU: Which Role for the Authorities and Which Role for the Courts after Menarini (July 5, 2012)*, in *European Competition Journal*, Vol. 8, No. 2, 2012, available at SSRN: <http://ssrn.com/abstract=2137524>, pp. 8-9.

to the Commission's discretion, which is not in any event called into question, and emphasizes that the Commission's discretion cannot dispense from conducting an in-depth review of the law and of the facts;<sup>312</sup> and (ii) the ECJ states it will start looking at what the GC actually does in its review of the Commission's competition decisions, beyond the GC's choice of language which may repeatedly refer to the Commission's discretion.<sup>313</sup>

Certain commentators<sup>314</sup> also consider that *KME* signs a certain rupture with past statements of the Courts where it was often reiterated that '*review of complex economic appraisals is necessarily limited*'<sup>315</sup>, as now the ECJ expressly states that '*the Courts cannot use the Commission's margin of discretion [...] as a basis for dispensing with the conduct of an in-depth review of the law and the facts*'.<sup>316</sup>

A number of critiques have anyway been raised against these judgments. On the one hand, it is still questioned whether these rulings are effectively compliant with what is mandated for the respect of fundamental rights, in particular the right to a fair trial, enshrined in Article 6(1) ECHR and Article 47 of the Charter. As examined *supra* in subsection 4.2.4 of Section II in Chapter 1, the case law of the ECtHR on the content of 'full judicial' review is not straightforward, but in its prevalent applications mandates an extensive review that entails the power to quash and reformulate in all respects on points of fact and law the decision of the competition authority under examination. While the *KME* judgments seem to fall into the steps of the recent *Menarini* case, allowing to conclude that the EU judicial review system and architecture as such is not incompatible with Articles 47 of the EU Charter and 6(1) ECHR, it must not be forgotten that the ECtHR *Menarini* judgment has been the object of intense criticism, in particular for

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<sup>312</sup> As indicated by one author: '*KME heralds more stringent review of the Commission's antitrust decisions*'; see NIKOLIC I., *Full Judicial Review of Antitrust Cases after KME: A New Formula of Review?*, in ECLR, 2012, Issue 12, p. 587.

<sup>313</sup> This is a welcome change in particular for those authors who believe that '*the crux is not whether the system has the "external characteristics" of a system that complies with the necessary guarantees but rather how the system operates in practice*'; see WESSELING R., VAN DER WOUDE M., *The Lawfulness and Acceptability of Enforcement of European Cartel Law*, in *World Competition*, 35, No. 4, 2012, pp. 574-575.

<sup>314</sup> See, *inter alia*, DERENNE J., *The Scope of Judicial Review in EU Economic Cases*, in *The Role of the Court of Justice of the European Union in Competition Law Cases*, GCLC Annual Conferences Series (edited by MEROLA M. and DERENNE J.), Bruylant, 2010, pp. 73-74.

<sup>315</sup> Case T-201/04 *Microsoft Corp. v Commission* [2007] ECR II-3601, para 87.

<sup>316</sup> Case C-272/09 P *KME Germany and Others v Commission*, not yet reported, para 102; and Case C-389/10 P *KME Germany and Others v Commission*, not yet reported, para 129.

affording too light of a protection in competition cases, in particular for ‘*water[ing] down the requirements of effective jurisdictional review in competition law cases*’.<sup>317</sup>

Another controversial matter is the extent to which the *KME* judgments effectively comply with the requirements set out in the earlier ECtHR *Menarini* judgment. One remarkable feature of the *KME* judgments is that, notwithstanding the lack of any reference to the ECtHR case law and Article 6 ECHR, the language used by the EU judges mirrors to a large extent that used by the ECtHR judges in *Menarini*. A more detailed analysis of the substantial findings of each Court shows however a significant difference in approaches.

In *Menarini*, after having recalled that among the most important features of a system of full judicial review there is the authority to examine all questions of fact and law relevant to the dispute and the power of modifying the contested decision,<sup>318</sup> and after acknowledging that in the Italian legal framework no administrative court can substitute its own legal qualification of the facts and technical evaluation to that of the AGCM, the ECtHR however concluded that, *in practice*, the Italian courts had not carried out a simple review of legality of the decision, but had thoroughly reviewed the applicant’s claims and thus the authority’s technical assessments (in addition to having the possibility to modify the fine).<sup>319</sup> The ECtHR judges in *Menarini* took care in fact to state clearly that the Italian judicial review system of antitrust decisions, *as implemented by the Italian judges in Menarini’s case*, was compliant with Article 6(1) ECHR and, thus, that there had been no breach of the applicants right to a fair trial. What is apparent from the *Menarini* judgment is that a distinction was made by the ECtHR between the judicial review powers as defined by the Italian legal framework, and the judicial review powers as exercised concretely by the Italian judges in the particular case. The circumstance that the legislation in itself did not foresee ‘full judicial review powers’, as conceived in the ECtHR case law, did not preclude a

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<sup>317</sup> See SIBONY A., *Case C-272/09 P, KME Germany and Others v. Commission, Judgment of the Court of Justice (Second Chamber) of 8 December 2011*, in CMLR, 2012, p. 1998.

<sup>318</sup> ECtHR judgment in *Menarini*, para 59: ‘[p]armi les caractéristiques d’un organe judiciaire de pleine juridiction figure le pouvoir de réformer en tous points, en fait comme en droit, la décision entreprise, rendue par l’organe inférieur. Il doit notamment avoir compétence pour se pencher sur toutes les questions de fait et de droit pertinentes pour le litige dont il se trouve saisi?’.

<sup>319</sup> ECtHR judgment in *Menarini*, para 64: ‘la Cour note que la compétence des juridictions administratives n’était pas limitée à un simple contrôle de légalité. Les juridictions administratives ont pu vérifier si, par rapport aux circonstances particulières de l’affaire, l’AGCM avait fait un usage approprié de ses pouvoirs. Elles ont pu examiner le bien-fondé et la proportionnalité des choix de l’AGCM et même vérifier ses évaluations d’ordre technique?’.

finding of compatibility with the right to a fair trial, provided that full judicial review powers had been exercised in practice.

In *KME*, on the other hand, the ECJ justifies its finding of compatibility of the GC's review with the right to a fair trial, considering first the general characteristics of the judicial review system provided under EU law. Notwithstanding that the Commission continues to exercise discretion in relation to complex economic assessments, the circumstance that EU Courts can carry out a review of both the law and the facts, that they have the power to assess the evidence, to annul the Commission's decision and to alter the amount of a fine, is sufficient for the Court to conclude that the judicial review provided under EU law is not contrary to the requirements of the principle of effective judicial protection. The ECJ's conclusion is thus that the system in itself is compatible with the requirements of the right to a fair trial and that deviations by the GC contrary to the system will be monitored on a case by case basis, as particular attention will be given to what the GC actually does in practice in its review of the Commission's competition decisions.

What is problematic of the ECJ's approach in *KME* is that the Court considers that the EU system as it stands, *i.e.* a review of legality of the law and the facts that leaves discretion to the Commission for complex economic assessments, coupled with unlimited jurisdiction in relation to fines, is in itself compatible with the right to a fair trial. In *Menarini*, instead, the ECtHR reached the conclusion that the right to a fair trial had not been violated on the basis solely of what the national judges had done in practice. Notwithstanding the recognition that on the basis of national legislation the Italian judges could not substitute the technical assessments of the Italian Authority, the circumstance that in practice they had not exercised this deference and had rather reviewed thoroughly the authority's assessments, had led to consider the requirement of 'full' review respected. The main difference between the two cases is that while the interpretation and application of the 'full review' requirement in *Menarini* does not leave space to the Commission's discretion,<sup>320</sup> that same requirement in *KME* is found instead to be respected even in the presence of

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<sup>320</sup> The ECtHR in *Menarini* considered that the Italian courts' competence '*n'était pas limitée à un simple contrôle de légalité*' as even if they did not have the '*pouvoir de se substituer à l'autorité administrative indépendante*' they could '*toutefois vérifier si l'administration a fait un usage approprié de ses pouvoirs*'. They could thus examine if '*par rapport aux circonstances particulières de l'affaire, l'AGCM avait fait un usage approprié de ses pouvoirs [and] le bien-fondé et la proportionnalité des choix de l'AGCM*'. They could also '*vérifier ses évaluations d'ordre technique*' (*Menarini* judgment, paras. 63-64).

deference towards the Commission's discretionary evaluations over complex economic assessments.

The *KME* cases have been also criticized for not providing 'a coherent framework for appraising whether the EU system of review complies with the requirement of a fair trial'.<sup>321</sup> As mentioned, after these judgments, there is still place for the 'limited' standard of judicial review. As indicated by one commentator: '[t]he Court does not deny that discretion constitutes a limit to the effectiveness of control. In other words, Courts undertake to review parties' submission carefully although they reserve their discretion to preserve the Commission's discretion'.<sup>322</sup> Accordingly, the EU Courts' practice of not interfering and questioning certain Commission assessments is not considered an obstacle to ensuring 'full review', *i.e.* not *per se* in violation of the interested parties' right to a 'fair trial'. However, this position of the ECJ has also been criticized for being confusing as, on the one hand, the Court states that judges cannot use the Commission's discretion for dispensing with the conduct of an in-depth review, and, on the other hand, that deference towards complex economic assessments is compatible with the principle of effective judicial protection.<sup>323</sup> Thus, whether the circumstance that the EU Courts can dismiss certain arguments without having to reach an opinion on their substance is compatible with the right to a fair trial is still an open question, which is why a clarification by the EU Courts on this point would be welcome.<sup>324</sup>

That a margin of discretion continues to be recognized to the Commission has been confirmed also by the position of individual EU judges on the matter, *i.e.* such as the president of the GC Judge Jaeger's proposal to marginalize the marginal review of the EU Courts, in order to give the Commission deference only in relation to assessments

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<sup>321</sup> See SIBONY A., *Case C-272/09 P, KME Germany and Others v. Commission, Judgment of the Court of Justice (Second Chamber) of 8 December 2011*, in CMLR, 2012, p. 2000.

<sup>322</sup> See SIBONY A., *Case C-272/09 P, KME Germany and Others v. Commission, Judgment of the Court of Justice (Second Chamber) of 8 December 2011*, in CMLR, 2012, pp 1997.

<sup>323</sup> See NAZZINI R., *Administrative Enforcement, Judicial Review and Fundamental Rights in EU Competition Law: A Comparative Contextual-functionalist Perspective*, in CMLR, 2012, Vol. 49(3), pp. 995-997. According to Nazzini: '[t]hree arguments have been put forward to "save" the current system. The first is that, in certain cases, the Union courts do not in fact apply the "manifest error" test – although they say that they do – but carry out a comprehensive review of the evidence. This seems to be the approach adopted by the Court of Justice itself in *KME*, where the Court said that, although the General Court had set out a test of deferential review, it did in fact carry out a full review of the Commission decision. This approach is far from satisfactory. The principle of effective judicial protection is better safeguarded, in a democratic society, by a legal test which complies with it and is clear and certain in advance, rather than by courts departing from a test which is not compliant with such a principle on a case-by-case basis and, more worryingly, without providing reasons for the departure from the non-compliant test but, on the contrary, purporting to apply it'.

<sup>324</sup> See SIBONY A., *Case C-272/09 P, KME Germany and Others v. Commission, Judgment of the Court of Justice (Second Chamber) of 8 December 2011*, in CMLR, 2012, p. 1997.

concerning economic policy choices.<sup>325</sup> This recommendation to reduce the sphere of discretion of the Commission (from complex economic and technical appraisals to only economic policy choices) is to be welcomed; however, it has also been contended that this is still not sufficient, as it leaves space for the Commission's discretion for particular categories of assessments, continuing to raise the question of the legitimacy of forms of 'judicial immunity'. The most critical authors still contend that what is necessary for effective compliance with the requirements of the fundamental right to a fair trial is either a system where the EU Courts have full appellate judicial review powers, *i.e.* the power to quash *and* reformulate all of the Commission's assessments,<sup>326</sup> either a system where, preserving the review of legality, within the latter no room is left to the discretionary choices of the Commission, the EU judges' control having necessarily to cover all of the Commission's assessments.

### ***2.3. The EU case law following the KME and Chalkor judgments***

The *KME* and *Chalkor* judgments have been welcomed for having brought more clarity in competition cases on the EU judiciary's position concerning the compatibility of the EU judicial review system with the right to a fair trial; however, these cases have also been the object of criticism for having left a grey area of controversial issues still to be defined. In particular, a contentious matter is whether the EU case law following these two landmark cases will continue to be deferential towards the Commission's complex economic and/or technical assessments, continuing to raise issues of compatibility with the right to a fair trial.

The risk inherent in the ECJ's approach in the *KME* and *Chalkor* cases is that given the novelty of the statements (one of the first times the ECJ made its view known on the issue of compatibility of deferential judicial review standards with the right to a fair trial), their timing (after the *Menarini* judgment and thus presumptively respecting its findings), and their origin (the EU's highest court), successive judgments of the GC or the ECJ may be unlikely to adopt or state a different view, at least not until the EU Courts' approach may be found to be in violation of the ECHR itself, after accession to the Convention. In the following subsections, the judgments rendered by the EU Courts in Article 101 TFEU

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<sup>325</sup> JAEGER M., *The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of the Marginal Review?*, in *Journal of European Competition Law Practice*, Vol. 2, No. 4, 2011.

<sup>326</sup> As seen *supra* in subsection 4.2.7 of Section II in Chapter 1, 'full jurisdiction' as interpreted in the *Menarini* case by the ECtHR does not however mandate full appellate judicial review as a minimum review standard.

cases after *KME* and *Chalkor* that are relevant in this regard have been examined, in order to assess how the principles enshrined in the 2011 cases have been given application thereafter. As will be seen *infra*, it appears evident that the EU Courts continue to consider the existence of the limited judicial review standard legitimate and fully compatible with the right to a fair trial.

### 2.3.1. *The 2012 Shell judgment*

In the *Shell* judgment,<sup>327</sup> rendered in September 2012, almost one year after the *KME* and *Chalkor* judgments, the GC stated that the EU judicial review system as foreseen by the Treaties was compatible with the right to a fair trial, as it empowers the Courts to carry out a review of legality and to substitute their own appraisal for the Commission's in relation to the penalty, and, consequently, to cancel, reduce or increase the fine or penalty payment imposed. The GC stated that:

*‘[t]he review provided for by the Treaties thus involves, in accordance with the requirements of the principle of effective judicial protection in Article 47 of the Charter of Fundamental Rights, review by the Courts of the European Union of both the law and the facts, and means that they have the power to assess the evidence, to annul the contested decision and to alter the amount of a fine’.*<sup>328</sup>

In this case, the statement from the Court was made in the framework of its examination of the applicants' arguments in the context of the Court's unlimited jurisdiction in relation to fines. In reaching this conclusion the GC expressly cited the *KME* and *Chalkor* judgments. What is interesting is that the GC here made a general statement on the compatibility of the system with the right to a fair trial. The risk inherent in these statements of the GC is that this clean bill of health provided to the system may translate in the Commission's discretionary assessments being fully insulated by 'full review'.

As mentioned *supra*, compliance with the right to a fair trial must be ascertained not only on a theoretical basis but also in practice. Formalistic announcements that the system of review as described in the Treaties is adequate as such cannot but be viewed with suspect,

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<sup>327</sup> Case T-343/06 *Shell Petroleum NV, The Shell Transport and Trading Company Ltd and Shell Nederland Verkoopmaatschappij BV v Commission*, not yet reported. The *Shell* judgment was one of 16 separate judgments handed down by the GC on 27 September 2012 in actions brought by bitumen producers and construction companies to challenge a decision of the Commission finding they had infringed Article 101(1) TFEU by participating in an illegal price-fixing cartel in the road bitumen sector in the Netherlands.

<sup>328</sup> Case T-343/06 *Shell Petroleum NV, The Shell Transport and Trading Company Ltd and Shell Nederland Verkoopmaatschappij BV v Commission*, not yet reported, para 116.



as there is no guarantee of what review will effectively be exercised in practice. The greatest of these risks being that the GC may feel dispensed from carrying out an in-depth evaluation of the Commission's findings, in particular in relation to complex economic and/or technical assessments.

### 2.3.2. *The 2012 Otis judgment*

A couple of months after the *Shell* judgment, on 6 November 2012, the ECJ handed down a ruling, of particular interest for the present debate, on a reference for a preliminary ruling from the Brussels Commercial Court.<sup>329</sup> Following a cartel decision fining a number of companies for infringement of Article 101 TFEU for operating illegal price-fixing, bid-rigging and market-sharing cartels relating to the installation and maintenance of lifts and escalators, upheld both by the GC and the ECJ, in June 2008 the Commission filed a case with the Brussels Commercial Court seeking damages from these companies (Otis, Kone, Schindler and Thyssenkrupp). The Brussels Commercial Court referred a number of questions to the ECJ to ask, in particular, whether the right of access to a tribunal and the principle of equality of arms enshrined in the EU Charter prevented the Commission, where it has taken a cartel decision, from claiming compensation before national courts for loss sustained by the EU in its capacity as a consumer of the products that were the subject of that cartel. The ECJ ruled that the EU Charter does not preclude the Commission from bringing on behalf of the EU an action before a national court for damages in respect of loss sustained by the EU as a result of an agreement or practice contrary to Article 101 of the TFEU.

This judgment is of interest because in the examination by the ECJ of the second question referred by the Brussels Commercial Court, particular reference was made to the content of the rights enshrined in Article 47 of the EU Charter. The main issue here concerned the circumstance that when national courts are hearing an action for damages on the basis of a Commission decision finding an infringement of Article 101 TFEU, they cannot take a decision that runs counter to the Commission's decision (under Article 16(1) of Regulation 1/2003). The parties in the national case had argued that their right to a fair trial and to effective judicial protection under Article 47 of the EU Charter had been

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<sup>329</sup> Case C-199/11 *Europese Gemeenschap v Otis NV and Others*, not yet reported. See Werner P., Lesur L., Aberg L., *The European Court of Justice rules that the EU Commission can bring follow-on actions for damages on behalf of the EU in cartel cases (Otis)*, in e-competitions No. 49461.

violated since, in their case, the review of legality carried out by the EU Courts under Article 263 TFEU had been insufficient because of the margin of discretion which the EU courts afford the Commission in economic matters. The ECJ, however, replied this was not the case as the ‘EU law provides for a system of judicial review of Commission decisions relating to proceedings under Article 101 TFEU which affords all the safeguards required by Article 47 of the Charter’.<sup>330</sup> In response to the specific claim that review of legality in the sphere of competition law is insufficient because of, *inter alia*, the margin of discretion allowed to the Commission in economic matters, the ECJ responded by re-formulating the exact wording used in the *KME* and *Chalkor* judgments. In particular, the ECJ answered that the EU courts must carry out a review of legality on the basis of the evidence submitted by the applicants in support of their pleas in law. In carrying out this review, the EU courts cannot use the Commission’s margin of discretion as a basis for dispensing with the conduct of an in-depth review of the law and facts. The ECJ concluded that ‘[t]he review provided for by the Treaties thus involves review by the EU Courts of both the law and the facts, and means that they have the power to assess the evidence, to annul the contested decision and to alter the amount of a fine. The review of legality provided for in Article 263 TFEU, supplemented by the unlimited jurisdiction in respect of the amount of the fine [...] therefore meets the requirements of the principle of effective judicial protection in Article 47 of the Charter’.<sup>331</sup>

This judgment is thus an apparent example of how in relation to the issue of whether the ‘limited’ judicial review standard is compatible with the right to a fair trial, the ECJ formulates once again general conclusions on the compatibility of the current system of review. The ECJ’s reasoning in the *Otis* case lacked any analysis of the intensity of review concretely exercised by the EU Courts in the framework of the previous action for annulment. While this specific review may be considered to go beyond what is required by the ECJ in the framework of a preliminary ruling, on the other hand, what is evident and relevant for any future debate on this topic is that, notwithstanding the effective nature and characteristics of the review carried out under Article 263 TFEU, and contested by the defendants in their action for damages, the ECJ continues to guarantee a clean bill of health to the existence of the Commission’s discretion in relation to complex economic assessments.

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<sup>330</sup> Case C-199/11 *Europese Gemeenschap v Otis NV and Others*, not yet reported, para 56.

<sup>331</sup> Case C-199/11 *Europese Gemeenschap v Otis NV and Others*, not yet reported, para 63.

### 3. THE EVOLUTION OF THE STANDARD OF REVIEW IN ARTICLE 102 TFEU CASES

For a long time there were no judgments concerning Article 102 TFEU in which the ECJ or GC described their powers of judicial review in terms comparable to the Article 101 cases mentioned *supra*.<sup>332</sup> Initially the EU Courts had elaborated the ‘limited’ judicial review standard only in relation to Article 101 cases, however, over the years, the EU Courts extended its application also to new domains. Once developed and applied consistently by the EU Courts in relation to the Commission’s complex economic assessments in the framework of Article 101 TFEU cases, the ‘limited’ review standard was then transposed also to cases decided in the framework of Article 102 TFEU. The ‘limited’ judicial review standard will in fact make its appearance in abuse of dominance cases only after the contours and content of the manifest error standard were well demarcated in the case law under Article 101 TFEU.

Interestingly, while Article 102 cases were for a long time not at the forefront of the debate on the ‘limited’ standard of judicial review, once this standard does make its appearance also in this field of competition law, Article 102 cases have since then contributed to further clarify and demarcate the ambit of application of this standard. By way of example, as will be seen *infra*, it is in the field of Article 102 cases that the EU Courts intervened to increase the categories of assessments (complex ‘economic’ assessments and complex ‘technical’ assessments) that could be caught by the ‘limited’ judicial review standard and thus be subject to more narrow review.

#### ***3.1. The early case-law on the standard of review in Article 102 TFEU cases***

The first time the ‘limited’ review standard makes its appearance in an Article 102 case is in the 2000 judgment in *Kisb Glass*.<sup>333</sup> Here the GC extended for the first time the application of the *Remia* formula, elaborated in the context of a 101 case, to an Article 102 case:<sup>334</sup>

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<sup>332</sup> VON BOGDANDY A., MAVROIDIS P. C., MÉNY Y., *European Integration and International Co-ordination: Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann*, Kluwer Law International, 2002, p. 194.

<sup>333</sup> Case T-65/96 *Kisb Glass&Co Ltd v Commission* [2000] ECR II-1885, para 64.

<sup>334</sup> See SIBONY A., BARBIER DE LA SERRE E., *Charge de la preuve et théorie du contrôle en droit communautaire de la concurrence: pour un changement de perspective*, in *Revue trimestrielle du droit européen* 43 (2), April-June 2007, p.

*‘[a]s a preliminary point, the Court of First Instance observes that, according to consistent case-law, although as a general rule the Community judicature undertakes a comprehensive review of the question whether or not the conditions for the application of the competition rules are met, its review of complex economic appraisals made by the Commission is necessarily limited to verifying whether the relevant rules on procedure and on stating reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers’ (para 64).*

Thereinafter a series of judgments were rendered in the framework of Article 102 cases considered particularly relevant for the discussion on the ‘limited’ standard of judicial review, a selection of which will be examined in the following subsections.

### *3.1.1. The Wanadoo judgment: the impact of the limited judicial review standard on the outcome of cases*

The 2007 *Wanadoo* judgment<sup>335</sup> can be considered a good example of how the existence or not of the limited standard of review in relation to complex economic assessments can lead to very different outcomes in cases, in particular to the finding or not of the existence of an infringement of competition rules. As previously described, the existence of this limited standard entails that EU judges limit themselves to verifying whether the Commission’s evaluations of complex economic matters contain a ‘manifest’ mistake (in addition to verifying the respect of procedural norms, statement of reason requirements and correct exercise of powers). As a consequence, if the party challenging the Commission’s assessments does so presenting an alternative plausible explanation of the facts, the EU judges will ignore such alternative proposal, unless the party in question is capable of demonstrating that the Commission’s theory is vitiated by a manifest error. This also entails that if two alternative and perfectly plausible interpretations of the facts are possible, none of which affected by errors, leading however to different outcomes (a finding or non-finding of abuse), the Commission’s interpretation will always prevail.<sup>336</sup>

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238; and ART J., COLOMBO P. I., *Judicial Review in Article 102*, in *Competition Law and the Enforcement of Article 102* (Etro & Kokkoris eds.), Oxford Univ. Press, 2010.

<sup>335</sup> Case T-340/03 *France Telecom* [2007] ECR II-107 (“Wanadoo”).

<sup>336</sup> See AZIZI who considers that ‘in case of equal plausibility of both parties’ submission, the Commission’s wide margin of assessment shall prevail and its decision thus be upheld; AZIZI J., *The Limits of Judicial Review concerning Abuses of a Dominant Position: Principles and Specific Application to the Communications Technology Sector*, in *Today’s Multi-layered*

In the *Wanadoo* case, the Commission imposed a fine of € 10.35 million on the French internet services provider Wanadoo for abusing its dominant position by engaging in predatory pricing.<sup>337</sup> Wanadoo appealed this decision in front of the CFI which, on 30 January 2007, handed down its judgment confirming the decision. In this case, one of the main issues at stake was whether Wanadoo was abusing its dominant position by applying prices below costs. The answer to this issue depended ultimately on the depreciation method applied. While the Commission had applied a particular amortization method, Wanadoo had argued that in its case the discounted cash flow method was more appropriate for calculating the rates of recovery.

The CFI, after first noting that the choice of method of calculation as to the rate of recovery of costs entails a complex economic assessment on the part of the Commission, thus *‘the Commission must be afforded a broad discretion’* and *‘the Court’s review must therefore be limited to verifying whether the relevant rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or a misuse of powers’*,<sup>338</sup> it then concluded that, to the extent that Wanadoo was unable to prove that the Commission’s method was affected by a manifest error, the CFI would adhere to the Commission’s findings. In particular, the CFI mentioned that even if Wanadoo’s method could be considered more appropriate in some respects, this would not be enough to consider the Commission’s method unlawful, nor enough to solicit the CFI to substitute its assessment for that of the Commission. The CFI in fact stated that:

*‘[f]inally, as regards WIN’s argument that only the method of discounted cash flows is relevant to calculating the rates of recovery in the present case, it should be observed that, even though WIN were to prove that the method which it advocates is appropriate in some respects, this would be insufficient to prove that the method used by the Commission in the present case is unlawful. It is for the applicant to prove that unlawfulness. However, the foregoing assessment has shown that the Commission did not commit a manifest error of assessment in choosing that method. To conclude, WIN has not proved that, in using the data recorded in WIN’s accounts and correcting it in favour of WIN to take account of the particular context of the market in question, while*

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Legal Order: Current Issues and Perspectives, Liber amicorum in honour of Arjen W.H. MEIJ, Paris Legal Publishers, Paris 2011, p. 10.

<sup>337</sup> Commission’s decision of 16 July 2003 relating to a proceeding under Article [82 EC] (Case COMP/38.233 – Wanadoo Interactive).

<sup>338</sup> Case T-340/03 *France Telecom* [2007] ECR II-107, para 129.

*complying with the requirements for an assessment under Article 82 EC, the Commission applied an unlawful test of recovery of costs in the present case. For the sake of completeness, it must be held, first, that it is not apparent from the case-law that use of the method of discounted cash flows was necessary in the present case, and, secondly, that WIN has not advanced any argument establishing that the Commission committed a manifest error of assessment in this regard. Consequently, the arguments relating to the method of calculating the rate of recovery of costs must be rejected* (emphasis added).<sup>339</sup>

It is evident from the CFI's reasoning that it did not consider the amortization method proposed by Wanadoo necessarily 'inappropriate' but that it focused its attention on verifying whether Wanadoo had proven to the requisite legal standard if the Commission's method had been affected by manifest mistakes and thus could be considered unlawful. Given that complex economic assessments were at stake, the CFI refused to substitute its own assessment for that of the Commission and was unwilling to challenge the method defended by the Commission.<sup>340</sup> According to certain authors, the *Wanadoo* example helps to show how different approaches can reasonably be taken which can profoundly change the outcome of a case (leading to the imposition of fines), without having the possibility that an independent Court overturn the relevant decision.<sup>341</sup>

### 3.1.2. *The Alrosa judgment: the application of the limited judicial review standard to commitments cases*

The 2007 CFI judgment in *Alrosa*, followed by the ECJ's 2010 judgment on appeal, are considered landmark rulings for the debate on the scope and standard of judicial review that must be applied in competition cases.<sup>342</sup> As a preliminary matter, it is important to note

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<sup>339</sup> Case T-340/03 *France Telecom* [2007] ECR II-107, paras. 153-156.

<sup>340</sup> France Telecom challenged the CFI's findings in relation to the assessment of the abuse which, however, were confirmed on appeal (Case C-202/07 P *France Télécom SA v Commission* [2009] ECR I-02369). As to France Telecom's plea alleging that the Court of First Instance erred in its assessment of the lawfulness of the method used by the Commission to calculate the rate of recovery of costs, the ECJ held that 'by this ground of appeal the appellant fails, in fact, to identify any error of law committed by the CFI [...] and merely repeats the arguments against the methodology adopted by the Commission in the contested decision already put forward at first instance' (para 72).

<sup>341</sup> See SLATER D. and WAELBROECK D., *Marginal Review by the European Court of Justice in Competition Cases*, in *The Role of the Court of Justice of the European Union in Competition Law Cases*, GCLC Annual Conferences Series (edited by MEROLA M. and DERENNE J.) Bruylant, 2010, p. 280.

<sup>342</sup> Case T-170/06 *Alrosa Company Ltd v Commission* [2007] ECR II-2601 and on appeal Case C-441/07 P *Commission v Alrosa Company Ltd* [2010] ECR I-5949. See, *inter alia*, CENGIZ F., *Judicial Review and the Rule of Law in the EU Competition Law Regime after Alrosa*, in *European Competition Journal*, April 2011, p. 127; and

that the discussion on the intensity and scope of judicial review in this case did not concern a substantial finding under Article 102 TFEU, but rather a commitment decision under Article 9 of Regulation 1/2003, in relation to which the Commission does not make a final finding of an infringement.<sup>343</sup>

As to the facts of the case, in 2006 the Commission adopted a decision under Article 9 of Regulation 1/2003 accepting the commitments offered by De Beers to resolve the Commission's concerns that, given the company's allegedly dominant position in the worldwide rough diamonds market, by entering into an agreement with its largest competitor Alrosa, it would gain control over an important source of rough diamond supplies. The commitments offered by De Beers, and made binding by the Commission's decision, required De Beers to stop purchasing altogether diamonds from Alrosa from 2009 and to phase-out its purchasing orders between 2006-2008.<sup>344</sup> Alrosa appealed the commitment decision to the CFI claiming, *inter alia*, that the Commission had failed to explain why the commitments originally proposed jointly by De Beers and Alrosa were inadequate; that its right to be heard had been violated in the procedure leading to the adoption of the decision; that the commitments made binding had been offered only by De Beers rather than both Alrosa and De Beers, amounting to a violation of Article 9 of Regulation 1/2003. Alrosa also claimed that the absolute prohibition for De Beers to purchase rough diamonds from Alrosa infringed Article 82 EC (now Article 102 TFEU), Article 9 of Regulation 1/2003 and the principle of proportionality, as a less onerous solution could have been found.

In its judgment, the CFI annulled the decision concluding that the Commission had breached the principle of proportionality, which according to the Court applies also when commitments are offered voluntarily, and that there were '*less onerous alternative solutions for the undertakings than the total prohibition of transactions and that the Commission could not refuse to take them into consideration on the basis of the alleged difficulty in determining them*'.<sup>345</sup> The

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GERARD D., *Alrosa, negotiated procedures and the procedural economy/due process conundrum – one step forward, three steps back?*, in Kluwer Competition Law Blog, 6 July 2010.

<sup>343</sup> The case is also of interest as it is the first time that the Commission's power to make commitments binding under Article 9 of Regulation 1/2003 has been reviewed by the EU Courts.

<sup>344</sup> See Commission Decision of 22 February 2006 relating to a proceeding pursuant to Article 82 of the EC Treaty and Article 54 of the EEA Agreement (Case COMP/B-2/38.381, *De Beers*).

<sup>345</sup> Case T-170/06 *Alrosa Company Ltd v Commission* [2007] ECR II-2601, para 154. The CFI also considered that the Commission had violated Alrosa's right to be heard during the proceedings which led to De Beers' commitments being made binding.

Commission appealed the ruling in front of the ECJ. The ECJ on 29 June 2010 handed down its judgment setting aside the CFI's judgment.

What is of particular interest for the debate on the intensity of judicial review is that the Commission in front of the ECJ claimed, *inter alia*, that in determining that the commitments were disproportionate, the CFI not only erroneously interpreted and applied Article 102 TFEU and Article 9 of Regulation 1/2003, but also, in particular, ignored the proper scope of judicial review, encroaching on the Commission's discretion. The ECJ agreed with the Commission and set aside the CFI's judgment. As to the correct standard of judicial review, the ECJ held that the CFI had encroached on the Commission's discretion by considering that since the joint commitments that had been proposed by De Beers and Alrosa were sufficient to address the competition concerns, the Commission should have accepted them.

According to the ECJ, the Commission had effectively considered the joint commitments, but since the results of the market test had been negative, it had concluded that they were not sufficient to address the antitrust concerns. In order to ascertain whether the CFI really had, as the Commission submitted, infringed the discretion the Commission has in connection with accepting commitments, the ECJ first defined the extent of that discretion and stated that the Commission is not required to seek out less onerous or more moderate solutions than the commitments offered, its only obligation being to ascertain whether the joint commitments offered in the proceedings initiated under Article 81 EC (now Article 101 TFEU) were sufficient to address its concerns. Furthermore, according to the ECJ, the CFI *'could have held that the Commission had committed a manifest error of assessment only if it had found that the Commission's conclusion was obviously unfounded, having regard to the facts established by it'*.<sup>346</sup> However, the CFI had made no such finding and had instead *'examined other less onerous solutions for the purpose of applying the principle of proportionality, including possible adjustments of the joint commitments'*.<sup>347</sup> Moreover, the CFI had *'expressed its own differing assessment of the capability of the joint commitments to eliminate the competition problems identified by the Commission, before concluding [...] that alternative solutions that were less onerous for the undertakings than a complete ban on dealings existed in the present case. By so doing, the General Court put forward its own assessment of complex economic circumstances and thus substituted its*

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<sup>346</sup> Case T-170/06 *Alrosa Company Ltd v Commission* [2007] ECR II-2601, para 63

<sup>347</sup> Case T-170/06 *Alrosa Company Ltd v Commission* [2007] ECR II-2601, para 65.



*own assessment for that of the Commission, thereby encroaching on the discretion enjoyed by the Commission instead of reviewing the lawfulness of its assessment*.<sup>348</sup> The ECJ concluded that that error in itself justified setting aside the judgment under appeal.<sup>349</sup>

According to certain commentators, the ECJ's judgment remains '*a big cause for concern, as it leaves a very wide margin of appreciation to the Commission to take decisions applying the commitment procedure*'.<sup>350</sup> Thus, while the Commission is encouraged to use this procedure more often, third parties will rarely appeal such decisions in view of the Commission's margin of appreciation.

### 3.1.3. *The Microsoft judgment: a qualitative and quantitative expansion of the application of the limited judicial review standard in Article 102 cases*

Another landmark dominance case where the EU Courts referred to the so-called manifest error standard in relation to complex economic assessments is the 2007 *Microsoft* case.<sup>351</sup> Interestingly, as will be examined further, this judgment also gained visibility in the debate on EU standards of judicial review as in this case the EU Courts expanded the area of Commission's assessments which can be subject to the manifest error standard and thus benefit from a deferential treatment by the EU judiciary.

As to the facts of the case, on 24 March 2004 the Commission adopted a decision finding that Microsoft had abused its dominant position in the market for client PC operating systems of which it held 95%. The Commission held that Microsoft had breached Article 82 EC (now Article 102 TFEU) by refusing to grant interoperability information and by bundling Windows Media Player with the Windows PC operating system and had imposed a € 497 million fine. Microsoft appealed this decision to the CFI which, on 17 September 2007, essentially rejected Microsoft's claims.<sup>352</sup>

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<sup>348</sup> Case T-170/06 *Alrosa Company Ltd v Commission* [2007] ECR II-2601, paras. 66-67.

<sup>349</sup> Case C-441/07 P, *Commission v Alrosa* [2010] ECR I-5949. On this point the ECJ followed Advocate General Kokott's opinion (Opinion of Advocate General Kokott of 17 September 2009 in Case 441/07 P). Advocate General Kokott considered that the GC had substituted its own assessment for that of the Commission, wrongly violating the margin of assessment enjoyed by the Commission in evaluating the market situation in which the commitments offered are embedded.

<sup>350</sup> BARBIER DE LA SERRE E., *Competition Law Cases Before the EU Courts*, in *The Role of the Court of Justice of the European Union in Competition Law Cases*, GCLC Annual Conferences Series (edited by MEROLA M. and DERENNE J.) Bruylant, 2010, p. 99.

<sup>351</sup> Case T-201/04 *Microsoft Corp. v Commission* [2007] ECR II-3601.

<sup>352</sup> The CFI upheld the Commission's findings of dominance and abuse, however, it held that the appointment of the monitoring trustee had been unlawful. See AHLBORN C, D. S. EVANS, *The Microsoft*

On the standard of judicial review, the CFI held that:

*[a]lthough as a general rule the Community Courts undertake a comprehensive review of the question as to whether or not the conditions for the application of the competition rules are met, their review of complex economic appraisals made by the Commission is necessarily limited to checking whether the relevant rules on procedure and on stating reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers.<sup>353</sup> Likewise, in so far as the Commission's decision is the result of complex technical appraisals, those appraisals are in principle subject to only limited review by the Court, which means that the Community Courts cannot substitute their own assessment of matters of fact for the Commission's... However, while the Community Courts recognise that the Commission has a margin of appreciation in economic or technical matters, that does not mean that they must decline to review the Commission's interpretation of economic or technical data. The Community Courts must not only establish whether the evidence put forward is factually accurate, reliable and consistent but must also determine whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it.<sup>354</sup>*

The above statement of the CFI is particularly interesting for a number of reasons. In the first place, this judgment is considered, notwithstanding the general language on 'limited' review and 'manifest error', a case in which the CFI (and its successor the GC) exercised a very exhaustive review.<sup>355</sup> For example, as to the finding in the Commission's

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*Judgment and its Implications for Competition Policy Towards Dominant Firms in Europe*, 2009 75(3) *Antitrust Law Journal* 887.

<sup>353</sup> For an identical formulation, see the previous Case T-65/96 *Kish Glass v Commission* [2000] ECR II-1885, para 64 (upheld on appeal by order of the Court of Justice in Case C-241/00 P *Kish Glass v Commission* [2001] ECR I-7759): *'the Court of First Instance observes that, according to consistent case-law, although as a general rule the Community judicature undertakes a comprehensive review of the question whether or not the conditions for the application of the competition rules are met, its review of complex economic appraisals made by the Commission is necessarily limited to verifying whether the relevant rules on procedure and on stating reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers'*.

<sup>354</sup> Case T-201/04 *Microsoft Corp. v Commission* [2007] ECR II-3601, paras. 87-89.

<sup>355</sup> According to certain commentators, the EU judges in *Microsoft* reviewed *'in excruciating detail the challenged Commission decision'*; see GERADIN N. and PETIT N., *Judicial Review in European Union Competition Law*, in *The Role of the Court of Justice of the European Union in Competition Law Cases*, GCLC Annual Conferences Series (edited by MEROLA M. and DERENNE J.) Bruylant, 2010, p. 67. This view is shared by other authors who consider that the impression is that in this case the GC, *'notwithstanding the general language on "limited" review and "manifest error", in reality exercises a quite exhaustive review'*; see WILS P. J. W., *The Increased Level of EU Antitrust Fines, Judicial Review, and the European Convention on Human Rights*, in *World Competition*, Volume 33, No. 1, March 2010, p. 31. This view is not shared by all authors as certain believe that the GC had an *'almost completely hands-off approach in Microsoft'*; see BAILEY D., *Standard of Judicial Review under Articles 101 and*

decision that Microsoft's refusal to supply interoperability information limited technical development to the prejudice of consumers, the Court opens its discussion in para 649 of the judgment, and closes it in para 665, by saying that it finds that the Commission's findings 'are not manifestly incorrect'. However, in the fifteen paragraphs in between, the Court seems to go beyond a mere check if there was a 'manifest' error, and seems rather to conduct an exhaustive review to exclude the existence of any error whatsoever in the Commission's assessments. The language used by the CFI in this case also seems to want to exclude any finding of an error, as the CFI reiterates in a number of instances that '*the Commission was correct to observe*' (para 650), or that '*the Commission was correct to consider*' (para 653), rather than limiting itself to exclude the existence of a manifest mistake.<sup>356</sup> The exhaustive review the CFI carried out in this case, even in the presence of complex economic or technical assessments by the Commission, leads also to consider that EU judges are perfectly capable of carrying out a comprehensive review of all assessments made by the Commission.<sup>357</sup>

In the second place, the judgment is of interest as it transposes to Article 102 TFEU cases the standard of review test developed by the EU Courts in merger cases. As will be examined in more detail in Chapter 3, dedicated to the analysis of the intensity of judicial review of merger decisions, in the *Tetra Laval* case,<sup>358</sup> the CFI developed a particular test that the EU Courts must apply in order to ensure that their review is sufficiently exhaustive even in the presence of economically complex matters. In the *Tetra Laval* case, the CFI stated that, although the Commission has a margin of appreciation in economic matters, this does not mean that the Courts must decline to review the Commission's interpretation

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102 TFEU, in *The Role of the Court of Justice of the European Union in Competition Law Cases*, GCLC Annual Conferences Series (edited by MEROLA M. and DERENNE J.) Bruylant, 2010, p. 116.

<sup>356</sup> Shortly after, in 2008, the CFI rendered its judgment in the *Deutsche Telekom* case, considered an example of case where the CFI did not second-guess the Commission's complex economic assessment and findings (Case T-271/03 *Deutsche Telekom AG v Commission* [2008] ECR II-477). Here the CFI found that the Commission's calculation method of the margin squeeze implemented by Deutsche Telekom, *i.e.*, based on the charges and costs of a vertically integrated dominant undertaking and disregarding the particular situation of competitors on the market, was correct (on appeal, Case C-280/08 P *Deutsche Telekom AG v Commission* [2010] I-9555). *See contra* AZIZI who considers that rather than not second-guessing the Commission's assessment, the CFI's approach was that of examining '*accurately the legality of the methodology of the margin squeeze test used by the Commission*'; AZIZI J., *The Limits of Judicial Review concerning Abuses of a Dominant Position: Principles and Specific Application to the Communications Technology Sector*, in *Today's Multi-layered Legal Order: Current Issues and Perspectives*, Liber amicorum in honour of Arjen W.H. MEIJ, Paris Legal Publishers, Paris 2011, p. 13.

<sup>357</sup> For a more in-depth discussion on this point *see also* subsection 2.2. in Section II of Chapter 1.

<sup>358</sup> Case C-12/03 P *Commission v Tetra Laval BV* [2005] ECR I-987, para 39.

of economic data. The Courts must in fact establish whether the evidence relied on is factually accurate, reliable and consistent, and whether the evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it. As can be seen from the paragraph of the *Microsoft* judgment cited above, the CFI in *Microsoft* restated the same test established in *Tetra Laval*. This can be viewed as an effort by the EU Courts to apply horizontally the same test for the standard of review across all matters falling within the umbrella of EU competition law.<sup>359</sup>

Finally, the *Microsoft* case is also of interest as in this judgment the CFI extended the application by the Commission of the manifest error standard from ‘*complex economic appraisals*’ to ‘*complex technical appraisals*’. The introduction of the reference to complex ‘technical’ appraisals as a limiting factor to the EU judges’ judicial review is novel in competition case law and has been the object of intense criticism by those authors who believe that this illegitimately expands the area of Commission assessments which benefit from a form of judicial immunity.<sup>360</sup> As explained more in detail in subsection 2.3 in Section I of Chapter 1, the definition of the notion of ‘complex economic assessment’ is crucial in order to understand which assessments fall within this concept, and are thus subject to less intense review.

The same considerations apply to the notion of ‘complex technical appraisals’, with all the difficulties, controversies and criticism that may arise when deciding, particularly in the field of competition law, naturally characterized by complex and technical assessments, when an appraisal is sufficiently technical and complex to fall or not within this notion. The CFI’s intervention in *Microsoft* to capture also complex technical assessments under the manifest error standard has not been isolated in the antitrust case law. As examined further

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<sup>359</sup> See MEIJ A., *In Search of a Manifest Error: Dutch Complexities Between Certainties of the Law and Uncertainties of Economics?*, in *European State Aid Law Quarterly*, 2012, Vol. 2, pp. 547: ‘[it is] particularly clear that judicial review of legality in the whole range of EU competition law, including merger review and State aid, follows basically one single standard’.

<sup>360</sup> The CFI supported its statement concerning complex technical assessments by referring to case law on complex assessments in the medico-pharmacological field. See, *inter alia*, FORRESTER S., *A Bush in Need of Pruning: The Luxuriant Growth of Light Judicial Review*, European University Institute, Robert Schuman Centre for Advanced Studies, EU Competition Law and Policy Workshop/Proceedings, 2009, p. 24: ‘[t]he Court’s enunciation of a different standard of review in paragraph 88 [for complex technical appraisals] is striking. The Court’s reference to cases “in the medico-pharmacological sphere” to present this new standard applicable to “complex technical appraisals” seems unfortunate. In any competition case, the Commission is not assisted by a special agency entrusted with elucidating scientific controversies and making recommendations for action. I respectfully submit that the Court should have determined the standard of review applicable to the Commission as a competition authority, which makes independent determinations and reaching conclusions based thereon’.

below, in the *AstraZeneca* judgment the CFI applied the same test and formula. However, the further reduction of the area where EU Courts exercise comprehensive review and the consequential expansion of the Commission's area of discretion have been criticised, in particular by the President of the GC Mr. Jaeger who in 2011 published an article advocating for clarification of which assessments are to be analysed by the Courts under the manifest error standard, and recommends the application of the manifest error test *only* to the Commission's economic policy choices.<sup>361</sup>

#### 3.1.4. *The AstraZeneca judgment: the consolidation of the limited judicial review standard developed in Microsoft*

The 2010 *AstraZeneca* judgment is equally interesting for the present discussion as the GC applied the same standard of review test formulated in the *Microsoft* judgment but, notwithstanding the recognition of a certain deference to the Commission's complex economic and technical appraisals, is considered to have engaged in an in-depth review of the authority's findings.<sup>362</sup>

As to the facts of the case, in June 2005 the Commission adopted a decision finding that AstraZeneca had abused its dominant position in the market for proton pump inhibitors between 1993 and 2000 by blocking or delaying market access for generic versions of its medicinal product Losec and by preventing parallel imports of this product.<sup>363</sup> In particular, AstraZeneca had abused its dominant position by making misrepresentations to national patent offices with a view to obtaining supplementary patent protection for Losec and by misusing rules and procedures applied to obtain market authorisations for medicinal products with the intent to block the entry of generic products or parallel imports. The Commission had thus fined AstraZeneca € 60 million for breach of Article 82 EC (now 102 TFEU). AstraZeneca had appealed to the GC seeking the decision's annulment.

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<sup>361</sup> JAEGER M., *The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of the Marginal Review?*, in *Journal of European Competition Law Practice*, Vol. 2, No. 4, 2011. For a further discussion on Mr. Jaeger's position see *supra* subsection 2.3 in Section I of Chapter 1.

<sup>362</sup> Case T-321/05 *AstraZeneca AB and AstraZeneca plc v Commission* [2010] II-2805. See BAILEY D., *Standard of Judicial Review under Articles 101 and 102 TFEU*, in *The Role of the Court of Justice of the European Union in Competition Law Cases*, GCLC Annual Conferences Series (edited by MEROLA M. and DERENNE J.) Bruylant, 2010, pp. 114-115. The ECJ on 6 December 2012 dismissed the appeal by AstraZeneca against the GC's judgment. In its judgment, the ECJ made no reference to the manifest error test; see Case C-457/10 P, *AstraZeneca AB and AstraZeneca plc v Commission*, not yet reported.

<sup>363</sup> Commission Decision C(2005) 1757 final of 15 June 2005 relating to a proceeding under Article 82 [EC] and Article 54 of the EEA Agreement (Case COMP/A.37.507/F3 – *AstraZeneca*).

The GC, in the sections of the judgment dedicated to the discussion of market definition and dominance, reiterated the ‘manifest error’ language. As the CFI had already done in *Microsoft*, it applied the manifest error test not only to ‘complex economic appraisals’ but also to ‘complex technical appraisals’, thus seeming to consolidate the Court’s trend in this sense. Furthermore, the GC specified, as previously done in *Tetra Laval* and *Microsoft*, that the recognition of a margin of discretion to the Commission does not mean that the Court will renounce to review the Commission’s interpretation of economic or technical data, as it will ‘*not only establish whether the evidence put forward is factually accurate, reliable and consistent but must also determine whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it*’.<sup>364</sup>

Furthermore, the judgment is considered by a number of authors an example of how the GC, notwithstanding the language it uses to describe its ‘limited’ review powers, may engage in an in-depth analysis of the Commission’s assessments, arriving to ‘*examine, painstakingly at times, the soundness of the Commission’s conclusions*’.<sup>365</sup> By way of example, the GC upheld the Commission’s findings on market definition but only after an in-depth consideration of the Commission’s Notice on Market Definition,<sup>366</sup> of an economic study and various statements of experts. It also expressed criticism to the Commission for not having investigated sufficiently the pricing mechanisms in certain Member States, although this omission was not sufficient to undermine the Commission’s conclusions.<sup>367</sup> In addition, the GC considered that the Commission did not commit any manifest error of assessment in its findings on dominance and thus upheld the Commission’s conclusions in this regard. As to the abuse in itself, the GC upheld almost all of the Commission’s findings but established that the Commission had failed to demonstrate that the deregistration of the Losec marketing authorisations was capable of restricting parallel imports in Denmark and Norway. The GC therefore reduced the fine from € 60 million to € 52.5 million.

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<sup>364</sup> Case T-321/05 *AstraZeneca AB and AstraZeneca plc v Commission* [2010] II-2805, para 33.

<sup>365</sup> BAILEY D., *Standard of Judicial Review under Articles 101 and 102 TFEU*, in *The Role of the Court of Justice of the European Union in Competition Law Cases*, GCLC Annual Conferences Series (edited by MEROLA M. and DERENNE J.) Bruylant, 2010, p. 115. According to Bailey, in the *AstraZeneca* judgment this could be explained by the novelty of the matters under examination in front of the GC and their future implications for the pharmaceutical sector.

<sup>366</sup> Commission notice on the definition of relevant market for the purposes of Community competition law [1997] OJ C 372/5.

<sup>367</sup> Case T-321/05 *AstraZeneca AB and AstraZeneca plc v Commission* [2010] II-2805, paras. 196-199.

### *3.2. The recent case-law of the EU Courts on the standard of review in Article 102 TFEU cases*

From an overview of the more recent case law in Article 102 TFEU cases, it is possible to argue that the existence of the limited review standard and the manner it continues to be exercised, notwithstanding the ECJ's statements in the Article 101 cases *KME* and *Chalkor*, continues to be unsatisfactory for parties wishing to bring forward a different interpretation of the facts and evidence put forward by the Commission to substantiate its case. In the *KME* and *Chalkor* cases the ECJ expressly indicated that the EU Courts cannot dispense from an in-depth review, while contemporarily recognizing that the Commission can maintain discretion for certain types of assessments (economically and/or technically complex). The ECJ's call for more thorough review by the Courts was certainly welcomed, although there was much expectation in the aftermath of these judgments as to how judges would have followed the ECJ's indications, also in the Article 102 domain. The judgments rendered thereafter confirm that the continued existence of the Commission's discretion entails that EU Courts can only decide on the plausibility of the legal conclusions reached by the Commission on the basis of the underlying facts of each case.<sup>368</sup> The circumstance that EU judges will not substitute their own assessment for that of the Commission also entails that they will not carry out a new balance of probabilities between the different interpretations of facts brought forward respectively by the Commission and the applicants.

The consequence of this for interested parties is that, in the absence of a manifest error in the conclusions reached by the Commission, they are not able to constructively bring forward alternative proposals on the interpretation of the evidence. Any effort in this sense is frustrated by the judges' impossibility to balance different theories capable of explaining the evidence, given that the Commission's assessment continues to benefit from a presumption of correctness and thus to prevail. The 2012 *Telefonica* judgment, examined below, exemplifies the role that the Commission's margin of discretion continues to have for the assessment of alleged abuses of dominance and the effects of this situation on the positive or negative outcome of cases.

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<sup>368</sup> GERARD D., *Breaking the EU Antitrust Enforcement Deadlock: Re-empowering the Courts?*, in ELR, Vol. 36(4), p. 469.

### 3.2.1. *The 2012 Telefonica judgment*

On 29 March 2012, the GC dismissed the appeal by Telefónica SA and Telefónica de España SAU (Telefonica) against the Commission's 2007 decision finding that Telefonica had engaged in a margin squeeze in breach of Article 102 TFEU.<sup>369</sup> The GC upheld the Commission's analysis in its entirety, including its market definition, assessment of dominance, approach to demonstrating that there was a margin squeeze (the 'as-efficient' competitor test) and the penalty imposed on the applicant.

One particular aspect of Telefonica's pleas is worth mentioning for the present debate, as it concerns specifically the extent of the GC's review of complex economic appraisals made by the Commission.<sup>370</sup> As to the impact of the alleged abusive conduct on the relevant markets, Telefonica argued, *inter alia*, that the Commission had committed major errors of calculation and omission in applying the 'Discounted Cash Flow' ("DCF") test and the 'period-by-period' test. In particular, Telefonica argued before the GC that the DCF methodology used by the Commission suffered from two fundamental types of errors. On the one hand, the method of calculating the terminal value used by the Commission was wrong and, secondly, the Commission should have used a terminal value based on market data.<sup>371</sup> Telefonica's plea in this regard was meant to demonstrate that if that methodology had been applied correctly, the Commission could not have established any margin squeeze.

The GC rejected Telefonica's arguments on the Commission's alleged error in the method of calculating the terminal value on the basis that: (i) the extension of the reference period increases the risk of errors by incorporating in the analysis rewards for

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<sup>369</sup> Case T-336/07 *Telefónica, SA and Telefónica de España, SA v Commission*, not yet reported, and Commission Decision C (2007)3196 final of 4 July 2007 relating to a proceeding under Article 82 [EC] (Case COMP/38.784 – *Wanadoo España v Telefónica*).

<sup>370</sup> The judgment contains also general statements on the content, scope and intensity of judicial review that reflect those used in the *KME* and *Chalkor* cases; see paras. 67-71.

<sup>371</sup> In a DCF analysis, a terminal value is calculated in order to reflect the fact that there are key assets that will continue to be used beyond the end of the reference period. Thus, it may be necessary to take account of a terminal value in the analysis since certain costs are not fully covered during the reference period. In the Commission's view, both the appropriate terminal value to be included in the DCF calculation and the appropriate reference period are intended to determine a final date after which the recovery of losses is no longer taken into account in the analysis. Since the DCF method allows for initial short-term losses, but provides for their recovery over a reasonable period, the Commission was required to determine the appropriate period of recovery in the present case. In that regard, the Commission considered that the most reasonable approach was to limit the period of analysis to the economic lifetime of the assets employed by the undertaking concerned. At recital 359 to the contested decision, the Commission considered that in Telefonica's case the appropriate period for the DCF analysis was the period between September 2001 and December 2006 (five years and four months); see *Telefonica* judgment, paras. 214-215.



anticompetitive behavior; (ii) the duration of the analysis is not arbitrarily set, as explained in the decision; (iii) even assuming that the methodology used by the Commission was not the most favorable to Telefonica, this did not imply the unlawfulness of the decision, and (iv) using a terminal value which incorporates all future profits of the company would not be reasonable or appropriate. Furthermore, the GC considered that Telefonica did not sufficiently explain how the application of a correct valuation methodology could have shown that an equally efficient competitor would have been profitable.

As to the GC's position that the extension of the reference period in the DCF analysis would have led to unacceptable distortions, it is interesting to note how the Court often made reference to the 'limited' standard test and thus to the absence of any 'manifest error' on the side of the Commission, *i.e.* '[t]he Commission did not make a manifest error of assessment when it considered that the dominant undertaking's downstream activity must be profitable over a period corresponding to the lifetime of its assets' (para 220) and 'did not make a manifest error of assessment in considering that the losses detected over the period [...] could not be regarded as being attributable to the lack of maturity of the Spanish broadband market' (para 223).

What was interesting in Telefonica's claims concerning the correct reference period for the DCF calculations is that it did not so much contest that the Commission had not sufficiently motivated its choice of the reference period, but rather that more reliable methodologies existed and could be used to properly treat the uncertainties in the evaluation exercise.

By applying the 'limited' judicial review standard, the GC's position was that of verifying whether the Commission's conclusions had been explained and were reasonable ('not manifestly incorrect') rather than weighting the methodology used by the Commission against that proposed by Telefonica, in order to finally decide which was more reliable.<sup>372</sup> Here the GC was confronted with two different methodologies when assessing the existence of a violation. The impression is that the GC gave preference to the

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<sup>372</sup> See *Telefonica* judgment, para 225: '[i]t should be observed in that regard that the applicants do not specify in their written pleadings the reasons why their argument, even if it were well founded, would render the contested decision unlawful. First, even on the assumption that, as the applicants maintain, the methodology adopted by the Commission were not more favourable to Telefónica than the methodology which it used in its initial business plan or that the methodologies in question were not similar, it would not follow that the findings relating to terminal value, set out in particular at recitals 360 to 362 to the contested decision, and to the determination of the terminal value in the context of the calculation of the DCFs, would be incorrect. Second, it must be observed that Telefónica's business plans were mentioned at recital 367 to the contested decision for the purpose of demonstrating that, contrary to Telefónica's contention, the Commission's calculation of the terminal value was not unprecedented. Even on the assumption that such a finding were incorrect, that would not render the calculation of the terminal value in the contested decision unlawful.'

Commission's choice without too much consideration for the mechanisms suggested by Telefonica to eliminate the hypothetical distortions that the use of the Commission's mechanism could have raised.

In addition, concerning the calculation of the terminal value, in a very concise statement in its judgment the GC dismissed Telefonica's assertion that *'the application of a correct evaluation method, based on market data, to calculate the terminal value would have shown that the activity of a possible competitor as efficient as Telefonica would have been profitable'*, on the basis that *'such an argument is neither explained nor developed in the written pleadings, where the applicants make a general reference to 10 pages of an economic study attached as an annex'*.<sup>373</sup> Here, Telefonica's effort was to show that its mathematical calculations were able to prove that once the Commission's errors in the DCF analysis were corrected, this would have resulted in a positive margin, thus the absence of a margin squeeze. However, the GC dismissed this argument stating that Telefonica had not explained or developed such claim in its pleadings, making instead a general reference to ten pages of an annexed economic study.

Regardless of whether the GC gave correctly account of Telefonica's claim, it is quite evident that the applicant's intent was to demonstrate that its valuation method based on market figures to calculate the terminal value would have led to a higher terminal value than that calculated by the Commission, thus proving that a hypothetical equally efficient competitor would have been profitable with no evidence of margin squeeze. These estimates were developed in an Annex to which Telefonica made specific reference to and which the GC decided to not consider for its assessment. It is hard to foresee if the outcome of the case would have been different if the GC had taken Telefonica's different methodology into account, it is however at the least remarkable that the GC decided to not address the issue *tout court*, leaving the Commission's methodology standing, even if potentially far from being flawless.<sup>374</sup>

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<sup>373</sup> See *Telefonica* judgment, para 231.

<sup>374</sup> The GC judgment was appealed by Telefonica on 13 June 2012 and is currently pending in front of the ECJ; see Case C-295/12 P *Telefónica S.A. and Telefónica de España, S.A.U. v Commission*, not yet reported. On 26 September 2013, Advocate General Wathelet delivered his Opinion in the above mentioned case. In sum, the Advocate General recommended that the ECJ reject the arguments presented by Telefonica against the criteria applied by the Commission to calculate the margin squeeze. According to the Advocate General these arguments reproduced the arguments set out in the application at first instance before the GC and were inadmissible since they essentially challenged findings of fact in the judgment of the GC (paras. 10-21 of the Opinion). Interestingly, in particular for the different debate on the exercise of the EU Courts' unlimited jurisdiction in relation to fines, the Advocate General did delve at length on the applicants' arguments relating to the calculation of the fine and concerning essentially the GC's shortcomings in the exercise its unlimited

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jurisdiction in relation to pecuniary penalties. In this regard, the Advocate General recommended that the ECJ annul the GC judgment on the ground that the GC did not exercise its powers of full judicial review in the framework of its examination of the fine imposed by the Commission (paras. 90-172 of the Opinion).



CHAPTER

**3**

THE STANDARD OF JUDICIAL REVIEW IN EU  
MERGER CASES



## 1. INTRODUCTION: THE PARTICULARITIES OF EU MERGER CONTROL

As examined in the previous Chapters, the current system of judicial control of competition decisions continues to be the subject-matter of intense debate. Although the terms and scope of this debate are manifold, one of the most contentious aspects of the controversy relates to the application by the EU Courts of the so-called ‘limited’ judicial review standard in relation to complex economic and/or technical appraisals carried out by the Commission in a context where it increasingly relies on economic analysis to substantiate its decisions. In Chapter 2 the case law concerning Articles 101 and 102 TFEU relevant to this discussion has been analyzed. In this Chapter the intensity of the EU Courts’ review in the field of merger control will be addressed. The analysis will focus on the standard of judicial review regarding complex economic and/or technical assessments in EU merger control cases.<sup>375</sup>

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<sup>375</sup> See, *inter alia*, in the field of merger control: LEVY N., *European Merger Control Law: A Guide to the Merger Regulation*, 9<sup>th</sup> ed., Matthew Bender & Co, 2012; JACKSON D., *A Return to Simplicity? A History of Developments in the Economic Analysis of Mergers*, in *Journal of European Competition Law & Practice*, 2011, Vol. 2, No. 2, pp. 170-175; VENIT J. S., *The Scope of EU Judicial Review of Commission Merger Decisions*, 15<sup>th</sup> Annual EU Competition Law and Policy Workshop – Merger Control in European and Global Perspective, Florence, Italy, 12-13 November 2010; VESTERDORF B., *Chapter 13: The European Court’s Case Law in Merger Control*, in *Competition Law and Economics* (edited by A. M. Mateus and T. Moreira), International Competition Law Series Volume 31, Kluwer Law International, 2007, pp. 243-254; CHELLINGSWORTH T., DRAUZ G., HYRKAS H., *Recent Developments in EC Merger Control*, in *Journal of European Competition Law & Practice*, 2010, No. 1, pp. 12-26; KINSELLA S., MEIER A., HARRISON P., *Judicial review of merger decisions: An overview of EU and national case law*, in *e-Competitions*, 2009, No. 29156; WERDEN G. J., *Economic reasoning in merger cases and how courts should evaluate it*, in *European Competition Journal*, 2009, Vol. 5, No. 3, pp. 701-720; PARR. N., *Observations on Burden and Standard of Proof and Judicial Review in EC and UK Merger Control*, Fordham Annual Conference on International Antitrust Law and Policy, 2008; VAN ROMPUY B., *The Standard of Proof in EC Merger Control*, Institute for European Studies (Vrije Universiteit Brussel), IES Working Paper 4/2008; TODOROV F., VALCKE A., *Judicial review of merger control decisions in the European Union*, in *The Antitrust Bulletin*: Vol. 51, No. 2/Summer 2006, p. 339; OLSSON K., *The Standard of Proof in EC Merger Control – The Impact of Airtours, Schneider and Tetra Laval*, Master Thesis, Faculty of Law of Lund, 2006; THEOPHILE D., PARMENTIER H., *L’étendue du contrôle juridictionnel dans le contentieux du contrôle des concentrations en droits interne et communautaire*, in *Concurrences*, No. 1, 2006, pp. 39-46; REEVES T., DODOOT N., *Standards of Proof and Standards of Judicial Review in EC Merger Law*, 14<sup>th</sup> Annual IBC Conference on “An Advanced analysis of Major Developments in the field of EC Competition Law and Policy”, Brussels, 17-18 November 2005; VESTERDORF B., *Standards of Proof In Merger Cases: Reflections In The Light Of Recent Case Law of The Community Courts*, in *European Competition Journal*, March 2005, pp. 3–33; NICHOLSON M., CARDELL S., MCKENNA B., *The Scope of Review of Merger Decisions under Community Law*, in *European Competition Journal*, March 2005; VESTERDORF B., *Recent CFI Rulings on Merger Cases, Interim Measures and Accelerated Procedures and Some Reflections on Reform Measures Regarding Judicial Control*, *EC Merger Control*, in *EC Merger Control: A Major Reform in Progress*, Papers from the EC Merger Control Conference held in Brussels in November 2002 under the auspices of the European Commission Directorate General for Competition and the International Bar Association, pp. 79-84; BAILEY D., *Standard of Proof in EC Merger Proceedings: A Common Law Perspective*, in *CMLR*, Vol. 40, 2003.

The need to operate a distinct analysis for merger decisions derives from the characteristics of these proceedings which leads to differentiate them from antitrust cases. In the first place, antitrust and merger cases have a different legal basis, the former finding express provision in the Treaties in Articles 101 and 102 TFEU, the latter in the EU Merger Regulation.<sup>376</sup> More importantly, in merger proceedings the Commission is called upon to decide whether to prohibit or clear a merger operation, not to declare if a company's conduct is illegal for an infringement of the competition rules as in antitrust cases, and in general fines are not imposed.<sup>377</sup> In this regard, the nature of the review carried out differs. In Article 101 and 102 TFEU cases the Commission is called upon to conduct an *ex post* review. The Commission's investigation focuses on infringements of these provisions for conduct carried out in the past and which, in certain cases, may still be ongoing. This reflects on the nature of the process which involves a great amount of fact-finding and, to the extent economic theories are relied upon, they are used to interpret conduct for which evidence already exists. Merger investigations, on the other hand, are forward-looking and carried out *ex ante*, before any anti-competitive conduct has yet occurred.<sup>378</sup> This entails that investigations involve future projections and estimates on market evolutions and company behavior.<sup>379</sup> Here economic theory and modeling have a

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<sup>376</sup> Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ [1989] L395/1) was substituted by the EU Merger Regulation. According to Article 21(2) of the EU Merger Regulation, the Commission has the exclusive power to take decisions on the control of concentrations. The Commission's decisions, under the same provision, are subject to review by the EU Courts. The basic rules on merger control are contained in the EU Merger Regulation which establishes that concentrations with EU dimension must be notified to the Commission, as they cannot be put into effect either before their notification or until they have been cleared by the Commission. *See also* Commission Regulation (EC) No. 802/2004 implementing Council Regulation (EC) No. 139/2004 (the "Implementing Regulation") and its annexes (Form CO, Short Form CO and Form RS), in OJ [2004] L 133/1; and the new Commission Implementing Regulation (EU) No 1269/2013 amending Commission Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, in OJ [2013] L 336/1.

<sup>377</sup> The Commission can ensure compliance with the EU Merger Regulation also by means of fines and periodic penalty payments which the EU Courts have unlimited jurisdiction to review pursuant to Article 229 TFEU; *see* Articles 14 and 15 of the EU Merger Regulation.

<sup>378</sup> WAELBROECK D., *Le contrôle du juge communautaire en matière de concentrations: «Censeur pédagogue» ou juge de la légalité?*, in *Concurrences*, No. 4, 2005, p. 1.

<sup>379</sup> *See* PARR. N., *Observations on Burden and Standard of Proof and Judicial Review in EC and UK Merger Control*, Fordham Annual Conference on International Antitrust Law and Policy, 2008, p. 12: '*merger control analysis [...] is not simply an exercise of demonstrating the existence of a particular factual matrix to a particular standard of proof but is, in fact, primarily an exercise of judgment and evaluation based on an initial fact-finding or investigation exercise*'. *See also* VENIT J. S., *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*, European University Institute, Robert Schuman Centre for Advanced Studies, EU Competition Law and Policy Workshop/Proceedings, 2009, p. 6: '*merger review presents very different issues from enforcement cases, particularly enforcement cases under Article 81*'.



predominant role, as they will aid in foreseeing what will be the likely outcome of a merger operation. The application of economic theories to perspective analysis can be particularly controversial, given the difficulties and uncertainties that accompany this exercise. As the outcome of these proceedings may in any event be particularly serious for the undertakings concerned, as the case for antitrust cases, the debate on the standard of review in the merger field is not less important.

In the merger field, the standard of review used by the EU Courts has also evolved in a way which deserves autonomous analysis, ranging from the early cases in which the EU Courts had a more ‘hands-off’ approach and were particularly respectful of the Commission’s margin of appreciation in the case of complex economic and/or technical appraisals, to the ‘merger revolution’ that occurred in 2002, year in which the EU Courts annulled 3 distinct merger prohibition decisions and started to scrutinize intensely the Commission’s assessments, leading to the more recent cases in which the EU Courts have consolidated their more dynamic approach to the review of merger decisions. For these reasons, the analysis of the relevant case law in the following subsections will be broken down in these three phases.

As will be seen, the first lesson that can be derived from the case law is that the lack of guidelines on the application of the limited standard of review has given the EU Courts the opportunity to clarify the degree of review that they should undertake. In this on-going work of interpretation, the EU Courts have progressively proven their willingness to scrutinize the Commission’s findings, thereby confirming the importance of a close review of the latter’s acts. The second lesson that can be derived is that, although ‘limited’ review with respect to complex economic appraisals and the definition of it seemed firmly fixed in case law, a change in definition occurred clearly with the *Tetra Laval* judgment<sup>380</sup> and subsequent case law, endorsing the view that the standard of review is a product of interpretation of the EU Courts which has evolved over time and could be modified by the EU Courts themselves. Another lesson that can be derived from various judgments, including, among other cases, *Airtours*,<sup>381</sup> *Tetra Laval*,<sup>382</sup> *Schneider Electric*,<sup>383</sup> *Sony/BMG*

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*In merger cases, the primary concerns are: (i) establishing the economic significance of certain facts rather than merely establishing the facts themselves; and (ii) predicting the likely future impact of the structural change the merger would bring about?.*

<sup>380</sup> Case C-12/03 P *Commission v Tetra Laval BV* [2005] ECR I-987.

<sup>381</sup> Case T-342/99 *Airtours plc v Commission* [2002] ECR II-2585.

<sup>382</sup> Case C-12/03 P *Commission v Tetra Laval BV* [2005] ECR I-987.

<sup>383</sup> Case T-310/01 *Schneider Electric v Commission* [2002] ECR II-4071.

(*Impala*)<sup>384</sup> and *Ryanair*,<sup>385</sup> examined in the following subsections, is that complex merger decisions involving in-depth economic analysis could be assessed by the EU Courts, both when the Commission has blocked or cleared a merger,<sup>386</sup> as the EU Courts have shown their ability to adequately engage in particularly intense judicial scrutiny of complex cases. In this regard, from a comparative perspective, it has also been argued that, in light of the case law, the EU Courts are more prepared to carry out a comprehensive review of the economic analysis carried out by the Commission in merger cases than in antitrust cases.<sup>387</sup> On the other hand, it has also been argued that under the ‘limited’ judicial review standard the EU Courts have been able to shield, also in the merger field, the Commission’s decisions from comprehensive review which, if it had effectively taken place, could have allegedly led to different conclusions and outcomes than those reached by the Commission.<sup>388</sup> All of the above points will be addressed in the following examination of the case law.

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<sup>384</sup> Case C-413/06 P *Bertelsmann AG and Sony Corporation of America v Independent Music Publishers and Labels Association* [2008] ECR I-4951.

<sup>385</sup> Case T-342/07 *Ryanair Holdings plc v Commission* [2010] ECR II-3457.

<sup>386</sup> FORRESTER I. S., *A Bush in Need of Pruning: The Luxuriant Growth of Light Judicial Review*, European University Institute, Robert Schuman Centre for Advanced Studies, EU Competition Law and Policy Workshop/Proceedings, 2009, p. 28.

<sup>387</sup> FORRESTER I. S., *A Bush in Need of Pruning: The Luxuriant Growth of Light Judicial Review*, European University Institute, Robert Schuman Centre for Advanced Studies, EU Competition Law and Policy Workshop/Proceedings, 2009, p. 28.

<sup>388</sup> The Commission’s Summary of Replies received to the Commission’s Green Paper on the reform of the EU Merger Regulation expressed the concern of respondents who felt that ‘*the availability of effective judicial review is illusory, on account of the lengthy delays before appeals can be heard and judgments rendered, as well as because of the existence of what is perceived by some to be inadequate standard of review*’; see Green Paper on the Review of Council Regulation (EEC) 4064/89 – Summary of Replies Received, para 192, available at [http://ec.europa.eu/competition/consultations/2002\\_council\\_regulation/summary\\_publication\\_en.pdf](http://ec.europa.eu/competition/consultations/2002_council_regulation/summary_publication_en.pdf).

## 2. THE EVOLUTION OF THE STANDARD OF REVIEW IN MERGER CASES

### *2.1. The early case law and the EU Courts' 'light' approach*

It is apparent from the first cases decided by the Court of Justice in the merger control field that in the early years of application of the EU Merger Regulation the tendency was to recognize that the Commission benefited from a discretionary margin of appreciation.<sup>389</sup> In these early cases, the Courts' role was mainly that of guiding the Commission in the interpretation of new legal concepts contained in the EU Merger Regulation, while leaving to the Commission the task of making substantial appraisals.<sup>390</sup> The EU Courts' practice was that of acknowledging the existence of a margin of discretion of the Commission over economic assessments conducted under the Merger Regulation<sup>391</sup> and would state in this connection that '[it was] *not for the Court...to substitute its own appraisal for that of the Commission*'.<sup>392</sup> The extent to which EU judges gave leeway to the Commission's assessments was such that EU judges would rarely proceed to an appreciation and evaluation of economically complex situations, leaving the Commission free to decide the substance of cases. This has led to consider that for a long time the intensity of judicial control remained very 'light'. The nearly absolute deference granted by the EU Courts to the Commission's analysis in the early case law is demonstrated by a number of judgments, including the rulings examined in the following subsections.

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<sup>389</sup> See TODOROV F., VALCKE A., *Judicial review of merger control decisions in the European Union*, in *The Antitrust Bulletin*: Vol. 51, No. 2/Summer 2006, p. 339: '[f]or a long time it has been commonly perceived that the decisions of the European Commission...appraising mergers have, for many reasons, not been fully subjected to substantive judicial review [...] the CFI was also considered to have granted a significant level of discretion – some would say too much – to the Commission over its application of economic analysis in merger decisions'; see also VALLINDAS G., *Le Tribunal et la concurrence: le juge face aux appréciations économiques complexes*, in *Revue des affaires européennes*, No. 3, 2009-2010, p. 436; and BROWN A., *Judicial Review of Commission Decisions under the Merger Regulation: the First Cases*, in *ECLR*, 1994, No. 6, p. 296.

<sup>390</sup> CHAPPATTE P., BOYCE J., REEVE M., *Annulment Proceedings in EU Merger Cases? Worth the Effort?*, in *The Role of the Court of Justice of the European Union in Competition Law Cases*, GCLC Annual Conferences Series (edited by MEROLA M. and DERENNE J.), Bruylant, 2010, p. 194.

<sup>391</sup> See Joined Cases C-68/94 and C-30/95 *French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC) v Commission* ("Kali und Salz") [1998] ECR I-1375, paras. 223-224; and Case T-221/95 *Endemol Entertainment Holding B.V. v Commission* ("Endemol") [1999] ECR II-1299, para 106.

<sup>392</sup> Case T-3/93 *Air France v Commission* ("Dan Air") [1994] ECR II-121, para 8.

2.1.1. *The Kali und Salz judgment: the recognition of the Commission's discretionary margin of appreciation in the merger field*

In *Kali und Salz*, the ECJ annulled a Commission decision authorizing the merger between Kali und Salz (K&S) and Mitteldeutsche Kali AG (Mdk) and Treuhand subject to certain conditions.<sup>393</sup> In its decision the Commission had approved the merger between K&S and Mdk, two German potash producers, subject to the condition that K&S withdraw from the joint venture with the French potash producer SCPA. The ECJ held that the Commission had not shown to the requisite legal standard that the merger would create a collective dominant position between K&S and SCPA, which had been the basis of the Commission's requirement that K&S withdraw from the joint venture with SCPA.<sup>394</sup>

Notwithstanding the annulment of the Commission's decision, as to the definition of the EU Courts' powers of review, the ECJ recognized the existence of a discretionary margin implicit in economic evaluations conducted under the EU Merger Regulation by stating that:

*'the basic provisions of the [Merger] Regulation, in particular Article 2 thereof, confer on the Commission a certain discretion, especially with respect to assessments of an economic nature. Consequently, review by the Community judicature of the exercise of that discretion, which is essential for defining the rules on concentrations, must take account of the discretionary margin implicit in the provisions of an economic nature which form part of the rules on concentrations.'*<sup>395</sup>

Advocate General Tesouro in his Opinion in this case had framed the Commission's discretionary powers in even stricter terms, observing that the Commission's discretion is *'all the more valid with regard to concentrations, the control of which, being necessarily preventative in character, requires an inherently discretionary appraisal on the part of the authority whose task it is to interpret and apply the Regulation'*,<sup>396</sup> and that the Court's review, from the point of view of substantive legality, *'takes the form of scrutiny of the accuracy of the [Commission's] economic and market analysis, of the anticompetitive effects and the correctness of the legal consequences (from the point of*

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<sup>393</sup> Joined Cases C-68/94 and C-30/95 *France and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC) v Commission* [1998] ECR I-1375.

<sup>394</sup> Interestingly, the appeal was not brought by the merging parties but by the French Republic and SCPA, the latter considering its commercial position threatened by the Commission's requirement.

<sup>395</sup> Joined Cases C-68/94 and C-30/95 *France and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC) v Commission* [1998] ECR I-1375, paras. 223-224.

<sup>396</sup> Opinion of Advocate General Tesouro in Joined Cases C-68/94 and C-30/95 *French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC) v Commission* ("Kali und Salz"), [1998] ECR I-1375, para 21.

*view of the characterization of the facts, for example) drawn from the analysis, without, of course, encroaching in the scope of the discretion which the Commission enjoys in the application of the rules on competition*.<sup>397</sup>

It is contended however that from a careful reading of the EU Merger Regulation it would emerge that its provisions left only a very limited margin of discretion to the Commission,<sup>398</sup> and that this extensive interpretation in favor of the Commission's powers operated by the ECJ, would demonstrate the EU judges' determination to limit the effectiveness of their control, by using the argument of the economic nature of the rules applied in the field of merger control.<sup>399</sup> Essentially, the EU Courts would limit themselves to verifying whether the facts were exact and the absence of any manifest errors of appreciation, in order to allow the Commission to pursue its competition policy.<sup>400</sup> This self-imposed limitation on the side of the EU Courts has led certain commentators to consider that '*il est possible de remarquer une tendance du Tribunal à protéger la compétence de la Commission*'.<sup>401</sup> The belief is that at the time EU judges were not ready to delve in detailed economic analysis and to effectively contest the substantive evaluations made by the Commission.

#### 2.1.2. *The Gencor judgment: the continued 'light' approach to judicial review in merger cases*

The *Gencor* ruling is a further demonstration of how in early judgments, in cases demanding complex economic appreciations, the Courts' control over the Commission's

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<sup>397</sup> Opinion of Advocate General Tesouro in Joined Cases C-68/94 and C-30/95 *French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC) v Commission* ("Kali und Salz"), [1998] ECR I-1375, footnote 33.

<sup>398</sup> According to Article 2(2) of the EU Merger Regulation, the Commission has to declare a merger compatible with the internal market if it does not create or strengthen a dominant position, while in the opposite case, on the basis of Article 2(3), the Commission can prohibit the operation. This criteria do not leave the Commission a margin of appreciation. Traces of a discretionary margin of appreciation could only and eventually be found for the demonstration of the existence or not of a dominant position; see VALLINDAS G., *Le Tribunal et la concurrence: le juge face aux appréciations économiques complexes*, in *Revue des affaires européennes*, No. 3, 2009-2010, p. 436.

<sup>399</sup> VALLINDAS G., *Le Tribunal et la concurrence: le juge face aux appréciations économiques complexes*, in *Revue des affaires européennes*, No. 3, 2009-2010, p. 436.

<sup>400</sup> TILLI V., VANHAMME J., *The "Power of Appraisal" (Pouvoir d'Appréciation) of the Commission of the European Communities vis-à-vis the powers of judicial review of the communities' Court of Justice and Court of First Instance*, in *Fordham International Law Journal*, Vol. 22, No. 3, 1999, p. 890.

<sup>401</sup> FAURÉ V., *L'apport du Tribunal au droit communautaire de la concurrence des entreprises*, Thèse Université de Nice Sophia Antipolis, 2003, p. 485. See also SZCZODROWSKI J., *Standard of Judicial Review of Merger Decisions Concerning Oligopolistic Markets*, *Yearbook of Antitrust and Regulatory Studies*, 2012, Vol. 5(6).

appraisals was of limited intensity.<sup>402</sup> This case concerned the companies Gencor Ltd (“Gencor”) and Lonrho plc (“Lonrho”) active in the mineral resources and metal industries. Gencor held 46.5% of the company Implats, active in the platinum group metals (“PGM”) sector, and 27% of East Plats and West Plats (LPD), also active in the same sector; while Lonrho held the remaining 73% of LPD. In the notified transaction, Gencor and Lonrho proposed to acquire joint control of Implats and then to grant Implats sole control of LPD, thereby eliminating competition between those two undertakings. Consequently, the EU market would have no longer been supplied by three African PGM suppliers but only by two. In its decision the Commission declared the operation incompatible with the internal market on the basis that it would have led to a collective dominant position on the part of the new entity and the remaining competitor on the market.<sup>403</sup> Gencor appealed the Commission’s decision which was upheld by the CFI.

The *Gencor* judgment illustrates the deference granted by the CFI to the Commission despite the strong arguments put forward by the applicant in the context of the categorization of a collective dominant position. In this regard, certain of Gencor’s arguments are noteworthy. In the first place, Gencor contended, *inter alia*, that the Commission was wrong in considering that the merged entity and Amplats, the remaining competitor, would inevitably act together on the market because of their similar cost structures. According to the applicant the Commission’s analysis had ignored the wide variety in operating cost levels of different shafts both at the companies Implats and LPD and at Amplats. In particular, the Commission’s method of observing average costs was misleading since production decisions were made on a shaft-by-shaft basis and competition took place at the level of marginal cost. The CFI dismissed this argument and held that the Commission’s conclusion that the cost structures between Implats/LPD and Amplats following the concentration would have been similar was correct, despite the Commission’s adverse finding that there were significant differences between the parties as to the quality of the ore extracted, processing, refining operations and administrative costs.<sup>404</sup> The CFI

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<sup>402</sup> Case T-102/96 *Gencor v Commission* [1999] ECR II-753.

<sup>403</sup> Commission Decision 97/26/EC of 24 April 1996 declaring a concentration to be incompatible with the common market and the functioning of the EEA Agreement (Case No IV/M.619 - *Gencor/Lonrho*) in OJ [1997] L 11/30.

<sup>404</sup> Case T-102/96 *Gencor v Commission* [1999] ECR II-753, paras. 218-223.

thus did not question the Commission's method of examining average costs rather than observing the marginal costs between shafts.

In the second place, concerning the characteristics of the market, namely the growth prospects in the platinum market for the finding of the creation of a collective dominant position, Gencor argued that the analysis carried by the Commission was incorrect in finding that a market characterized by slow growth did not encourage new entrants or vigorous competition. In this regard, the applicant argued there was an overcapacity in the industry in question and producers had to compete by reducing their production costs in order to avoid the shutting down of their surplus production. In support of this argument Gencor presented an economic report and demonstrated that there had been past instances of reduction in platinum prices and rationalization measures. Notwithstanding Gencor's arguments, the CFI argued, referring to the above-mentioned economic report, that more recently, demand was not forecast to increase substantially and that, in any event, the concentration would most probably have led to parallel anticompetitive conduct.<sup>405</sup> The CFI therefore seemed to have favored the more recent figures of an economic report put forward by the Commission over Gencor's past data and instances of vigorous competition.

Finally, concerning the reaction of interested third parties, Gencor put forward that during the market test most customers and third parties contacted by the Commission reacted neutrally or positively to the concentration. However, the Commission, upheld on this point by the CFI, decided to endorse the minority view of the customers and other interested third parties who had reacted negatively to the proposed transaction.<sup>406</sup>

In this case, the CFI's 'minimum' or 'limited' control was summarized in the CFI's own words:

*'the basic provisions of the Regulation, in particular Article 2 thereof, confer on the Commission a certain discretion, especially with respect to assessments of an economic nature [...] Consequently, review by the Community judicature of the exercise of that discretion, which is essential for defining the rules on concentrations, must take account of the discretionary margin implicit in the provisions of an economic nature which form part of the rules on concentrations.'*<sup>407</sup>

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<sup>405</sup> Case T-102/96 *Gencor v Commission* [1999] ECR II-753, paras. 233-238.

<sup>406</sup> Case T-102/96 *Gencor v Commission* [1999] ECR II-753, paras. 290-292.

<sup>407</sup> Paras. 164-165; for an identical formulation see also Case T-22/97 *Kesko Oy v Commission* [1999] ECR II-3775, para 142.

## *2.2. The EU Courts' stricter approach to the intensity of judicial review: the Airtours, Schneider and Tetra Laval cases*

In 2002 the EU Courts annulled three different Commission prohibition decisions in what became three landmark judgments on the intensity and scope of judicial review in the merger field.<sup>408</sup> While in the first years of application of the EU Merger Regulation the EU Courts had a 'light' approach to review of Commission merger decisions (*see supra* subsection 2.1 in this Chapter), in these three cases the EU Courts demonstrated their willingness to change approach and to increase the intensity with which they reviewed decisions. The criticisms against the EU Courts' submissive role and the increased importance of economic analysis led the Courts to surpass the classical arguments used to justify their passive role in judicial control of Commission decisions.<sup>409</sup>

The *Tetra Laval*,<sup>410</sup> *Airtours*,<sup>411</sup> *Schneider Electric*<sup>412</sup> cases arguably prove, on the one hand, that the EU Courts have power in shaping the content of the 'limited' judicial review standard and, on the other hand, that the EU Courts have the instruments and capacity to assess complex merger decisions involving in-depth economic analysis.<sup>413</sup> In these cases the CFI appeared to stretch the 'limited' judicial review standard by attempting to determine whether the Commission's assessment had not been convincing or plausible.<sup>414</sup> While acknowledging the discretion entrusted to the Commission under the EU Merger

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<sup>408</sup> LEVY N., *Evidentiary Issues In the EU Merger Control*, Fordham Competition Law Institute's 35<sup>th</sup> Annual Conference: 'it is clear that the trilogy of judgments rendered by the Court of First Instance in 2001 in the *Airtours*, *Schneider*, and *Tetra Laval* cases represented a watershed in the Commission's application of the Merger Regulation that accelerated the Commission's reliance on sound economics and quantitative evidence'. See also ABRAHAMSSON H., *The Standard of Proof in EC Merger Control – The Impact of Airtours, Schneider and Tetra Laval*, Master Thesis, Faculty of Law – University of Lund, 2006.

<sup>409</sup> See VALLINDAS G., *Le Tribunal et la concurrence : le juge face aux appréciations économiques complexes*, in *Revue des affaires européennes*, No. 3, 2009-2010, p. 448. According to the author, 2002 had to be surnamed the Commission's 'annus horribilis'. The annulment of three prohibition decisions led the Commission to change and reinforce its internal procedures, including the creation of a Chief economist team, peer review panels and increasing the role of the Hearing Officer (*see supra* subsection 3.3 in Section II of Chapter 1).

<sup>410</sup> Case C-12/03 P *Commission v Tetra Laval BV* [2005] ECR I-987.

<sup>411</sup> Case T-342/99 *Airtours plc v Commission* [2002] ECR II-2585.

<sup>412</sup> Case T-310/01 *Schneider Electric SA v Commission* ("*Schneider*"), [2002] ECR II-4071.

<sup>413</sup> FORRESTER I. S., *A Bush in Need of Pruning: The Luxuriant Growth of Light Judicial Review*, European University Institute, Robert Schuman Centre for Advanced Studies, EU Competition Law and Policy Workshop/Proceedings, 2009, p. 28.

<sup>414</sup> By way of example, in *Airtours/First Choice*, an important finding in the Commission's decision was that the leading tour operators set capacity mainly by renewing capacity budgeted or sold in the past. The CFI conducted its own measures of enquiry on this point and elicited detailed written replies that showed that capacity decisions were in fact complex attempts to predict how future demand would evolve; *see* Case T-342/99 *Airtours plc v Commission* [2002] ECR II-2585, paras. 148–181.



Regulation to review economic assessments, the CFI proceeded to ‘*adjudicate on the merits of the Commission’s findings concerning the effects of the concentration on competition*’.<sup>415</sup> The extent to which these judgments were so groundbreaking led certain commentators to suggest that the Court had adopted a new approach to reviewing substantive Commission merger decisions. However, the President of the CFI ‘*categorically rejected*’ these suggestions, contending that the Court had instead ‘*adjusted the normal approach to reviewing Commission competition decisions so as to take account of the peculiarities of all merger cases and, above all, the peculiarities of each merger case that it has to review*’.<sup>416</sup>

While, on the one hand, these judgments effectively prove the EU Courts’ ‘activism’ in shaping the content and boundaries of the ‘limited’ judicial review standard, on the other hand, they also demonstrate that, despite the emphasis placed by some commentators on these cases as evidence of a comprehensive and thorough judicial review carried out by the Courts,<sup>417</sup> the Commission effectively still enjoys a margin of appreciation in relation to complex economic and technical assessments, the existence of which can lead to cases having very different outcomes. In particular, when applying the ‘manifest error’ standard, the EU Courts have on occasion left aside alternative and arguably equally plausible conclusions put forward by applicants, thereby granting a considerable deference to the Commission. In these cases, it can be considered that the application of the ‘limited’ judicial review standard has determined their outcome given that the EU Courts’ review has not been as thorough as it would have been had ‘complex economic assessments’ not been involved.

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<sup>415</sup> Case T-342/99 *Airtours plc v Commission* [2002] ECR II-2585, para 53; *see also* para 120 where the Court found that the Commission had failed to provide ‘adequate evidence’ to support its finding that there was already a tendency in the industry to collective dominance (particularly as regards capacity setting). *See also* Case T-5/02 *Tetra Laval v Commission* (“*Tetra Laval*”) [2002] ECR II-4381, para 246, where the Court held that the Commission’s prediction that Tetra Laval would obtain a dominant position on the market for aseptic filling machines was ‘*not plausible*’; and Case T-310/01 *Schneider Electric SA v Commission* (“*Schneider*”), [2002] ECR II-4071, para 209, where the Court held that the Commission’s conclusion as to the relationship between high concentration at the wholesaler level and prices had not been sufficiently demonstrated in law (*‘ne peut être tenue pour suffisamment étayée’*). *See* LEVY N., *European Merger Control Law: A Guide to the Merger Regulation*, 9<sup>th</sup> ed., Matthew Bender & Co, 2012.

<sup>416</sup> VESTERDORF B., *Standards of Proof In Merger Cases: Reflections In The Light Of Recent Case Law of The Community Courts*, in *European Competition Journal*, March 2005, pp. 3–33.

<sup>417</sup> CASTILLO DE LA TORRE F., *Evidence, Proof and Judicial Review in Cartel Cases*, in *World Competition Law and Economics Review*, No. 4, December 2009, pp. 561-562.

### 2.2.1. *The Airtours judgment*

On 6 June 2002 the CFI overturned for the first time a prohibition decision under the EU Merger Regulation in the *Airtours/First Choice* case.<sup>418</sup> The Commission's decision had prohibited the merger of two UK suppliers of short-haul package holidays (Airtours and First Choice) on the ground that the transaction would create a collective dominant position in the UK market for short-haul foreign package holidays between Airtours/First Choice and the other two large tour operators, Thomson and Thomas Cook. According to the Commission, the collectively dominant undertaking would have an incentive to tacitly restrict market capacity, leading to higher prices and to the exclusion from the market of smaller operators. Airtour's appeal was upheld by the CFI and in annulling the Commission's decision, the Court determined that '*far from basing its prospective analysis on cogent evidence, [the decision] is vitiated by a series of errors of assessment as to factors fundamental to any assessment of whether a collective dominant position might be created.*'<sup>419</sup>

Other than providing important guidance on the application of the EU Merger Regulation to situations of collective dominance,<sup>420</sup> the *Airtours* judgment is also interesting as regards the varying intensity of judicial review applied by the EU Courts within the framework of the 'limited' review standard. In this case, although the CFI expressly stated that it had applied such standard,<sup>421</sup> it nonetheless carried out a thorough review of the Commission's analysis, therefore departing from its classical formulation and application.

This is illustrated, for example, by the CFI's in-depth review of the Commission's assessment of the definition of the relevant product market. In this regard, the CFI

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<sup>418</sup> Case T-342/99 *Airtours plc v Commission* [2002] ECR II-2585.

<sup>419</sup> Case T-342/99 *Airtours plc v Commission* [2002] ECR II-2585, para 294. In *Airtours*, the Court concluded that '*the Commission has failed to prove that the result of the transaction would be to alter the structure of the relevant market in such a way that the leading operators would no longer act as they have in the past and that a collective dominant position would be created*' (para 293) and indicated that '*the prospective analysis which the Commission has to carry out in its review of concentrations involving collective dominance calls for close examination in particular of the circumstances which, in each individual case, are relevant for assessing the effects of the concentration on competition in the reference market*' (para 63).

<sup>420</sup> The Court held that a finding of collective dominance requires that three conditions be satisfied. First, the alleged oligopolists must be in a position to monitor each other's market behavior. Without such market transparency, the members of the oligopoly cannot be certain that the others are adhering to the strategy that maximizes their collective benefits. Second, there must be, in the Court's view, '*an incentive not to depart from the common policy on the market*'. The viability of a collective dominant position thus depends upon the existence of deterrents, such as the ability to retaliate against a participant that deviates from the oligopolistic position. Third, it must be shown that the actions of competitors and/or consumers would not '*jeopardise the results expected from the common policy*'; see Case T-342/99 *Airtours plc v Commission* [2002] ECR II-2585, para 62.

<sup>421</sup> The Court stated that the '*Community judicature...must take account of the discretionary margin implicit in the provisions of an economic nature which form part of the rules on concentrations*'; see Case T-342/99 *Airtours plc v Commission* [2002] ECR II-2585, para 64.

reviewed the Commission's analysis in a very detailed manner before finding that the Commission had not committed a manifest error of assessment in excluding long-haul package holidays from the definition of the relevant product market.<sup>422</sup> Namely, the CFI analysed the documents it had in its possession, concluding that the Commission had taken various factors into account in reaching its conclusion that short-haul package holidays belong to a separate market from that to which long-haul packages belong.<sup>423</sup>

The CFI's analysis was very thorough also in relation to the Commission's assessment of collusive behaviour post-merger. Here the CFI effectively criticized the methodology used by the Commission to assess the extent to which capacity decisions adopted by each of the major tour operators were sufficiently transparent for collusive behaviour to arise post-merger.<sup>424</sup>

Moreover, the CFI analysed, of its own motion, numerous documents presented by the applicant in order to verify the plausibility and correctness of the conclusions reached by the Commission in its decision.<sup>425</sup> In this respect, the CFI even compared the figures provided in Airtours' reply to one of the Commission's information requests, which were not originally cited in the Commission decision.<sup>426</sup> The CFI also described that when it requested the Commission to produce a market study referred to in the decision, the Commission supplied only an extract of a single page which a competitor had annexed to a response to a request for information. The CFI also disagreed with the Commission's interpretation of that market study, stating that the Commission '*construed that document without having regard to its actual wording and overall purpose, even though it decided to include it as a document crucial to its finding*'.<sup>427</sup>

Thus, although the CFI did reiterate that the Commission had a certain discretion in relation to assessments of an economic nature, the judgment pointed out in various instances the factual and theoretical shortcomings of the Commission's analysis. The

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<sup>422</sup> Case T-342/99 *Airtours plc v Commission* [2002] ECR II-2585, paras. 17-48.

<sup>423</sup> Case T-342/99 *Airtours plc v Commission* [2002] ECR II-2585, para 25.

<sup>424</sup> BOTTEMAN Y., *Mergers, Standard of Proof and Expert Economic Evidence*, in *Journal of Competition Law & Economics*, Issue 1, 2006, p. 85. While the Commission decided to look at overall capacity as a whole, the CFI considered that since decisions on global capacity stem from a range of individual decisions, the Commission should not have limited itself to looking at global capacity.

<sup>425</sup> Case T-342/99 *Airtours plc v Commission* [2002] ECR II-2585, paras. 36-41.

<sup>426</sup> Case T-342/99 *Airtours plc v Commission* [2002] ECR II-2585, paras. 37-38.

<sup>427</sup> Case T-342/99 *Airtours plc v Commission* [2002] ECR II-2585, para 130.

review carried out by the CFI was formally categorised as a ‘manifest error’ standard,<sup>428</sup> although it arguably seemed to go beyond that standard.<sup>429</sup>

On the other hand, even though the Court carried out an in-depth review, in *Airtours* the Court relied on the manifest error of assessment to ultimately dismiss certain allegations of the defendants. For example, despite the CFI’s in-depth review of the Commission’s assessment of the definition of the relevant product market, the Court disregarded some of the arguments put forward by the applicant without providing other reasons than the margin of discretion of the Commission. In this regard, the Court indicated that ‘*in the circumstances of the present case and with reference to market definition, the fact that the Commission did not consider decisive (i) changing consumer tastes, (ii) the growing importance of substitutability between long-haul package holidays to destinations such as Florida and the Dominican Republic, and short-haul packages or (iii) the growth of the market for long-haul packages over recent years is not sufficient to support a finding that the Commission exceeded the bounds of its discretion in concluding that short-haul package holidays are not within the same product market as long-haul packages*’.<sup>430</sup>

#### 2.2.2. *The Schneider Electric judgment*

On 22 October 2002 the CFI, in the first judgments rendered by the Court under the expedited procedure, annulled two Commission decisions in the *Schneider/Legrand* case.<sup>431</sup> In January 2001, Schneider had announced a takeover bid for Legrand, another French company active in the supply of low-voltage electrical equipment. In the first decision the Commission prohibited the completed acquisition of Legrand by Schneider, while in the second it ordered Schneider to divest all but 5% of the acquired share capital of Legrand.<sup>432</sup> Schneider had appealed the Commission’s decisions which were both annulled by the CFI. The CFI found that the Commission’s economic analysis of the competitive effects and impact of the merger was flawed and contained serious ‘*errors, omissions and inconsistencies*’.<sup>433</sup>

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<sup>428</sup> Case T-342/99 *Airtours plc v Commission* [2002] ECR II-2585, paras. 26 and 32.

<sup>429</sup> According to WILS P. J. W. ‘[t]he Court of First Instance’s judgments in cases such as *Airtours* clearly show that, not only in cases under Articles 81 or 82 EC but also in merger cases, the Court undertakes an exhaustive review of both the Commission’s substantive findings of fact and its legal appraisals of those facts’; see WILS P. J. W., *The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis*, in *Concurrences*, 2005, No. 3, p. 5.

<sup>430</sup> Case T-342/99 *Airtours plc v Commission* [2002] ECR II-2585, para 44.

<sup>431</sup> Case T-310/01 *Schneider Electric SA v Commission* [2002] ECR II-4071.

<sup>432</sup> Commission Decision C(2001)3014 final declaring a concentration to be incompatible with the common market and the EEA Agreement (Case COMP/M.2283 - *Schneider-Legrand*).

<sup>433</sup> Case T-310/01 *Schneider Electric SA v Commission* [2002] ECR II-4071, para 404.

In its decision prohibiting the merger, the Commission had identified national product markets but then had considered the effects of the merger on the basis of trans-national and global considerations. The CFI had thus agreed with Schneider that the Commission had based its negative assessment on trans-national considerations, without demonstrating their relevance at the national level, except in relation to the French market. The Court therefore rejected the Commission's finding that the transaction would create or strengthen a dominant position in markets outside France. However, given that the Commission's conclusions as to the existence of a dominant position and adverse effects on competition in the French market could be accepted, the errors affecting the decision were not enough to lead to its entire annulment. The CFI did however annul the decision on the basis of procedural grounds, as in the decision the Commission's review of the French markets included arguments that were not included in its statement of objections.<sup>434</sup> In particular, while the statement of objections had focused on the overlapping nature of the two businesses, the final decision had changed the focus to the preponderant positions held by the two undertakings in two distinct but complementary sectorial markets.<sup>435</sup> The CFI therefore held that Schneider had been denied the possibility to respond to this objection and to offer appropriate remedies, amounting to an infringement of the parties' rights of defense that called for an annulment of the decision.

In this case, as in *Airtours*, the Court undertook a detailed factual analysis in which it identified 'errors, omissions and inconsistencies...of undoubted gravity',<sup>436</sup> while traditionally the evaluation of the relevant market would have been considered as belonging to the category of complex economic appreciations.<sup>437</sup> As to the issue of the intensity of judicial review

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<sup>434</sup> These defects which had led the CFI to annul the decision were confirmed in part on appeal in front of the Court of Justice; see Case C-440/07 P *Commission v Schneider Electric SA* [2009] ECR I-6413. This also led the GC to subsequently find that the Commission should compensate partially Schneider for losses incurred as a result of the unlawful prohibition decision; see Case T-351/03 *Schneider Electric SA v Commission* ("*Schneider IP*") [2007] ECR II-2237. Interestingly, in the latter case, the CFI acknowledged the principle that Article 6(1) ECHR accepts the concentration of powers within an administrative authority that does not provide the safeguards established in that provision, provided there is the right to access an independent and impartial tribunal that can review its decisions. In the CFI's own words '*provided that the right to an impartial tribunal is guaranteed, Article 6(1) of the Convention does not prohibit the prior intervention of administrative bodies that do not satisfy all the requirements that apply to procedure before the courts*' (paras. 182-183).

<sup>435</sup> CHAPPATTE P., BOYCE J., REEVE M., *Annulment Proceedings in EU Merger Cases? Worth the Effort?*, in *The Role of the Court of Justice of the European Union in Competition Law Cases*, GCLC Annual Conferences Series (edited by MEROLA M. and DERENNE J.), Bruylant, 2010, pp. 195-196.

<sup>436</sup> Case T-351/03 *Schneider Electric SA v Commission* [2007] ECR II-2237, para 404.

<sup>437</sup> VALLINDAS G., *Le Tribunal et la concurrence: le juge face aux appréciations économiques complexes*, in *Revue des affaires européennes*, No. 3, 2009-2010, p. 451. As to the difficulties inherent in identifying the categories of

carried out, in the *Schneider Electric* case the CFI decided not to substitute an arguably equally plausible solution proposed by the applicant – the use of the cross-elasticity of demand test – for that of the Commission – the test of price sensitivity of overall demand for low voltage electrical equipment. Although the CFI partially annulled the Commission decision on the grounds that it had committed errors of assessment by overestimating the strength of the merged entity, namely on the Italian and Danish markets, it dismissed Schneider Electric’s plea concerning alleged errors in the economic reasoning underpinning the analysis of the impact of the concentration. In this regard, the CFI found that the Commission had not erred in finding that the merged entity would be able to act independently of other players and to raise prices on the basis of the low price sensitivity of overall demand for low-voltage electrical equipment.<sup>438</sup> Moreover, although the applicant had submitted an economic report – the ‘second Nera report’ – showing that customers reacted quickly to changes in the price of electrical equipment, the CFI considered that the Commission was not wrong in using the test of price sensitivity of overall demand.<sup>439</sup> The CFI was not convinced that that report and Schneider’s arguments demonstrated the point it was trying to make. The applicant’s proposal to use an alternative test to measure price sensitivity of demand was therefore rejected on the basis that the CFI did not consider it sufficiently plausible and proven.<sup>440</sup> The question remains however how the CFI would have acted in this case if it had considered both parties’ economic theories, Schneider’s and the Commission’s, equally plausible, but at odds. It is contended that the existence of the ‘limited’ review standard bears its effects in these particular situations, as the Courts, instead of adjudicating autonomously on the merits of each theory in order to decide which should prevail, are led to give preference to the Commission’s assessments and choice.

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assessments that fall under the limited review standard, such as market definitions, *see supra* subsection 2.3 in Chapter 1.

<sup>438</sup> Case T-310/01 *Schneider Electric v Commission* [2002] ECR II-4071, paras. 134-146.

<sup>439</sup> Case T-310/01 *Schneider Electric v Commission* [2002] ECR II-4071, para 142.

<sup>440</sup> In *Schneider*, the CFI finished its reasoning indicating that ‘*it has not been proved to the requisite legal standard that the merger results in the creation of a dominant position on the Italian markets for distribution and final panel-board components*’ and pointed out that since ‘*the Commission (...) adopted a prospective approach to the state of competition to which the concentration was likely to give rise in the future (...) The Commission was consequently required to explain all the more clearly the competition problems raised by the proposed merger*’ (paras. 402 and 443).

### 2.2.3. *The Tetra Laval judgment: the alleged formulation of a new standard of review*

On 25 October 2002, the CFI in the *Tetra Laval/Sidel* case annulled two Commission decisions prohibiting the merger of two producers of packaging materials and ordering the separation of the two companies.<sup>441</sup> In its decision the Commission had declared the acquisition of Sidel by Tetra Laval incompatible with the internal market despite the lack of horizontal competition between the parties. The Commission's assessment was largely based on the 'conglomerate' effects of the merger. The Commission held that, although each company operated in separate markets, Tetra Laval's dominant position in the market for carton packaging, combined with Sidel's leading position in plastic ("PET") packaging equipment, would create a dominant position in the market for PET packaging equipment. The Commission relied on the so-called 'leveraging' economic theory to find that Tetra Laval's dominant position in one market could lead it to exercise pressure on customers to purchase also products in another distinct but close market. Tetra Laval and Schneider both appealed against the Commission's decisions.

In its judgment, the CFI held that the Commission had overestimated the anti-competitive effects of the concentration and, in particular, had failed to adequately prove that the merged entity would have an incentive to leverage its dominant position on the carton packaging market into the PET packaging machine market. The CFI did not dismiss the 'leveraging' theory on which the Commission based its decision, however it found that the Commission's assessment of the potential for leveraging contained a number of important errors. Although the CFI found it would be '*possible*' for the merged entity to engage in leveraging activities in the future,<sup>442</sup> the Commission had not demonstrated to the required legal standard that the merged entity would have the incentive to use that ability. In particular, the Commission had not sufficiently shown which leveraging methods could have been used by Tetra Laval or what could have been the consequences of any such action. The CFI therefore annulled the Commission's decision and its findings were largely confirmed on appeal by the ECJ in February 2005.<sup>443</sup>

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<sup>441</sup> The Court's judgment resulted in the annulment of the Commission's second decision ordering the separation of Tetra Laval and Sidel; Case T-5/02 *Tetra Laval v Commission* [2002] ECR II-4381. See, *inter alia*, BAY M. F., CALZADO J. R., *Tetra Laval II: the Coming of Age of the Judicial Review of Merger Decisions*, World Competition 28(4), 2005, pp. 433-453.

<sup>442</sup> See also Case T-5/02 *Tetra Laval v Commission* [2002] ECR II-4381, para 192.

<sup>443</sup> Case C-12/03 P *Commission v Tetra Laval BV* [2005] ECR I-987.

What is particularly of interest in the *Tetra Laval* case for the debate on the standard of review is that the depth of the review carried out by the CFI was such that the Commission appealed the judgment on the grounds that the CFI ‘*whilst claiming to apply the test of manifest error of assessment, in fact applied a different test*’.<sup>444</sup> The Commission contended that the CFI had imposed a new and unduly high standard of judicial review, thereby exceeding its role, ‘*which is to review the administrative decision of the Commission for clear errors of fact or reasoning, and not to substitute its view of the case for that of the Commission*’.<sup>445</sup> According to the Commission, the CFI’s insistence that the Commission adduce ‘*convincing evidence*’ effectively created a new standard that unduly limited its discretion and allowed the Court to substitute its views for those of the Commission.

In his Opinion in this case, Advocate General Tizzano stated that the separation of powers between the Commission and the EU Courts does not allow the CFI ‘*to enter into the merits of the Commission’s complex economic assessment or to substitute its own point of view for that of the institution*’.<sup>446</sup> He nevertheless recognized that the Commission’s discretion is not unfettered and that while with regards to findings of fact, ‘*the review is clearly more intense, in that the issue is to verify objectively and materially the accuracy of certain facts and the correctness of the conclusions drawn in order to establish whether certain known facts make it possible to prove the existence of other facts to be ascertained*’,<sup>447</sup> by contrast, with regard to the complex economic assessments made by the Commission, ‘*review by the Community judicature is necessarily more limited, since the latter has to respect the broad discretion inherent in that kind of assessment and may not substitute its own point of view for that of the body which is institutionally responsible for making those assessments. The fact that the Commission enjoys broad discretion in assessing whether or not a concentration is compatible with the common market does certainly not mean that it does not have in any case to base its conviction on solid elements gathered in the course of a thorough and painstaking investigation or that it is not required to give a full statement of reasons for its decision, disclosing the various passages of logical argument supporting the decision. The Commission [...] is bound to examine the relevant market carefully; to base its assessment on elements which reflect the facts as they really are, which are not plainly insignificant and which support the*

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<sup>444</sup> Case C-12/03 P *Commission v Tetra Laval BV* [2005] ECR I-987, para 19.

<sup>445</sup> Commission Press Release IP/02/1952 of 20 December 2002.

<sup>446</sup> Opinion of Advocate General Tizzano in Case C-12/03 P *Commission v Tetra Laval BV* [2005] ECR I-987, para 89.

<sup>447</sup> Opinion of Advocate General Tizzano in Case C-12/03 P *Commission v Tetra Laval BV* [2005] ECR I-987, para 86. On the intensity of the control over facts, see, *inter alia*, VESTERDORF B., ‘Standards Of Proof In Merger Cases: Reflections In The Light Of Recent Case Law Of The Community Courts’, in *European Competition Journal*, March 2005, pp. 3–33.



*conclusions drawn from them, and on adequate reasoning; and to take into consideration all relevant factors*.<sup>448</sup> In essence, according to the Advocate General, the EU Courts must exercise a restrained control on the substance of the Commission's complex and economic appreciations, but this can nonetheless be considered an effective control.<sup>449</sup> It also held that in *Tetra Laval*'s case the GC had substituted its own judgment for that of the Commission for an important part of the analysis.

The ECJ did not follow the Advocate General's Opinion, rejected the Commission's arguments, and in doing so clarified the meaning of the 'limited' review standard. The ECJ's engagement in this case in defining the 'contours' of this notion proves, to a certain degree, the role that the EU Courts play in giving content and form to the standard of review they exercise.<sup>450</sup> The ECJ stated that, '[w]hilst the Court recognises that the Commission has a margin of discretion with regard to economic matters, that does not mean that the Community Courts must refrain from reviewing the Commission's interpretation of information of an economic nature'.<sup>451</sup> The Court upheld the EU Courts' right to examine: (1) whether the evidence relied on by the Commission is factually accurate, reliable, and consistent; (2) whether that evidence contains all the information which must be taken into account in order to assess a complex situation; and (3) whether the evidence is capable of substantiating the conclusions drawn from it.<sup>452</sup> The ECJ also added that '[s]uch a review is all the more necessary in the case of a prospective analysis required when examining a planned merger with conglomerate effect'.<sup>453</sup> Accordingly, for the ECJ, the CFI's requirement that proof of anti-competitive effects of a merger call for 'a precise examination, supported by convincing evidence, of the circumstances which allegedly produce those effect',<sup>454</sup> is not a new standard imposed upon the Commission but simply the reflection of the essential function of evidence which is to establish convincingly the merits of a

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<sup>448</sup> Opinion of Advocate General Tizzano in Case C-12/03 P *Commission v Tetra Laval BV* [2005] ECR I-987, paras. 86–87.

<sup>449</sup> THEOPHILE D., PARMENTIER H., *L'étendue du contrôle juridictionnel dans le contentieux du contrôle des concentrations en droits interne et communautaire*, in *Concurrences*, No. 1, 2006, p. 41.

<sup>450</sup> See WAHL N., *Standard of Review – Comprehensive or Limited?*, European University Institute, Robert Schuman Centre for Advanced Studies, EU Competition Law and Policy Workshop/Proceedings, 2009, p. 6: '[a]lthough the limited review and the definition of it seemed firmly fixed in case law from the Court of Justice, a certain change in the definition occurred in the *Tetra Laval* case decided in 2005'.

<sup>451</sup> Case C-12/03 P *Commission v Tetra Laval BV* [2005] ECR I-987, para 39.

<sup>452</sup> *Ibid.*

<sup>453</sup> *Ibid.*

<sup>454</sup> Case T-5/02 *Tetra Laval v Commission* [2002] ECR II-4381, para 155.

merger decision.<sup>455</sup> In this case, the ECJ left unfettered the Commission's discretion in relation to complex economic assessments, and rather focused its conclusions on the CFI's findings of fact and its criticism that the Commission had not adequately proven the plausibility of its forecasts.

It is also interesting to note that in this case the ECJ expanded the content of the 'limited' judicial review standard and, in comparison with previous case law, the differences concerned: (i) the reference to '*whether the evidence contains all the information which must be taken into account*', thus a stricter obligation for the Commission to prove its conclusions; and (ii) that '*a review is all the more necessary in the case of a prospective analysis*', which could be interpreted as a difference in the review to be carried out depending on which situation is being analysed.<sup>456</sup> With its statements the ECJ, although denying the creation of a 'new' standard, clarified the meaning of the 'limited' judicial review standard in various directions. First, it drew a distinction between the assessment itself and the evidence that underpins such assessment. While the EU Courts can and must verify whether the evidence underpinning a complex economic or technical assessment is sufficiently strong, in relation to the assessment itself, on the other hand, the Commission still benefits from discretion.<sup>457</sup> Then, having acknowledged the forward-looking nature of assessments concerning mergers, the ECJ concluded that a more (not less) careful and stringent review is necessary.<sup>458</sup> Merger control calls in fact for a perspective analysis that must be exercised with great care, as it does not concern events already occurred but rather the prediction of facts that may more or less occur in the future if a prohibition decision is not adopted.

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<sup>455</sup> EHLERMANN C-D., RATLIFF J., *The ECJ rules on the standard of judicial review in merger cases and clarifies the burden of proof upon the Commission in conglomerate mergers cases (Tetra Laval/Sidel)*, in e-Competitions, 2005, No. 37199, p. 2.

<sup>456</sup> See WAHL N., *Standard of Review – Comprehensive or Limited?*, European University Institute, Robert Schuman Centre for Advanced Studies, EU Competition Law and Policy Workshop/Proceedings, 2009, p. 6.

<sup>457</sup> According to certain commentators, the ECJ '*endorsed a system of "selected" review, whereby the EC Courts' scrutiny only targets a limited set of features of the Commission's decisions*'; see PETIT N., RABEUX L., *Judicial Review in French Competition Law and Economic Regulation - A Post-Commission v. Tetra Laval Assessment (October 26, 2008)*; available at SSRN: <http://ssrn.com/abstract=1290143> or <http://dx.doi.org/10.2139/ssrn.1290143>, p. 12.

<sup>458</sup> REEVES T., DODOOT N., *Standards of Proof and Standards of Judicial Review in EC Merger Law*, - 14th Annual IBC Conference on "An Advanced analysis of Major Developments in the field of EC Competition Law and Policy", Brussels, 17-18 November 2005, p. 127. In the *General Electric* case the CFI confirmed the principle established in *Tetra Laval* that where the analysis of the competitive harm is prospective the Commission will have to conduct its review '*with great care*'; see Case T-210/01 *General Electric v Commission* [2005] ECR II-5575, paras. 26-27.

The ECJ thus indicated that a more cautious approach towards deference might be necessary in the case of prospective rather than *ex-post* analysis.<sup>459</sup>

### ***2.3. The case law following the 2002 Airtours, Schneider and Tetra Laval judgments***

While the 2002 cases were certainly welcomed for having brought more rigor and clarity in the intensity of the review carried out by the Courts in the merger field, on the other hand, the case law following *Tetra Laval*, *Airtours*, and *Schneider* seems to suggest that the manifest error of assessment standard is not as comprehensive and thorough as some commentators have argued. While the various cases following the 2002 judgments often recite literally the standard of review formula elaborated in *Tetra Laval*, and refer to the in-depth review of economic assessments that must be carried out, on the other hand, considerable room is still left to the Commission's discretion and its presence seems still capable of influencing the outcome of cases. The absence of a 'correctness' standard of review, and thus the impossibility for the Courts to substitute their views for those of the Commission, in particular when there are two equally plausible explanations of economic circumstances, is even more relevant in the merger field, where the Commission is called upon to make a prospective analysis of what will be the likely effects of a transaction. In the following subsections, the analysis of a selection of the more recent case law will thus focus on examining the extent to which the existence of the 'limited' judicial review standard may have determined the outcome of cases and how, absent such standard, different results could have taken place.

#### *2.3.1. The Petrolescence judgment*

The *Petrolescence* judgment can be considered an example of a case where the CFI rejected what could have allegedly been considered equally plausible arguments proposed by the applicant because constrained by the 'manifest error' standard.<sup>460</sup> This case stemmed

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<sup>459</sup> This approach seems to have been confirmed by the GC in the recent "Cisco" judgment delivered on 11 December 2013. In this case the GC emphasized that "[i]n so far as the Commission is thus required to carry out a prospective analysis requiring numerous economic factors to be taken into account, it enjoys a margin of discretion which the Court must take into account when exercising its power of review. However, that does not mean that the Court must refrain from reviewing the Commission's interpretation of data of an economic nature"; see Case T-79/12 *Cisco Systems, Inc. and Messagenet SpA v Commission*, not yet reported, para 63.

<sup>460</sup> Case T-342/00 *Petrolescence and SG2R v Commission* [2003] ECR II-67.

from the proposed merger between TotalFina and Elf Aquitaine which had been approved in Phase II subject to the acceptance of commitments. The Commission had found that the merger would lead to the creation of a dominant position on the market for motorway fuel sales in France and that, after the merger, TotalFina Elf would have strong incentives to raise its prices and/or reduce the quality of its services. TotalFina was therefore required to divest, *inter alia*, 70 service stations to transferees which had to be approved by the Commission. TotalFina Elf proposed the divestiture of six service stations putting forward Petrolescence as a possible transferee. The Commission rejected Petrolescence's candidacy on the ground that the applicant would not be able to bring about a situation of effective competition on the market for the sales of fuels on motorways in France.

In this respect, it is particularly interesting to analyze the second plea in law put forward by the applicant. Petrolescence argued that the Commission had committed a manifest error of assessment as regards their candidacy to be the transferees of certain service stations. The applicant put forward various arguments to demonstrate that they were capable of developing effective competition on the market for motorway fuel sales in France. It argued, *inter alia*, that (i) they had proposed to create restaurants in four of the transferred service stations which would be set-up in a period ranging from 18 months to two years and already owned buffet bars in the remaining stations; (ii) they owned shops in their stations which would allow them to obtain considerable margins while the restaurants would be set-up, (iii) the fact that TotalFina Elf would continue owning the Mardyck refinery would put all wholesale buyers in the zone where the six service stations in question were situated on an equal footing; (iv) the Commission took no account of the compensation principle between fuel distribution and shop/restaurant activities; and (v) their intention of developing a policy of loss-leader pricing in order to establish their credibility in the eyes of consumers should have persuaded the Commission to give priority to their candidacy. In sum, Petrolescence argued it was a viable operator capable of developing effective competition on the market.

However, the CFI first stated that the Court's review '*must be limited to ensuring compliance with the rules of procedure and the statement of reasons, as well as the substantive accuracy of the facts, the absence of manifest errors of assessment and of any misuse of power*' and that '*it is not for the [CFI] to substitute its own economic assessment for that of the Commission*'; although it is entitled to a '*close*

*examination in particular of the circumstances which, in each individual case, are relevant for assessing the effects of the concentration on competition in the market in question.*<sup>461</sup>

The CFI interestingly went on and stated that ‘*the applicants' present arguments can be accepted only if they show that the Commission's appraisal of their candidacy [...] is manifestly erroneous. However, it must be observed that the applicants have not established that the Commission's appraisal of those points is clearly mistaken and it must be concluded that the applicants' present arguments consist in inviting the Court of First Instance to substitute a different appraisal of their candidacy for that of the Commission.*’<sup>462</sup> It can thus be observed that the CFI was unable to review the factors which the Commission had taken into account to assess the candidacy of the potential transferees of the service stations, including the applicant.

### 2.3.2. *The General Electric judgment*

On 14 December 2005 the CFI delivered its judgment on the Commission’s decision prohibiting the proposed merger of General Electric Company and Honeywell International Inc. (“Honeywell”).<sup>463</sup> Although the Court upheld the Commission’s decision and its findings that the transaction would create or strengthen a dominant position in the markets for jet engines for large aircraft, engines for corporate jet aircraft and for small gas turbines, it rejected the Commission’s findings on the transaction’s conglomerate and vertical effects. These findings were sufficient for the merger to be held to be incompatible with the internal market, despite the fact that the Commission had made a number of errors in its assessment of the impact of certain vertical overlaps between the parties and the conglomerate effects of the merger and that these parts of the Commission’s decision were, therefore, vitiated by illegality.

As to the standard of review, the CFI reiterated the standard described in *Tetra Laval*, restating the existence of a margin of assessment for the Commission, but also that the Courts have to adequately review the Commission’s economic assessments since they must

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<sup>461</sup> Case T-342/00 *Petrolescence and SG2R v Commission* [2001] ECR II-67, para 102.

<sup>462</sup> Case T-342/00 *Petrolescence and SG2R v Commission* [2001] ECR II-67, para 103. Commentators have stated that where the Commission’s assessment is based upon inferences drawn from primary facts, ‘*a more limited discretion will be allowed (in other words, it may be easier for the EU courts to control whether the Commission's assessment was manifestly erroneous or not), while a greater margin will be allowed to pure economic assessments*’; see B. VESTERDORF, *Standards Of Proof In Merger Cases: Reflections In The Light Of Recent Case Law Of The Community Courts*, in *European Competition Journal*, March 2005, pp. 3–33.

<sup>463</sup> Case T-210/01 *General Electric v Commission* [2005] ECR II-5575 and Case T-209/01 *Honeywell v Commission* (“Honeywell”) [2005] ECR II-5527.

establish whether the evidence relied on is factually accurate, reliable and consistent, contains all the information which must be taken into account in order to assess a complex situation, and is capable of substantiating the conclusions drawn from it.<sup>464</sup> It also emphasized that effective judicial review is even more necessary when the Commission carries out a prospective analysis, as is the case when considering conglomerate effects. In such cases, the quality of the evidence relied on is particularly important. In this regard, the CFI censured the Commission's analysis of the conglomerate effects of the transaction and the evidence it brought in support of its findings as to the probable conduct of the merged entity. In particular, it concluded that the Commission had not shown that the merger would have created an incentive for the parties to engage in leveraging conduct. One of the main criticisms was against the Commission's failure to assess the possible deterrent effect of the unlawful nature of the conduct and thus of Article 102 TFEU, and the circumstance that the Commission had relied on General Electric's conduct in unrelated markets to infer its likely future conduct on the markets at issue, without a concrete assessment of the latter.

As to the Court's findings on the horizontal overlaps between the merging parties, the CFI dismissed the applicant's appeal against the Commission's prohibition decision on the grounds, *inter alia*, that General Electric had not demonstrated that prior to the merger it did not hold a dominant position on the market for large commercial jet aircraft engines. The applicant argued that the Commission's analysis of the horizontal overlap relating to large regional jet aircraft engine was vitiated by fundamental errors, such as, *inter alia*, the finding that General Electric's large regional jet aircraft engine and those of Honeywell were in the same market. It contended that the Commission had departed from its previous practice according to which each engine 'family', with unique features which make it suitable for a particular platform, seemed to form a separate relevant market, thereby implementing a novel methodology. Therefore, it argued that the Commission had considered that General Electric and Honeywell's engines might be substitutable on the sole grounds that some purchasers of the 'Avro' aircraft, which is powered by the Honeywell engine, might purchase other aircraft powered by General Electric engines. The applicant claimed that when the Commission invokes such indirect 'second level' substitutability, it ought to explain this novel methodology, and, in any event, is required to produce empirical evidence of such substitution, which it had not done in this specific

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<sup>464</sup> Case T-210/01 *General Electric v Commission* [2005] ECR II-5575, para 63.

case.<sup>465</sup> The applicant's main argument was that the difference in thrust of the Honeywell and General Electric engines was so different that these could not be substitutable.

The CFI initiated its argumentation underlining that whether '*an undertaking is in a dominant position on a given market is a question of economic appraisal [...] in respect of which the Commission enjoys a broad margin of assessment. In that respect, the Court's role is confined to a review of whether that appraisal is free of manifest errors*'.<sup>466</sup> It then rebutted the applicant's arguments by contending, *inter alia*, that the Commission had mentioned specific cases of functional interchangeability between the 'Avro' (a four-engine aircraft), powered by the Honeywell engine, and other aircraft (a two-engine aircraft).<sup>467</sup> However, the CFI granted deference to the Commission in relation to its departure from previous case-law and to the fact that the Commission had not cited any specific example of instances of competition between the four-engine large regional aircraft powered by Honeywell and the two-engine large regional aircraft powered by General Electric. Therefore, in essence, the CFI did not question itself as to whether the novel method of defining the market by reference to the aircraft mission profile - by taking into account the number of seats, flying range and price - was appropriate in this case or whether the conventional method used by the Commission in its decisional practice would have been more adequate.

It should also be emphasized that, in this case, although the CFI had found several manifest errors of assessment vitiating the analysis carried out by the Commission, it did not annul the decision since it considered that the Commission had validly found that the criteria under Article 2(3) of Regulation No. 4064/89, establishing that a concentration that creates or strengthens a dominant position as a result of which effective competition would be significantly impeded shall be declared incompatible with the internal market, had been satisfied in relation to three separate markets. These included the market for jet engines for large regional aircraft, the market for corporate jet aircraft engines and the market for small marine gas turbines. The arguments put forward by the applicant in relation to these three markets, namely, the fact that General Electric and Honeywell's engines were not substitutable, were identical to the ones mentioned *supra* relating to the market for large regional jet aircraft engines, which had been dismissed by the CFI. Therefore, it is dubious

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<sup>465</sup> Case T-210/01 *General Electric v Commission* [2005] ECR II-5575, paras. 475-479.

<sup>466</sup> Case T-210/01 *General Electric v Commission* [2005] ECR II-5575, para 489.

<sup>467</sup> Case T-210/01 *General Electric v Commission* [2005] ECR II-5575, para 526.

whether the outcome of the appeal would have been the same had the CFI not applied the ‘manifest error standard’.

### 2.3.3. *The airline cases: the Easyjet and Ryanair judgments*

The *Easyjet*<sup>468</sup> judgment is also illustrative given that despite the strong arguments put forward by the applicant, the CFI on 4 July 2006 dismissed Easyjet’s appeal against the Commission decision to authorize the Air France/KLM merger on the ground that the Commission had not committed manifest errors of assessment. The applicant argued, *inter alia*, that the Commission had failed to consider the strengthening of the dominant position of the merged entity on the routes on which the activities of the merging parties did not overlap, either directly or indirectly. Easyjet also contended that the Commission had committed a manifest error of assessment by failing to consider the possible strengthening of the dominant position of the merged entity on the market for the purchase of airport services and by finding that the CDG and Orly airports were substitutable.

Concerning the first plea in law, Easyjet alleged that the Commission had failed to consider whether the additional benefits resulting from the merger and the increase in Air France’s network or its presence at international level would have the effect of strengthening its position on those routes. Easyjet thus considered that the Commission had departed from its previous decisional practice by not analyzing the broader impact of the concentration on non-overlapping markets.<sup>469</sup> It also pointed out that Air France had a monopoly of 27 of the 42 domestic routes from Paris, that it had 61.8% of the total capacity on routes from France and 53% of the total number of slots available at Orly as well as 74% of those at CDG airport. The CFI dismissed the applicant’s first plea on the ground that it had failed to identify clearly the non-overlapping markets and stated, that, in any case, commitments had been offered to remedy possible competition problems on overlapping routes.<sup>470</sup>

As regards the second plea put forward by Easyjet, the latter argued that Air France and KLM were purchasers of airport services, a market which is linked to airport infrastructures for which a fee is payable. It also explained that, in accepting commitments to deal with Air France’s dominant position in its Paris hub, the Commission implicitly found that the

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<sup>468</sup> Case T-177/04 *Easyjet v Commission* [2006] ECR II-1931.

<sup>469</sup> Case T-177/04 *Easyjet v Commission* [2006] ECR II-1931, para 48.

<sup>470</sup> Case T-177/04 *Easyjet v Commission* [2006] ECR II-1931, paras. 63-71.



merger would strengthen Air France's position at CDG and Orly airports in the market for the purchase of airport services. Nevertheless, the CFI rejected the applicant's plea stating that '[t]he Commission's acknowledgment of the existence of adverse effects on competition in respect of the commercial activities of the parties to the merger at the hubs, without carrying out a precise analysis of those markets, is not a manifest error of assessment such as to undermine the legality of the contested decision'.<sup>471</sup>

In relation to the third plea, the most interesting for the debate on the standard of review, Easyjet argued that the Commission had committed a manifest error of assessment by finding that the CDG and Orly airports were substitutable. It contended that CDG was almost twice as far from the center of Paris as Orly and that, in practice, most long-haul network carriers had concentrated their activities at CDG, while Orly was used for more short-haul intra-European and domestic traffic. In addition, given the differences in charges between these airports, low-cost carriers were usually based at the Orly airport. In rejecting the applicant's plea, the CFI explained that the Commission's *method* to assess the geographic substitutability of the airports by calculating the time required to travel from the center of Paris to the airports had not been contradicted by the applicant, given that the applicant had adduced no evidence to show that that test was not an important indicator of geographic substitutability. More interestingly, the CFI rebutted the applicant's arguments stating that the Commission had correctly found, when assessing the demand-side substitutability, that for point-to-point traffic, comprising both time-sensitive and non-time sensitive passengers, CDG and Orly were substitutable as they were located in the same catchment area and had comparable access facilities. As regards supply-side substitutability, although the Commission had taken into account the differences in types of flights and charges between airports, given that these only had a 'limited impact' on the substitutability assessment, the Commission had not committed a manifest error of assessment.<sup>472</sup>

This case arguably shows, namely its third plea relating to the various methods of assessment which were available, that even though an applicant's arguments may be plausible, the burden of proof on the applicant seems difficult to discharge, in particular to demonstrate a manifest error of assessment by the Commission when commitments have been accepted to remedy competition concerns and authorize a merger.

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<sup>471</sup> Case T-177/04 *Easyjet v Commission* [2006] ECR II-1931, para 87.

<sup>472</sup> Case T-177/04 *Easyjet v Commission* [2006] ECR II-1931, paras. 100-109.

More recently, in the *Ryanair* judgment,<sup>473</sup> the GC dismissed Ryanair's appeal against the Commission's prohibition decision of the Ryanair/Aer Lingus merger on the ground that the latter had failed to show that the Commission had exceeded the limits of the power of appraisal of economic situations that it enjoys under the case-law.<sup>474</sup> In this case, Ryanair alleged, *inter alia*, that the Commission had committed manifest errors of assessment regarding the competitive relationship between Ryanair and Aer Lingus. As part of this plea, Ryanair contended that the Commission had failed to take account of the 'fundamental differences' between both airline companies. In this respect, it argued that there were '*numerous flaws in the econometric analysis carried out by the Commission in accordance with the "fixed effects" (or "panel data" method)*' and had therefore proposed to use an alternative method; the 'cross-section regression' technique.<sup>475</sup>

According to Ryanair, by using the 'fixed effects' method, the Commission allegedly '*overstated the true competitive impact of the airlines on one another*'<sup>476</sup> and '*...the Commission's findings are not robust to small changes in the way in which the seasonal effects were taken into account in the model used*'.<sup>477</sup> After having submitted economic reports undertaken by RBB Economics in support of its argument, Ryanair went on to say that the Commission applied '*inconsistent standards in accepting or rejecting factual evidence*' and that '*[t]he econometric analysis undertaken by the Commission does not clearly show that Ryanair and Aer Lingus react to each other's promotions*'.<sup>478</sup>

In dismissing Ryanair's plea, the GC first reiterated the limits on the scope for judicial review in the following terms:

*'[t]he basic provisions of the [Merger Regulation]... confer on the Commission a certain discretion especially with respect to assessments of an economic nature, and ... consequently, review by the [EU] Courts... must take account of the margin of discretion implicit in the provisions of an economic nature which form part of the rules on concentrations... Whilst the Courts of the European Union recognize that the Commission has a margin of discretion with regard to economic matters, that does not mean that they must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must they establish, in particular, whether the evidence relied on is factually accurate, reliable and consistent but also whether that*

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<sup>473</sup> Case T-342/07 *Ryanair Holdings plc v Commission* [2010] ECR II-3457.

<sup>474</sup> See, *inter alia*, Case T-352/07 *Ryanair v Commission* [2010] ECR II-3457, paras. 119, 164, 178-180.

<sup>475</sup> Case T-342/07 *Ryanair Holdings plc v Commission* [2010] ECR II-3457, para 139.

<sup>476</sup> Case T-342/07 *Ryanair Holdings plc v Commission* [2010] ECR II-3457, para 139.

<sup>477</sup> Case T-342/07 *Ryanair Holdings plc v Commission* [2010] ECR II-3457, para 143.

<sup>478</sup> Case T-342/07 *Ryanair Holdings plc v Commission* [2010] ECR II-3457, para 144.

*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*.<sup>479</sup>

As to the specific circumstances of the case, the GC then went on emphasizing the Commission's margin of discretion by mentioning that *'it is necessary to refer to the content of the contested decision to understand the role played by the price regression analysis during the detailed investigation phase. That role must be assessed in the light of the case-law on the Commission's margin of discretion with regard to economic matters'*.<sup>480</sup>

The GC then explained that the Commission had favored the fixed-effects regression technique over the cross-section regression technique proposed by Ryanair because *'a panel regression with route specific fixed-effects could mitigate the omitted variable bias that affects cross-section regressions. It considered that that method was "the most suitable to assess the competitive constraint exerted by Ryanair on Aer Lingus'*.<sup>481</sup> The GC argued that *'the Commission stated in the contested decision that, as there are many instances of Ryanair entering or exiting routes on which Aer Lingus was already present, the fixed-effects regression analysis was very well suited to assess whether Ryanair's presence is "negatively associated" with Aer Lingus prices'*.<sup>482</sup> It also added that *'it is important to bear in mind the role given to the fixed-effects regression analysis in the evaluation of the competitive situation. The Commission thus stated in the contested decision that that analysis confirmed and complemented the conclusions derived from the qualitative evidence, namely that Ryanair and Aer Lingus are close competitors. It stated that those results were also in line with the opinion of the majority of the people surveyed during the customer survey, from which it is apparent that the parties to the concentration are "closest competitors" where other airlines operate on the route'*.<sup>483</sup> On these grounds, the GC rejected Ryanair's proposal to use the 'cross-section regression' technique and concluded that the applicant had failed to

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<sup>479</sup> Case T-342/07 *Ryanair Holdings plc v Commission* [2010] ECR II-3457, paras. 29–30. See also former President of the General Court VESTERDORF B., *Standard of Proof in Merger Cases: Reflections in the Light of Recent Case Law of the Community Courts*, Conference Paper for the BICCL Third Annual Merger Conference, 6 December 2004 (*'As regards matters of law, the Community courts exercise full jurisdictional control. Indeed it is for the Community courts to provide the definitive interpretation of Community law, be it in Treaty provisions or secondary legal provisions such as those contained in the Merger Regulation, and this goes for both procedural and substantive legal provisions. The Community courts interpret the law and then check whether the Commission has applied the correct legal principles in the case under examination. There is no margin of appreciation left to the in this respect as to what are the legal criteria to apply'*).

<sup>480</sup> Case T-342/07 *Ryanair v Commission* [2010] ECR II-3457, para 147.

<sup>481</sup> Case T-342/07 *Ryanair v Commission* [2010] ECR II-3457, para 152.

<sup>482</sup> Case T-342/07 *Ryanair v Commission* [2010] ECR II-3457, para 159.

<sup>483</sup> Case T-342/07 *Ryanair v Commission* [2010] ECR II-3457, para 163.

demonstrate that the Commission had exceeded the limits of its discretion in relation to economic matters.<sup>484</sup>

#### 2.3.4. *The Impala case*

The *Impala* judgment, concerning the Commission's *SONY/BMG* decision,<sup>485</sup> is particularly interesting for the debate on the standard of review as here the EU Courts reiterated their views on the intensity of their control *vis à vis* complex economic assessments made by the Commission.

As to the facts of the case, in 2004 Sony and BMG notified the Commission of their agreement to merge their recorded music businesses into a 50/50 joint venture named SonyBMG. On 20 July 2004 the Commission adopted a decision in which it approved the merger unconditionally under the old EC Merger Regulation (Regulation No. 4064/89) as it considered that the merger would not create or strengthen a collective dominant position between the remaining four major record companies (Universal, SonyBMG, Warner and EMI) in the market for recorded music. Impala, a trade association representing independent music companies, lodged an action before the CFI seeking the annulment of the Commission's decision. It claimed that the Commission committed a number of manifest errors of assessment, in particular, by finding that there was not a collective dominant position in the market for recorded music prior to the merger and that the merger did not strengthen this existing collective dominant position. The CFI on 13 July 2006 annulled the Commission's decision finding it was affected by a number of manifest errors of assessment. In particular, the two main reasons why it had concluded that there was not a collective dominant position on the markets for recorded music (the lack of transparency and absence of retaliatory measures) were not adequately supported by the

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<sup>484</sup> Case T-342/07 *Ryanair v Commission* [2010] ECR II-3457, para 164. In 2009, Ryanair notified to the Commission a further bid to acquire Aer Lingus, but this notification was then withdrawn. In 2012, Ryanair announced and notified to the Commission its intention to make an all cash offer for the entire issued and to be issued share capital of Aer Lingus. In February 2013, after an in-depth Phase II investigation, the Commission announced that it prohibited the acquisition under the EU Merger Regulation (Commission Decision of 27 February 2013 in Case COMP/M.6663 – *Ryanair/Aer Lingus III*). Ryanair appealed this decision to the GC (Case T-260/13 *Ryanair Holdings v Commission*) in front of which the case is currently pending. See, *inter alia*, CALZADO R. J., BARBIER DE LA SERRE E., *Judicial Review of Merger Control Decisions After the Impala Saga: Time for Policy Choices?*, in *The European Antitrust Review – Global Competition Review*, 2009; and VAN ROMPUY B., *The Standard of Proof in EC Merger Control. Conclusions from the Sony BMG Saga*, IES Working Paper 4/2008.

<sup>485</sup> Commission Decision of 19 July 2004, approving under the EC Merger Regulation (Regulation 4064/89) the joint venture between Sony and BMG (Case COMP/M.3333 - *Sony/BMG*).

Commission's reasoning or examination.<sup>486</sup> Sony and BMG appealed the CFI's judgment to the ECJ which, on 10 July 2008, annulled the CFI's judgment.<sup>487</sup> Interestingly, one of the main claims of the appellants was that the CFI had exceeded the scope of its judicial review by substituting its own assessment for that of the Commission and, in doing so, committed manifest errors and fundamentally misconstrued the evidence.

In her Opinion delivered in this case, Advocate General Kokott discussed in detail issues relating to the standards and burdens of proof in merger cases and the scope of the CFI's review, concluding that the CFI was correct to find that the Commission had failed to state adequate reasons and had committed a manifest error of appraisal.<sup>488</sup> From the Advocate General's analysis it is possible to claim that the deference that the EU Courts must show to the Commission's complex economic assessments concerns the Commission's 'assessment', rather than the 'complexity' or 'economic' character of the evidence relied upon.<sup>489</sup> As Advocate General Kokott explained, '*the [General] Court exceeds the limits of judicial review of a Commission decision in the context of merger control only where the factual and evidential position reasonably allows different assessments, the Commission adopts one of them, and the [General] Court nonetheless substitutes its own different assessment for that of the Commission*'.<sup>490</sup>

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<sup>486</sup> As a result of the CFI's judgment, the SonyBMG transaction (which had been fully implemented) had to be re-notified by the parties for re-examination by the Commission on the basis of current market conditions. Following a Phase II investigation, the Commission announced in October 2007 that it had again decided to approve the merger unconditionally (Case COMP/M.3333 – *Sony/BMG*). Impala lodged a further appeal with the GC against this second Commission Decision (Case T-229/08 *Impala v Commission*), which was declared devoid of purpose by Order of the General Court of 30 September 2008.

<sup>487</sup> Case C-413/06 P *Bertelsmann AG and Sony Corporation of America v Independent Music Publishers and Labels Association (Impala)* [2008] I-4951. See, *inter alia*, BRANDENBURGER R., JANSSENS T., AITKEN J., *Bertelsmann and Sony Judgment Welcome Clarity for EC Merger Review of the EU's Highest Court*, GCP – Online Magazine for Global Competition Policy, July 2008, No. 2; and HIRSBRUNNER S., KÖCKRITZ C. V., *Rebalancing EC Merger Control: The ECJ Judgment in Case C-413/06P (Bertelsmann and Sony)*, GCP – Online Magazine for Global Competition Policy, July 2008, No. 2.

<sup>488</sup> Opinion of Advocate General Kokott in Case C-413/06 P *Bertelsmann AG and Sony Corporation of America v Independent Music Publishers and Labels Association (Impala)* [2008] I-4951.

<sup>489</sup> See, *inter alia*, FORWOOD N., *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*: '[t]he mere fact that an assessment is made which requires the consideration of (possibly esoteric) economic arguments and the examination of economic evidence ... does not necessarily make an assessment subject to judicial review a "complex" one, subject only to limited control, even though it may make the task of the judge extremely difficult to or burdensome ... it could be said that what the Court of Justice had in mind, at least in the first thirty years or so of its case law, was that "complexity" refers more to the nature of assessment that needs to be made, rather than its technical or evidential difficulty'.

<sup>490</sup> Opinion of Advocate General Kokott in Case C-413/06P *Bertelsmann AG and Sony Corporation of America v Independent Music Publishers and Labels Association (Impala)* [2008] I-4951, para 240.

The ECJ judgment however diverged from the Advocate General's conclusions and set aside the CFI judgment on the basis that the CFI had made a number of errors of law.<sup>491</sup>

As to the scope of the CFI's role in exercising its judicial review powers, the ECJ noted that, due to the Commission's margin of assessment with regard to economic matters, and applying the substantive rules of the EU Merger Regulation, the CFI's review is limited to ascertaining that the facts have been accurately stated and that there has been no manifest error of assessment. The CFI must not substitute its own economic assessment for that of the Commission.<sup>492</sup> The CFI must, however, establish whether the evidence relied on is factually accurate, reliable and consistent, complete and capable of supporting the Commission's conclusions. Therefore the CFI could not be criticised for conducting an in-depth examination of the evidence underlying the Commission's decision when considering the arguments raised before it. However, the CFI committed errors of law in relation to the manner in which some of the evidence was dealt with and the legal criteria applying to collective dominance. Therefore, at least part of the CFI's judgment dealing with the examination of the arguments raised by Impala, alleging manifest errors of assessment by the Commission, was vitiated by errors of law. The ECJ therefore set aside the CFI's judgment; however, since it considered that the CFI had only examined two of the five original pleas of the applicant and was not in a position to give final judgment, it referred the case back to the CFI. On 30 June 2009, the CFI made an order stating that the case was devoid of purpose and there was no need for the court to adjudicate on the matters referred back.<sup>493</sup>

#### ***2.4. Concluding remarks on the standard of review in EU merger control: the current rule as it stands***

With the change in formulation of the 'limited' standard of review which occurred in *Tetra Laval*, the question remained whether there was still room for the Commission's margin of appreciation in relation to complex economic and/or technical assessments. The

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<sup>491</sup> The ECJ found that the CFI placed too much reliance on the conclusions in the Commission's statement of objections. Further, the CFI placed too high an investigatory standard on the Commission and erred in relying on confidential documents which the Commission could not have relied on. The CFI also misconstrued the legal criteria applying to a collective dominant position: it failed to analyse market transparency in the light of a plausible theory of tacit co-ordination. Finally, the CFI erred in finding that the Commission had failed to provide an adequate statement of reasons.

<sup>492</sup> Case C-413/06 P *Bertelsmann AG and Sony Corporation of America v Independent Music Publishers and Labels Association (Impala)* [2008] I-4951, para 145.

<sup>493</sup> Order of the CFI of 30 June 2009 in Case T-464/04 *Impala v Commission*.

examination of the case law above demonstrates that even though the *Tetra Laval*, *Airtours* and *Schneider* jurisprudence clarified the meaning of the ‘limited’ standard of review and emphasized the need for the Commission to provide more evidence to substantiate its cases, it has left the Commission a significant margin of discretion. The answer is thus in the affirmative. On the one hand, it is peaceful that there is no margin of discretion for the Commission when evaluating facts, which entails that EU Courts may subject to rigorous review the accuracy, completeness and robustness of the facts relied upon by the Commission. On the other hand, the EU Courts may not substitute their judgment for that of the Commission. This entails that a margin of appreciation continues to exist for the Commission in relation to the choice of the approach that is best adapted to the hypothesis it has to treat.<sup>494</sup> In practical terms, this entails that the Commission is still free to choose the methodology it wants to use, no theory being inadmissible in so far as it leads to convincing results. Thus while EU Courts may annul a decision when the Commission has committed a manifest error that calls into question the validity of the conclusions reached, they must refrain from overturning the decision when the Commission’s assessment was reasonable in the circumstances.<sup>495</sup>

This is particularly relevant when the same evidence might lead to different conclusions depending on the methodology used in interpreting this evidence. The latter are still today decisions that fall within the margin of discretion of the Commission. In these cases the EU Courts cannot substitute an alternative and equally plausible conclusion, proposed by the parties or conceived on the Court’s own initiative, for the one the Commission has reached, in so far as the Commission has not committed a ‘manifest error of assessment’. In reviewing the exercise of that discretion, the Courts have consistently acknowledged that the ‘*Community judicature ... must take account of the discretionary margin implicit in the provisions of an economic nature which form part of the rules on concentrations*’.<sup>496</sup> This has been very well resumed in the words of Advocate General Kokott in the *Impala* case where she explained

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<sup>494</sup> VALLINDAS G., *Le Tribunal et la concurrence: le juge face aux appréciations économiques complexes*, in *Revue des affaires européennes*, No. 3, 2009-2010, p. 464.

<sup>495</sup> REEVES T., DODOOT N., *Standards of Proof and Standards of Judicial Review in EC Merger Law*, - 14th Annual IBC Conference on “An Advanced analysis of Major Developments in the field of EC Competition Law and Policy”, Brussels, 17-18 November 2005, pp. 140-141: ‘*the case law of the Courts suggests that the Commission is entitled to a broad margin of discretion in relation to its choice of economic theory of harm applied to a case, provided, importantly, that the theory in question is consistent with, and is supported by, the underlying facts of the case*’.

<sup>496</sup> Case T-342/99 *Airtours plc v Commission* [2002] ECR II-2585, para 64. *See also* Case C-12/03 P *Commission v Tetra Laval BV* [2005] ECR I-987, para 119.

that ‘the [General] Court exceeds the limits of judicial review of a Commission decision in the context of merger control only where the factual and evidential position reasonably allows different assessments, the Commission adopts one of them, and the [General] Court nonetheless substitutes its own different assessment for that of the Commission’.<sup>497</sup>

Accordingly, while on the one hand following the 2002 cases the EU Courts have been called upon to exercise increased rigor in their analysis in the presence of complex economic or technical appraisals, which hardly leads to consider the EU Courts’ review one concerning only obvious, irrational or glaring mistakes; on the other hand, the continuous presence of the ‘limited’ review test continues to tip the scale in favor of the Commission’s appreciations in cases where equally plausible theories could be advanced. This may be particularly problematic and hard to justify in cases where the Commission follows a theory or methodology which is not consistent with mainstream economics, but shows as highly probable an increase in prices, instead of mainstream methodologies or theories that lead to less clear-cut results.<sup>498</sup> More generally, the risk is that this approach may give too much leeway to the Commission in cases where the circumstance that the application of different models may lead to conflicting results concerning the possible harmful effects of a merger should have effectively led the Commission to not intervene in the first place.

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<sup>497</sup> Opinion of Advocate General Kokott in Case C-413/06P *Bertelsmann AG and Sony Corporation of America v Independent Music Publishers and Labels Association (Impala)* [2008] I-4951, para 240.

<sup>498</sup> BOTTEMAN Y., *Mergers, Standard of Proof and Expert Economic Evidence*, in *Journal of Competition Law & Economics*, Issue 1, 2006, p. 73.



CHAPTER

4

PROPOSALS FOR REFORM CONCERNING THE SCOPE  
AND INTENSITY OF JUDICIAL REVIEW IN  
COMPETITION CASES



## 1. INTRODUCTION

After having examined in the previous Chapters the terms of the debate on the opportunity and/or necessity of intensifying the judicial control exercised by the EU Courts in competition cases, and after having analysed the EU case law in both the antitrust and merger fields on how the standard of review has been described and applied over the years, the following Chapter will illustrate the proposals that have been made to reform the characteristics of the current system of judicial review. In particular, the analysis will focus on the suggestions that have been made to solve the alleged problems raised by the limited review EU judges exercise over the Commission's assessments in the competition field within the review of legality *ex* Article 263 TFEU. A number of these proposals entail structural changes to the current system while others could be implemented without affecting the general EU architecture in competition cases. An attempt will be made to understand the likelihood that institutional changes may be implemented in the near future considering the positive or negative views accompanying them. As to the proposals that are essentially centred on the EU Courts' willingness to intensify the judicial review they carry out, an attempt will be made to understand the likelihood that judicial control may effectively become more intense in the future and, if so, which areas of competition law are likely to be interested by this change.

## 2. PROPOSALS FOR REFORM WHICH ENTAIL STRUCTURAL CHANGES TO THE SYSTEM OF JUDICIAL REVIEW IN ARTICLE 101 AND 102 TFEU CASES

Several proposals have been made over the past years that are meant to address from a structural and institutional point of view the shortcomings of the current system of judicial review in competition cases. A number of these proposals affect directly the review powers and the organization of the EU Courts, while others affect more closely the powers of the Commission and its organization. Particular attention will be given to those proposals which affect more closely the EU Courts and the EU judicial architecture. As to those proposals that concern more closely the Commission, to the extent they are conceived to

address the criticisms raised by the current characteristics of the judicial review system, they will be addressed briefly in this overview.

### ***2.1. Decision-making powers left to the EU Courts or attribution of full appellate jurisdiction on the merits***

One reform which is considered highly controversial but at the same time capable of addressing ‘*many of the concerns, if not all, raised over the years, concerning the compatibility of the system with the [ECHR]*’,<sup>499</sup> foresees the replacement of the current system with a contradictory process where the Commission and interested firms argue their positions before the GC, which would be in charge of adopting a binding decision.<sup>500</sup> The current system would be replaced by a new one where the Commission continues to investigate and exercise its prosecutorial role, while the decisional power is transferred to the EU judiciary which becomes responsible for deciding if effectively there has been a violation of the competition rules, including the imposition of sanctions.

The authors who defend the various variants of this proposal are mainly attracted by the circumstance that all the controversies and mysteries surrounding the EU Courts’ ‘limited’ judicial review standard in competition cases would be swept away by this solution. The contradictory nature of the process would guarantee in fact that the EU Courts not only assess complex economic and/or technical assessments, but also evaluate on an equal footing the Commission’s and the interested firms’ views. As well described by one author ‘*[i]n a contradictory process, where there is no presumption of legality for the Commission’s position, parties will have equality in arms in trying to convince the judges of the merits of their arguments and appraisals of*

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<sup>499</sup> See WAHL N., *The Role of the Court of Justice in Ensuring Compliance with Fundamental Rights*, in *The Role of the Court of Justice of the European Union in Competition Law Cases*, GCLC Annual Conferences Series (edited by MEROLA M. and DERENNE J.) Bruylant, 2010, p. 274; see also LANG J. T. who considers this ‘*the only reform which could lead to a situation clearly compatible with the European Convention on Human Rights*’; LANG J. T., *Three Possibilities for Reform of the Procedure of the European Commission in Competition Cases under Regulation 1/2003*, CEPS Special Report, 18 November 2011, p. 194.

<sup>500</sup> LANG J. T., *Three Possibilities for Reform of the Procedure of the European Commission in Competition Cases under Regulation 1/2003*, CEPS Special Report, 18 November 2011. The author cites the proposal advocated by Schwarze on 25 September 2009 in a speech at the conference ‘Celebration of 20 years of the Court of First Instance of the European Communities’ at the GC in Luxembourg. This idea is not novel and was already explored and discussed in the 1990’s. At that time a number of authors believed the EU judicial review system to be unsatisfactory and advocated that adequate protection could only be guaranteed if the decision-making power was left to an independent judge. According to them, this solution would also ensure that the right to a fair trial under Article 6 ECHR would be respected in competition proceedings; see WAELBROECK D. and FOSSELARD D., *Should the Decision-Making Power in EC Antitrust Procedures be Left to an Independent Judge? - The Impact of the European Convention on Human Rights on EC Antitrust Procedures*, in *Yearbook of European Law*, 1994, Vol. 14, pp. 111-142.

*complex facts. The judges will no longer review a privileged party's appraisal in order to find "manifest errors", but will undertake the exercise judges do best, next to interpreting the law: assessing whose position is the most probable.*<sup>501</sup>

Closely related to the above suggestion in terms of benefits for interested parties is the proposal that, rather than foreseeing a structural change in the EU competition architecture, leaves unchanged the current distinction between the Commission as investigator, prosecutor and decision-maker, and the EU Courts as guardians of the Commission's actions, but advocates for the introduction of a jurisdiction on the merits for the EU Courts in competition cases.

These proposals will be examined in turn in the following subsections. As will be seen, the main arguments against these solutions range from practical issues concerning their administrative costs of execution,<sup>502</sup> and difficulties in their implementation (requiring more or less extensive Treaty and/or legislative amendments), to broader concerns relating to the difficulty of reconciling these solutions with the principles governing the EU judicial architecture established with the Treaties.

#### 2.1.1. *The EU Courts as decision-makers*

The proposal of vesting the GC with decision-making powers is highly attractive for the present debate on the standard of judicial review as it addresses one of the main *lacunae* of the system, the existence of an impartial view by an independent body of which, among two potentially equal positions, is the most probable and should be validated. This solution would thus increase the intensity and scope of judicial review of the Commission's

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<sup>501</sup> WAHL N., *The Role of the Court of Justice in Ensuring Compliance with Fundamental Rights*, in *The Role of the Court of Justice of the European Union in Competition Law Cases*, GCLC Annual Conferences Series (edited by MEROLA M. and DERENNE J.) Bruylant, 2010, p. 275.

<sup>502</sup> Certain authors advocate for a strengthening of internal checks and balances within the Commission rather than the creation of a system based on prosecution before the EU Courts or a new court created to this end, as '*an intermediate approach... (hopefully) will address the most significant due process concerns regarding the existing ECMR system, while minimising the risk that the costs of a full-blown U.S.-style system are incurred*'; see Skadden Arps Comments on Commission's Green Paper on the Review of the EC Merger Regulation available at [http://ec.europa.eu/competition/consultations/2002\\_council\\_regulation/skadden.pdf](http://ec.europa.eu/competition/consultations/2002_council_regulation/skadden.pdf), para 4.3. This view is not shared by those authors who argue that the cost advantages of keeping the system unchanged are not as obvious as they seem. This argument is based on the consideration that in the current system subsequent applications for judicial review are frequent and the decision-making phase risks becoming a superfluous anticipation of the work which will later be anyway carried out by the reviewing court; see WILS P. J. W., *The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis*, in *Concurrences*, 2005, No. 3, pp. 10-11.

assessments as the final decision is no longer taken by the latter.<sup>503</sup> This proposal would also be compatible with the requirements of the right to a fair trial enshrined in Article 6 ECHR as the final decision imposing a sanction in a ‘criminal’ or ‘quasi-criminal’ proceeding would be adopted by an independent and impartial tribunal.<sup>504</sup>

According to certain authors, this solution would be easily attainable from a practical point of view as it would not necessarily require an amendment of the EU Treaties. According to this view, the power to adopt decisions could in fact be transferred from the Commission to the EU Courts relying on Article 103 TFEU which authorises the EU Council ‘to define the respective functions of the Commission and the Court of Justice’ in applying competition law.<sup>505</sup> The EU Courts, in particular the GC, would have the power to decide all competition cases and would thus exercise powers of full jurisdiction, as currently the case in relation to appeals concerning fines. This view however is not shared by those commentators who consider that the conferral to the EU Courts of the power to adopt or re-adopt a decision on the merits entails a radical departure from the powers of judicial

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<sup>503</sup> INTERNATIONAL CHAMBER OF COMMERCE COMMISSION, *Due process in EU antitrust proceedings*, Comments submitted on the European Commission's draft Best Practices in Antitrust Proceedings and the Hearing Officers' Guidance Paper, 8 March 2010, p. 8: ‘[i]n an ideal world, we would recommend that the Commission would hand over the power to take decisions involving penalties to an independent court or tribunal (whether the GC or another community court). Then penalties would be imposed by the Courts not the Commission, resolving the ECHR issue’. According to Wils, ‘the arguments in favour of an alternative system in which the European Commission would prosecute before the Community Courts would appear to be stronger with regards to Articles 81 and 82 than with regard to mergers’. Wils bases his conclusion on the quasi-criminal nature of Article 101 and 102 TFEU cases and on the assumption that there are greater risks of prosecutorial bias in these enforcement cases than in merger case; see WILS P. J. W., *The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis*, in *Concurrences*, 2005, No. 3, p. 12.

<sup>504</sup> Certain authors also remark that should the concentration of powers in an administrative agency issuing criminal sanctions in competition cases be condemned as contrary to the right to a fair trial, then a transfer of decision-making powers to the courts becomes all the more necessary; see BRONCKERS M, VALLERY A., *Fair and Effective Competition Policy in the EU: Which Role for the Authorities and Which Role for the Courts after Menarini (July 5, 2012)*, in *European Competition Journal*, Vol. 8, No. 2, 2012, available at SSRN: <http://ssrn.com/abstract=2137524>, p. 13.

<sup>505</sup> LANG J. T., *Three Possibilities for Reform of the Procedure of the European Commission in Competition Cases under Regulation 1/2003*, CEPS Special Report, 18 November 2011, p. 221. The author however points out that difficulties may arise as the Commission, having the exclusive right of legislative initiative, may not want to pursue measures that do not meet its institutional interests. However, these should be overcome by the Commission's own interest that its procedures not be found to be incompatible with the ECHR. See also WILS P. J. W., *The combination of the investigative and prosecutorial function and the adjudicative function in EC antitrust enforcement: A legal and economic analysis*, in *Concurrences*, 2005, No. 3, p. 5. Wils considers that the transfer of decision-making powers in antitrust cases from the Commission to the EU Courts would not require a modification of the Treaties as ‘Article 83(1) EC [now Article 103(1) TFEU] gives a wide mandate to the Council...[and] this provision would appear precisely to allow the Council to transfer the decisional power with regard to Articles 81 and 82 EC from the Commission to the Courts’. Interestingly, Wils also considers that prosecution by the Commission before the EU Courts would have been the understanding of the Spaak Report preceding the adoption of the EC Treaty; see WILS W. P. J., *Principles of European Antitrust Enforcement*, Hart Publishing, 2005, p. 160.

review attributed to the EU Courts, and would thus require an amendment of the Treaty.<sup>506</sup> A further obstacle is that in the merger field Article 103(1) TFEU could not be used as the main legal basis for any proposal for change given that the legal basis of the EU Merger Regulation is not Article 103 TFEU but rather Article 352 TFEU (ex Article 308 EC).

In any event, a reform of this nature and scope require changes to Regulation 1/2003 and to the EU Merger Regulation (as the Commission would no longer be entitled to adopt prohibition or - in the merger field - clearance decisions), and to the Statute and Rules of Procedure of the EU Courts. The latter changes would find their legal basis in Article 256(1) TFEU that states that '[t]he Statute may provide for the General Court to have jurisdiction for other classes of action or proceeding'.<sup>507</sup>

This proposal is considered attractive in terms of timing of proceedings as, according to its advocates, the length of the Commission's investigations would remain the same, while the length of the new procedure (investigation, application to the GC and GC decision) would be the same if not shorter than under the current procedure (investigation and decision by the Commission followed by judgment of the GC).<sup>508</sup> One of the disadvantages of this proposal concerns however the increased workload for the EU Courts, in particular the GC. Also, as the GC will engage in economic assessments that were prerogative of the Commission and in relation to which it exercised only limited review, it may have to

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<sup>506</sup> See Andreangeli reporting the comments of Judge Vesterdorf to the House of Lords Select Committee discussing the proposal advanced by the Confederation of British Industry to introduce a EU specialized panel responsible for the review of merger decisions and, perhaps at a later stage, of all competition decisions; ANDREANGELI A., *EU Competition Enforcement and Human Rights*, Edward Elgar, 2008, p. 237 and footnote 68. See also Killick and Berghe who consider that: '[t]his solution raises significant constitutional questions – it could require a change to the Treaties to implement, as well as significant organizational changes. So this is probably best seen as a long term goal, rather than a solution in the near term. Few associated with the EU would be keen to suggest Treaty changes after the difficulties of securing approval for the Lisbon Treaty – a process which highlighted that changing the Treaty can take many years to achieve and is not a short term or even medium term solution'; KILLICK J., BERGHE P., *This is not the time to be tinkering with Regulation 1/2003 - It is time for fundamental reform - Europe should have change we can believe in*, October 2010; available at [http://www.whitecase.com/files/Publication/08a7ee59-bbaa-44c8-90a7-d81d891d637f/Presentation/PublicationAttachment/7890f325-49b4-43e4-a0a5-dd7f74b44fc0/Article\\_This\\_is\\_not\\_the\\_time\\_to\\_be\\_tinkering\\_with\\_Regulation\\_1-2003.pdf](http://www.whitecase.com/files/Publication/08a7ee59-bbaa-44c8-90a7-d81d891d637f/Presentation/PublicationAttachment/7890f325-49b4-43e4-a0a5-dd7f74b44fc0/Article_This_is_not_the_time_to_be_tinkering_with_Regulation_1-2003.pdf), p. 2.

<sup>507</sup> For an overview of the changes that would be needed to the provisions of Regulation 1/2003 and the EU Courts' Statute and Rules of Procedure see LANG J. T., *Three Possibilities for Reform of the Procedure of the European Commission in Competition Cases under Regulation 1/2003*, CEPS Special Report, 18 November 2011, pp. 221 and 224-227.

<sup>508</sup> LANG J. T., *Three Possibilities for Reform of the Procedure of the European Commission in Competition Cases under Regulation 1/2003*, CEPS Special Report, 18 November 2011, p. 222.

require the assistance of economic experts or advocate for the appointment of judges with specialised economic knowledge.<sup>509</sup>

#### *2.1.1.1. The creation of a specialized competition chamber*

Closely related to the above solution is the proposal that recommends the creation of a chamber within the GC specialized in competition matters.<sup>510</sup> While the Commission would retain its investigative and prosecutorial tasks, the GC would decide on infringements of competition law and possibly sanctions through the determinations of a specific competition chamber. This solution would ensure that proceedings are fair, objective and impartial, and that the review of complex economic and/or technical findings is made by judges who are competent in both law and economics. According to certain commentators, this solution would be compatible with the present constitutional framework as it could be implemented using as legal basis Article 103 TFEU, as illustrated above, without the need for Treaty modifications.<sup>511</sup> This view is not however shared by those commentators who, as seen *supra*, consider that the conferral to the EU Courts of the power to adopt or re-adopt a decision on the merits entails a radical departure from the powers of judicial review attributed to the EU Courts, and would thus require an amendment of the Treaty, which could be all the more necessary in order to ensure consistency and in order to apply equivalent procedures in the merger field.

#### *2.1.1.2. The creation of a competition specialized court*

The creation of a judicial panel competent for competition cases has also been debated. Introduced by the Nice Treaty and now having their legal basis in Article 257 TFEU, specialised courts attached to the GC can be established by the European Parliament and the Council, to hear and determine at first instance certain classes of action or proceedings

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<sup>509</sup> LANG J. T., *Three Possibilities for Reform of the Procedure of the European Commission in Competition Cases under Regulation 1/2003*, CEPS Special Report, 18 November 2011, p. 223.

<sup>510</sup> This solution was considered '*the most satisfactory alternative*' to giving the EU Courts powers of full jurisdictional review by Working Group III in its Report produced for the GCLC conference of 11-12 June 2009; see WAELBROECK D., *The Enforcement System for Articles 81 and 82 EC: Time for a Redefinition of Decision-Making in EC Competition Law*, Concurrences, No. 3, 2009, p. 19.

<sup>511</sup> WAELBROECK D., *The Enforcement System for Articles 81 and 82 EC: Time for a Redefinition of Decision-Making in EC Competition Law*, Concurrences, No. 3, 2009, p. 19.



brought in specific areas.<sup>512</sup> However, given that decisions by specialized courts may be subject to a right of appeal before the GC, it has been claimed that they present no obvious advantage compared to specialized chambers within the GC or compared to the creation of a new court at the level of the GC.<sup>513</sup> Furthermore, given the panel's 'lower' status compared to the GC, the implementation of this proposal could meet the practical obstacle of not easily finding judges specialized in competition law willing to work for this lower court, without considering the amount of criticism this solution can raise in terms of prolonging competition proceedings in light of the creation of a third level of judiciary review.

In 2007 a U.K. House of Lords Committee discussed the proposal advanced by the Confederation of British Industry to introduce a EU specialized panel responsible for the review of merger decisions and, perhaps at a later stage, of all competition decisions. The conclusions reached by the Committee in its final report are interesting for the present debate as it was considered that the creation of a new judicial body was not appropriate and proportionate to respond to the concerns for timely and final review of merger decisions.<sup>514</sup> In particular, the main criticisms against the proposal concerned the circumstance that it would increase the complexity of the current framework by adding a new layer of review and would not necessarily entail time savings considering the nature of the complex litigation. These concerns were also expressed by the President of the ECJ Mr. Skouris who, speaking personally, in 2008 considered that the creation of a specialized court for competition cases would make the system complex, time consuming and could lead to lack

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<sup>512</sup> Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed at Nice, 26 February 2001, in OJ [2001] C80/1. Article 256 TFEU establishes that: '[t]he European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish specialised courts attached to the General Court to hear and determine at first instance certain classes of action or proceeding brought in specific areas. The European Parliament and the Council shall act by means of regulations either on a proposal from the Commission after consultation of the Court of Justice or at the request of the Court of Justice after consultation of the Commission'. On the basis of this provision on 2 November 2004 the Council of the EU adopted a decision establishing the EU Civil Service Tribunal. The new specialized court, composed of seven judges, adjudicates in disputes between the EU and its civil service, a jurisdiction that until 2005 was exercised by the GC. Its decisions are subject to appeal on questions of law only to the GC and, in exceptional cases, to review by the ECJ.

<sup>513</sup> LANG J. T., *Do We Need a European Competition Court?*, in *Liber Amicorum* in honour of Bo Vesterdorf, Brussels, 2007. According to the President of the CFI Mr. Jaeger, the proposal to appoint specialised judges should be examined with great care and attention by the Member States because difficult to reconcile with the generalist nature of the CFI as envisaged by the treaty itself; see JAEGER M., *The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of the Marginal Review?*, in *Journal of European Competition Law & Practice*, Vol. 2, No. 4, 2011, p. 311.

<sup>514</sup> See ANDREANGELI A., *EU Competition Enforcement and Human Rights*, Edward Elgar, 2008, pp. 236-238.

of cohesion given the ECJ's reduced role in these specialized areas.<sup>515</sup> This view is not shared by those commentators who consider the creation of a specialized court a serious option still to be studied. In particular, the Nice Treaty expressly introduced the possibility of a third-level review in certain areas of the law, not necessarily limited to staff cases, with the agreement of the Member States, thus any risk of diversity in jurisprudence should be addressed with the instruments and remedies provided for in the Treaties, such as Article 256(2) TFEU which provides for mechanisms for resolving interpretative problems.<sup>516</sup>

### 2.1.1.3. *The creation of a competition court at the same level of the GC*

Another proposal that has been advanced is that of creating *at the same level* of the GC a new court specialized in competition law. This is normally considered an alternative solution to the creation, always at the GC level, of specialized chambers within the GC's own organization. It has been considered that this solution should be pursued only to the extent that it is not possible to set up specialized chambers, as the creation of a new court raises a number of additional issues, including, among others, the length for setting it up, the clear definition of its jurisdiction (in particular for competition cases which overlap with other areas of EU law), and coordination of the interpretation and application of EU law by the judges of the new court and the GC.<sup>517</sup>

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<sup>515</sup> SKOURIS V., *De nouveaux défis pour la Cour de Justice dans une Europe élargie*, ERA-Forum, Vol. 9, Issue. 1, 2008, pp. 99-108. Judge Jaeger shares a similar view and considers that: *'the creation of a specialist judicial panel to deal with competition cases (or even certain categories of competition cases), often put forward as possible solution to the current overload of cases pending before the CFI, would not be, in my view, a satisfactory solution. Indeed, not only would it, in fact, increase the possibility of delays due to the resulting addition of a possible 're-examination' procedure of CFI appeal decisions before the ECJ, but it would also lead to the unacceptable risk of loss of cross-fertilisation advantage within the domain of EC administrative law, which is inherent in the current system'*; see JAEGER M., *The Court of First Instance and the Management of Competition Law Litigation*, in *EU Competition Law in Context*, Essays in Honour of Virpi Tiili, H. Kanninen, N. Korjus and A. Rosas (eds.), Hart Publishing, Oxford 2009, p. 9.

<sup>516</sup> BELLAMY C., *An EU Competition Court: The Continuing Debate*, in LIANOS I., KOKKORIS I. (eds.), *The reform of EC competition law: new challenges*, Kluwer Law International, 2010, pp. 50-51. Article 256(2) TFEU establishes that: *'[t]he General Court shall have jurisdiction to hear and determine actions or proceedings brought against decisions of the specialised courts. Decisions given by the General Court under this paragraph may exceptionally be subject to review by the Court of Justice, under the conditions and within the limits laid down by the Statute, where there is a serious risk of the unity or consistency of Union law being affected'*.

<sup>517</sup> LANG J. T., *Do We Need a European Competition Court?*, in *Liber Amicorum in honour of Bo Vesterdorf*, Brussels, 2007. According to BARBIER DE LA SERRE, the case for the establishment of a specialised competition court will become less and less compelling if the number of competition cases actually diminish, which may be a consequence of the increased use of the commitment procedure; see BARBIER DE LA SERRE E., *Competition Law Cases Before the EU Courts*, in *The Role of the Court of Justice of the European Union in Competition Law Cases*, GCLC Annual Conferences Series (edited by MEROLA M. and DERENNE J.) Bruylant, 2010, p. 100. The proposals for the creation of a judicial panel or a new court specialized in competition matters is not novel; see VESTERDORF B., *Recent CFI Rulings on Merger Cases, Interim Measures and Accelerated Procedures and Some Reflections on Reform Measures Regarding Judicial Control*, in EC

### 2.1.2. *The attribution of full judicial review powers to the EU Courts*

Another solution that has been advanced to solve the current shortcomings of the judicial review system in competition cases is to empower the EU Courts with full appellate jurisdiction over all of the Commission's assessments incorporated in a decision, and not only in relation to fines. It is argued that this solution, which would allow for the EU Courts to vary all of the contested measure, including the merits of the Commission's decision and not only the amount of the fine, would have the advantage of ensuring '*an open space for litigating the merits of antitrust cases*'.<sup>518</sup> Currently, under the review of legality, EU Courts can only declare the measure examined void, and under the limited judicial review standard, the EU Courts do not substitute their own assessments for those of the Commission in the case of complex economic and/or technical evaluations. This entails that the EU Courts do not carry out a balancing exercise between the Commission's interpretation of facts and evidence and the different interpretations that may be advanced by interested parties, as this would encroach on the Commission's discretion. The attribution of full judicial review powers would ensure that the Commission and interested parties appear on an equal footing in front of the EU Courts and that their pleas and arguments are given the same weight and relevance. Providing the EU Courts with full appellate review powers would also address the widespread criticism against the concentration of powers in the hand of the Commission as, notwithstanding the accumulation of investigatory, prosecutorial and decision-making functions, the Commission would have to conduct its activities in the shadow of full review.

Moreover, certain advocates of this proposal claim that this solution would bring the EU competition enforcement system to comply with the case law of the ECtHR on the right to a fair trial. According to this view, in the case of non hard-core criminal charges (as allegedly the case in the competition field),<sup>519</sup> the ECtHR requires that the appeal

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Merger Control: A Major Reform in Progress, Papers from the EC Merger Control Conference held in Brussels in November 2002 under the auspices of the European Commission Directorate General for Competition and the International Bar Association, pp. 79-84.

<sup>518</sup> GERARD D., *Breaking the EU Antitrust Enforcement Deadlock: Re-empowering the Courts*, in *European Law Review*, 2011, Vol 36(4), p. 475.

<sup>519</sup> Commentators who consider that competition charges belong to the 'hard-core' criminal head of Article 6 ECHR argue that this solution is still incompatible with ECHR requirements because a criminal punishment would still not be imposed by a court at first instance; this solution would however contribute to curing the defects of proceedings before the Commission; see KILLICK J., BERGHE P., *This is not the time to be tinkering*

jurisdiction not only verify the correct application of the law, but also engage in a complete reassessment of the facts and evidence before it (*de novo* review). Accordingly, the EU Courts' unlimited jurisdiction in relation to fines should also extend to the determination of the infringement.<sup>520</sup>

According to the supporters of this proposal, the current legal framework would already provide for the necessary means to support this transformation, without the need for formal Treaty amendments. According to one view, Article 103 TFEU could be used as it empowers the Council to adopt secondary legislation that defines the respective functions of the Commission and the Courts with regard to competition law, including expansion of the Courts' powers of review (*see supra* subsection 2.1.1 in this Chapter on Article 103 TFEU).<sup>521</sup> According to another view, the legal basis for the exercise of this unlimited jurisdiction in relation to the entire content of a Commission's decision would be provided by Article 31 of Regulation 1/2003 and Article 16 of the EU Merger Regulation which refer to the EU Courts' '*unlimited jurisdiction...to review decisions*'.<sup>522</sup> This view would also find

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*with Regulation 1/2003 - It is time for fundamental reform - Europe should have change we can believe in*, October 2010; available at [http://www.whitecase.com/files/Publication/08a7ee59-bbaa-44c8-90a7-d81d891d637f/Presentation/PublicationAttachment/7890f325-49b4-43e4-a0a5-dd7f74b44fc0/Article\\_This\\_is\\_not\\_the\\_time\\_to\\_be\\_tinkering\\_with\\_Regulation\\_1-2003.pdf](http://www.whitecase.com/files/Publication/08a7ee59-bbaa-44c8-90a7-d81d891d637f/Presentation/PublicationAttachment/7890f325-49b4-43e4-a0a5-dd7f74b44fc0/Article_This_is_not_the_time_to_be_tinkering_with_Regulation_1-2003.pdf), p. 10; and GCLC WORKING GROUP, *Enforcement by the Commission. The Decisional and Enforcement Structure in Antitrust Cases and The Commission's Fining System*, Report prepared from the Global Competition Law Centre (GCLC)'s Annual Conference "Towards an Optimal Enforcement of Competition Rules in Europe -- Time for a Review of Regulation 1/2003" (11 and 12 June 2009, Brussels), available at [http://www.learlab.com/conference2009/documents/The%20decisional%20and%20enforcement%20structure%20and%20the%20Commission\\_s%20fining%20system%20GERADIN.pdf](http://www.learlab.com/conference2009/documents/The%20decisional%20and%20enforcement%20structure%20and%20the%20Commission_s%20fining%20system%20GERADIN.pdf), p. 27.

<sup>520</sup> See, *inter alia*, SLATER D., THOMAS S., WAELBROECK D., *Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?*, Research Papers in Law/Cahiers juridiques, No. 5/2008, College of Europe, p. 33. According to these authors '[t]he CFI cannot limit its analysis to "manifest errors of appraisals or misuse of power" but should in every case reassess fully the facts and the choice of the appropriate legal and economic tests applied to these facts. The "unlimited jurisdiction" that the Community Courts are entitled to exercise should not be limited to altering the amount of the fines imposed on companies but should also extend to the very determination of the infringement giving rise to these sanctions' (p. 34). For a discussion on whether *de novo* review is effectively mandated by the ECHR *see supra* subsection 4.2.4.1 in Section II of Chapter 1.

<sup>521</sup> GCLC WORKING GROUP, *Enforcement by the Commission. The Decisional and Enforcement Structure in Antitrust Cases and The Commission's Fining System*, Report prepared from the Global Competition Law Centre (GCLC)'s Annual Conference "Towards an Optimal Enforcement of Competition Rules in Europe -- Time for a Review of Regulation 1/2003" (11 and 12 June 2009, Brussels), available at [http://www.learlab.com/conference2009/documents/The%20decisional%20and%20enforcement%20structure%20and%20the%20Commission\\_s%20fining%20system%20GERADIN.pdf](http://www.learlab.com/conference2009/documents/The%20decisional%20and%20enforcement%20structure%20and%20the%20Commission_s%20fining%20system%20GERADIN.pdf), p. 28.

<sup>522</sup> The scholarly debate concerning the scope of application of the EU Courts' unlimited jurisdiction is not novel and has often resurfaced over the years. The controversy finds its origins in the conflicting wording used in Article 261 TFEU and Article 31 of Regulation 1/2003. While Article 261 TFEU refers to '*unlimited jurisdiction with regard to the penalties provided*', Article 31 of Regulation 1/2003 refers to '*unlimited jurisdiction to review decisions*'. This different wording has led a number of commentators to argue that unlimited jurisdiction can be or should be exercised in relation to the whole decision imposing a fine. See, *inter alia*, FORRESTER I., *A Bush in Need of Pruning: The Luxuriant Growth of Light Judicial Review*, European University Institute, Robert

confirmation in certain case law where the EU Courts interpreted broadly their unlimited jurisdiction and appeared to consider that the entire decision, not only the part on fines, could be modified.<sup>523</sup> According to certain commentators, if the EU Courts are still unwilling to engage in such full review and to depart from the deep-rooted interpretation of their jurisdiction, incentives could be created by the EU legislator through non-binding acts such as resolutions and positions or, if ineffective, through full-fledged legislative interventions, not on the Treaties, but more simply on secondary legislation (such as an amendment in the EU Courts' Statute that mirrors the wording of Article 31 of Regulation 1/2003 and Article 16 of the EU Merger Regulation).<sup>524</sup>

This view is however not shared by who considers that the passage from a judicial review of legality to that of unlimited jurisdiction on the merits would be inconsistent with the current legislative framework.<sup>525</sup> The current EU framework would provide for a review of legality of the Commission's decisions on the basis of Article 263 TFEU and an

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Schuman Centre for Advanced Studies, EU Competition Law and Policy Workshop/Proceedings, 2009, pp. 38-40. Forrester contends that *'it is too cautious to hold that the European Courts have unlimited jurisdiction only over the level of the fine in antitrust cases. The CFI has, should have, and should exercise, the broadest possible scope of judicial review under Article 229 EC in antitrust cases'* (p. 39); see also GERARD D., *EU Antitrust Enforcement in 2025: Why wait? Full Appellate Jurisdiction, Now*, in CPI Antitrust Journal, December 2010, p. 7: *'the case law settled in favor of the narrow solution...time has come, it is argued, to reverse the trend and to interpret the EU Courts' unlimited jurisdiction as applying to the review of the decisions whereby the Commission imposes fines, i.e., full appellate jurisdiction'*. For an overview of the historical reasons which would justify the use of Article 31 of Regulation 1/2003 as legal basis for full appellate judicial review (including the negotiations which led to its adoption and early Treaty commentaries) see GERARD D., *Breaking the EU Antitrust Enforcement Deadlock: Re-empowering the Courts*, in *European Law Review*, 2011, Vol 36(4), pp. 475-477.

<sup>523</sup> See GERARD D., *Breaking the EU Antitrust Enforcement Deadlock: Re-empowering the Courts*, in *European Law Review*, 2011, Vol 36(4), p. 473, who lists the following cases: Case T-69/04 *Schunk GmbH and Schunk Kohlenstoff-Technik GmbH v Commission* [2008] ECR II-2567, paras. 23 and 41 the GC stated that: *'[u]nder Article [261 TFEU] and [Article 31 of Regulation 1/2003], [the GC and the ECJ] have unlimited jurisdiction in advance brought against decisions whereby the Commission has fixed fines and may thus not only annul the decisions taken by the Commission but also cancel, reduce or increase the fines imposed'* and that *'[t]hus the Commission's administrative practice is subject to unlimited review by the [Union] judicature'* (emphasis added). In Case C-534/07 P *William Prym GmbH & Co. KG and Prym Consumer GmbH & Co. KG v Commission* [2009] ECR I-7415, para 86, the ECJ stated that: *'[t]he unlimited jurisdiction conferred on the [General Court] by Article 31 of Regulation 1/2003 in accordance with Article [261 TFEU] authorizes that court to vary the contested measure, even without annulling it, by taking into account all of the factual circumstances, so as to amend, for example, the amount of the fine'* (emphasis added).

<sup>524</sup> This view is based on the wording of Article 256 TFEU which states that *'[t]he Statute ... may provide for the General Court to have jurisdiction for other classes of action or proceeding'*. The circumstance that the initiative for amendments to the Statute must originate from the Court of Justice after consulting the Commission, or *vice versa*, and that thus the Court of Justice may be unwilling to make such a proposal, could be circumvented by the Parliament or Council issuing resolutions and/or positions calling for proposals from the Commission. See GERARD D., *Breaking the EU Antitrust Enforcement Deadlock: Re-empowering the Courts*, in *European Law Review*, 2011, Vol 36(4), pp. 477-478.

<sup>525</sup> See GRASSANI S., *Jurisdictional vs. "Juris...Fictional" Review in the Land of Menarini*, (June 7, 2012), 19th St.Gallen International Competition Law Forum ICF - June 7th and 8th 2012; available at SSRN: <http://ssrn.com/abstract=2190929>, pp. 3-5.

unlimited jurisdiction only in relation to fines on the basis of Article 261 TFEU and Article 31 of Regulation 1/2003 and Article 16 of the EU Merger Regulation. This is also supported by the consideration that currently, on the basis of Article 264 TFEU, the only remedy the EU Courts have is a declaration that the Commission's decision is void. This is a further argument that the EU Courts are not empowered to substitute their decision for that of the Commission. Moreover, it is argued that this power would run contrary to the institutional balance introduced by the 'Treaties between the Courts' and the Commission's prerogatives, where the recognition of a certain discretion to the Commission is inherent in the concept of separation of powers.<sup>526</sup> As illustrated by one commentator:

*'[i]t would be illogical to empower the Union courts to review in full all aspects of a Commission decision without limitations, but to forbid them from adopting a judgment substituting the decision. This would simply result in a duplication of effort and waste of resources. If, when exercising the review of legality, the Union courts cannot adopt the decision that the Commission itself is empowered to adopt, this must be because the Commission has a reserved sphere of decision-making which the drafters of the Treaty decided should ultimately rest with the Commission and not with the Union courts.'*<sup>527</sup>

In light of the above, the leading view is that the proposal to introduce full appellate judicial review powers over the entire Commission decision would require a Treaty change and is considered for this reason hardly practicable until broader consensus is reached on the topic.<sup>528</sup>

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<sup>526</sup> In the *Italian Flat Glass* case the GC stated that: '[a]ccordingly, the Court considers that, although a Community court may, as part of the judicial review of the acts of the Community administration, partially annul a Commission decision in the field of competition, that does not mean that it has jurisdiction to remake the contested decision. The assumption of such jurisdiction could disturb the inter-institutional balance established by the Treaty and would risk prejudicing the rights of defence. In the light of those factors, the Court considers that it is not for itself, in the circumstances of the present case, to carry out a comprehensive re-assessment of the evidence before it, nor to draw conclusions from that evidence in the light of the rules on competition' (Joined Cases T-68, 77-78/89 *Società Italiana Vetro SpA and Others v Commission* [1992] ECR II-1403, paras. 319-320).

<sup>527</sup> NAZZINI R., *Administrative Enforcement, Judicial Review and Fundamental Rights in EU Competition Law: A Comparative Contextual-functional Perspective*, in CMLR, 2012, Vol. 49(3), p. 1000.

<sup>528</sup> Particularly in the merger field, the possibility that the GC decide definitely the cases under review is considered one of the remedies, if not the only, to the length of proceedings and the risk that transactions will fail due to review periods; see KINSELLA S., MEIER A., HARRISON P., *Judicial review of merger decisions: An overview of EU and national case law*, in e-Competitions, 2009, No. 29156, pp. 2-3.

## *2.2. The increase in competition specialization within the chambers of the General Court or the increase in number of EU judges*

Other proposals which have been advanced to address the shortcomings of the limited judicial review standard concern the functional organization of the EU Courts rather than the scope and intensity of their judicial review.

One first proposal moves from the premise that with the expansion of the importance of economic analysis in competition cases, the EU Courts may have become more and more unwilling to engage in the appraisal of complex economic and/or technical assessments due to the lack of the necessary know-how and knowledge. In order to avoid that competition cases may be too complicated for generalist judges to adjudicate on, leading them to refrain from in-depth analysis of the Commission's assessments, one proposal, advanced in the past to address the problem of the number and length of judicial proceedings, could help circumvent this problem. Reference is made here to the suggestion of increasing specialization within the chambers of the GC.<sup>529</sup> This proposal would contribute to accelerate the treatment of cases, without prejudging the quality of rulings, while ensuring that judges have the necessary competences to carry out in-depth reviews of the measures under examination. This solution would also have the advantage of not requiring a complex and formal Treaty modification, contrary to what might be required for the creation of a specialized competition chamber or court,<sup>530</sup> as it could be implemented with the agreement of the President of the GC and its judges. This solution would also be consistent with the EU Courts' past practice and with the practice of many tribunals in the EU.<sup>531</sup>

Closely related to the above solution, without however changing the current generalist nature of the EU judges' expertise, is the proposal to increase the number of EU judges. Certain authors consider an increase in the number of judges an adequate response,

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<sup>529</sup> See GARCIA-VALDECASAS R., *Le TPICE à la croisée des chemins*, in *Concurrences*, No. 1, 2008, pp. 1-2; and BELLAMY C., *An EU Competition Court: The Continuing Debate*, in LIANOS I., KOKKORIS I. (eds.), *The reform of EC competition law: new challenges*, Kluwer Law International, 2010, p. 11.

<sup>530</sup> See *supra* subsection 2.1.1 in this Chapter for a discussion on the debate on whether Treaty modifications would be needed for the creation of a specialized competition chamber or court competent to take a decision in competition cases.

<sup>531</sup> GARCIA-VALDECASAS R., *Le TPICE à la croisée des chemins*, in *Concurrences*, No. 1, 2008, p. 2.

as this would enable the GC to use time more efficiently while ensuring the required review of matters of fact and law.<sup>532</sup>

In order to address and solve a number of problems raised by the increase in the number of cases dealt with, including their backlog and increase in duration, the EU Courts in 2011 proposed to change their composition asking for 12 new judges at the GC, bringing, at the time, the number from 27 to 39.<sup>533</sup> Over the past years a number of different proposals have been made by the EU Courts and Member State representatives in order to unblock the *impasse* on how to improve the efficiency of judicial proceedings. Although there seems to be consensus that more judges are needed, it is highly debated what the exact number should be and how they should be chosen. On 20 June 2013 plans to increase the number of judges at the General Court by 12 to ease the growing workload of the EU Court of Justice was backed by the European Parliament's Committee for Legal Affairs. In addition, the committee has proposed that the additional judges be selected based on merits instead of nationality. However, diversities in views among Member States have impeded this proposal from making any progress which, to date, is still stalled.

### ***2.3. Separation of investigative and adjudicatory functions within the Commission***

As examined *supra* in Chapter 1, one of the main criticisms raised against the current system of limited judicial review concerns the extent to which the parties' procedural rights and rights of defense are safeguarded in the competition domain. One of the main arguments raised in this context is that the concentration of investigative, prosecutorial and decision-making powers in the hands of a single authority, namely the Commission, raises the question as to whether such extensive and far-reaching powers are subject to effective controls.<sup>534</sup> The concentration of functions in the hands of a single administrative body is not an unusual feature of many administrative systems,<sup>535</sup> however certain authors doubt

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<sup>532</sup> See, *inter alia*, NIKOLIC I., *Full Judicial Review of Antitrust Cases after KME: A New Formula of Review?*, in ECLR, 2012, Issue 12, pp. 587-588.

<sup>533</sup> NEWMAN M., CROFTS L., *Extra EU judge appointments still divide European States*, M-lex, 14 January 2014.

<sup>534</sup> FORRESTER I., *Due Process in EC Competition Cases: A Distinguished Institution with Flawed Procedures*, 2009, *European Law Review*, 817, pp. 1-17.

<sup>535</sup> Other EU Member States use two-tier systems in which the national competition authority has the power to investigate and make findings of infringements and impose remedies and fines then subject to judicial review such as, *inter alia*, the UK, France and Italy.



that this represents best international practice.<sup>536</sup> Furthermore, this is usually considered acceptable only if the decisions adopted are subject to checks and balances, in particular, effective external control in the form of judicial review by a court.<sup>537</sup> In light of these concerns and in order to address the shortcomings of the current architecture of EU competition enforcement, proposals have also been made which concern not the judicial phase but rather the administrative stage of enforcement proceedings, in order to ensure the fairer handling of cases by the Commission.

One structural proposal foresees the existence of two distinct bodies, one which investigates and the other which decides, and whose findings are subject to appeals to the GC. One concrete suggestion in order to separate decisional and prosecutorial powers is the creation of a new specialized ‘European Competition Agency’. Several different options have been advanced in this regard, one that leaves the investigative activities to the new agency and the adjudication tasks to the Commission,<sup>538</sup> another one that leaves to the Commission the investigative activities and gives the decision-making tasks to the new agency, and another one that leaves both functions to the new agency.<sup>539</sup> The body entrusted with the decision-making task should not only be more specialized and professional, but also ‘quasi-judicial’, and separated from the Commission’s normal policy functions.

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<sup>536</sup> GERADIN N. and PETIT N., *Judicial Review in European Union Competition Law*, in *The Role of the Court of Justice of the European Union in Competition Law Cases*, GCLC Annual Conferences Series (edited by MEROLA M. and DERENNE J.) Bruylant, 2010, p. 40.

<sup>537</sup> According to Nazzini, the level of protection of the parties’ rights during the administrative procedure, and not only the characteristics of the Courts’ review, must be taken into account in order to assess properly the compatibility of limited judicial review with the right to a fair trial. This author argues that currently the guarantees during the administrative procedure are not sufficient for limited review to be compatible with Article 6 ECHR. He argues that limited judicial review could be compatible if at the administrative level prosecution and decision-making functions were separated. See NAZZINI R., *Administrative Enforcement, Judicial Review and Fundamental Rights in EU Competition Law: A Comparative Contextual-functionalist Perspective*, in *CMLR*, 2012, Vol. 49(3), p. 979 onwards.

<sup>538</sup> It is considered that a precedent of this type of delegation of investigative powers can be found in the Decision creating the European Anti-Fraud Office (“OLAF”; Commission Decision (EC, ECSC, Euratom) No. 1999/352 of 28 April 1999 establishing the European Anti-Fraud Office, OJ [1999] L136/20); see GCLC WORKING GROUP, *Enforcement by the Commission. The Decisional and Enforcement Structure in Antitrust Cases and The Commission’s Fining System*, Report prepared from the Global Competition Law Centre (GCLC)’s Annual Conference “Towards an Optimal Enforcement of Competition Rules in Europe -- Time for a Review of Regulation 1/2003” (11 and 12 June 2009, Brussels), available at [http://www.learlab.com/conference2009/documents/The%20decisional%20and%20enforcement%20structure%20and%20the%20Commission\\_s%20fining%20system%20GERADIN.pdf](http://www.learlab.com/conference2009/documents/The%20decisional%20and%20enforcement%20structure%20and%20the%20Commission_s%20fining%20system%20GERADIN.pdf), p. 23.

<sup>539</sup> WAELBROECK D., *The Enforcement System for Articles 81 and 82 EC: Time for a Redefinition of Decision-Making in EC Competition Law*, *Concurrences*, No. 3, 2009, p. 18.

Another proposal foresees a functional separation that can be implemented within the Commission, without the creation of an external agency.<sup>540</sup> In this scenario the separation of investigative and decisional functions is achieved by establishing an adjudication unit outside DG Competition reporting directly to the Commissioner for competition. While DG Competition would retain the power to investigate cases, this new unit would have the role of drafting the decision, while the Commissioner would retain the ultimate power to adopt the decision together with the College of Commissioners, remaining the ultimate decision-maker.<sup>541</sup> This solution would break the link between investigator and who is responsible for drafting the decision, while the Commissioner for Competition and the College of Commissioners can be trusted to be sufficiently independent and impartial, provided safeguards are foreseen to avoid their excessive involvement during the course of the investigation.

In all variants of these proposals, the separation of functions is viewed positively as, among other reasons, it allows the interested firms to defend their views on an equal footing with the prosecutorial body in front of the decision-making body. This proposal would thus potentially address one of the main shortcomings of the current system of judicial review which resides in the ‘privileged’ position that the Commission benefits from in relation to its complex economic and/or technical assessments, currently overridden in a limited number of cases, such as if found to be ‘manifestly erroneous’. The new systems proposed have the potential to guarantee that the decision-making body hears all the positions and views of the interested parties in order to decide which one is more plausible, in addition to the subsequent possibility to appeal this decision in front of the GC. Similar proposals would also bring along with them the benefits of de-politicized decision-making

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<sup>540</sup> See NAZZINI R., *Administrative Enforcement, Judicial Review and Fundamental Rights in EU Competition Law: A Comparative Contextual-functionalist Perspective*, in CMLR, 2012, Vol. 49(3), pp. 1002-1003.

<sup>541</sup> In another variant of this proposal the two-tier system would see DG Competition responsible for the first phase of the administrative procedure and for the adoption of a first instance decision and, in case of disagreement, the Hearing Officer responsible for a full review of the case team’s decision and for issuing a ‘final decision’ which would be sent to the College of Commissioners for adoption; see MACGREGOR A., GECIC B., *Due Process in EU Competition Cases*, in Journal of European Competition Law & Practice, 2012, Vol. 3, No. 5, available at [http://awards.concurrences.com/IMG/pdf/ue\\_process\\_in\\_eu\\_competition\\_cases\\_following\\_the\\_introduction\\_of\\_the\\_new\\_best\\_practices\\_guidelines\\_on\\_antitrust\\_proceedings.pdf](http://awards.concurrences.com/IMG/pdf/ue_process_in_eu_competition_cases_following_the_introduction_of_the_new_best_practices_guidelines_on_antitrust_proceedings.pdf), pp. 437-438. For a similar proposal, with also the variant of the establishment of an independent competition agency, see FORRESTER I. S., *Due Process in EC competition cases: A distinguished institution with flawed procedures*, 2009, ELR, 817, pp. 13-14.

mechanisms, and more efficient and effective quality control of fact-finding and economic assessments.<sup>542</sup>

However, it could still be contended that full compatibility with the right to a ‘fair trial’ under the ECHR<sup>543</sup> would be respected only where the subsequent review by the GC left no space to the decision-making body’s margin of discretion.<sup>544</sup> This view is not shared by who considers that the guarantees enshrined in Article 6(1) ECHR would be respected, even preserving a deferential standard of review, where the necessary procedural measures have been adopted to ensure a functional separation between the prosecutor and the decision-maker within the Commission. This argument is based on the consideration that compliance with Article 6(1) ECHR would be guaranteed if, when deference is recognized towards the decision-maker, the latter complies with the requirements of independence and impartiality.<sup>545</sup> This would ensure that the right to an independent and impartial tribunal is safeguarded.

As to the likelihood that these reforms see the light, one important practical aspect is whether they would require an amendment of the Treaties. Depending on the answer to this question, issues of timing and lengthy disagreements between Member States could be avoided. There are however conflicting views on this issue. On the one hand, there is who believes that the creation of a new agency would be possible without an amendment of the Treaty. The EU legislator, according to this view, would be free to organize decision-

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<sup>542</sup> ANDREANGELI A., *EU Competition Enforcement and Human Rights*, Edward Elgar, 2008, p. 239.

<sup>543</sup> See *supra* subsection 4.2.4.1 in Section II of Chapter 1 for a detailed discussion on the different definitions of right to a fair trial under Article 6(1) ECHR. A different issue is whether this new system would be compatible with other due process requirements imposed by the ECHR; for further discussion see LANG J. T., *Three Possibilities for Reform of the Procedure of the European Commission in Competition Cases under Regulation 1/2003*, CEPS Special Report, 18 November 2011, pp. 219-221.

<sup>544</sup> Commentators who consider that competition charges belong to the ‘hard-core’ criminal head of Article 6 ECHR argue that this solution is still incompatible with ECHR requirements because a criminal punishment would not be imposed by a court at first instance; see KILLICK J., BERGHE P., *This is not the time to be tinkering with Regulation 1/2003 - It is time for fundamental reform - Europe should have change we can believe in*, October 2010; available at [http://www.whitecase.com/files/Publication/08a7ee59-bbaa-44c8-90a7-d81d891d637f/Presentation/PublicationAttachment/7890f325-49b4-43e4-a0a5-dd7f74b44fc0/Article\\_This\\_is\\_not\\_the\\_time\\_to\\_be\\_tinkering\\_with\\_Regulation\\_1-2003.pdf](http://www.whitecase.com/files/Publication/08a7ee59-bbaa-44c8-90a7-d81d891d637f/Presentation/PublicationAttachment/7890f325-49b4-43e4-a0a5-dd7f74b44fc0/Article_This_is_not_the_time_to_be_tinkering_with_Regulation_1-2003.pdf), p. 10.

<sup>545</sup> NAZZINI R., *Administrative Enforcement, Judicial Review and Fundamental Rights in EU Competition Law: A Comparative Contextual-functional Perspective*, in CMLR, 2012, Vol. 49(3), p. 990. According to Nazzini, competition enforcement regimes which are characterised by an administrative decision-maker with no guarantees of independence and impartiality and deferential judicial review, are incompatible with Article 6(1) ECHR and Article 47(2) EU Charter, and should be remedied not by reforming the intensity of judicial review, but by introducing procedures that allow for sufficient safeguards of independence and impartiality of the decision-maker.

making systems differently than currently the case using as legal basis Article 103 TFEU.<sup>546</sup> On the other hand, there is who believes that an amendment of the Treaty is necessary as Article 103 TFEU does not foresee the application of EU competition law, at EU level, by any entity other than the Commission and the EU Courts.<sup>547</sup> Article 103 TFEU states in fact that the Council, on a proposal from the Commission and after consulting the European Parliament, can lay down ‘[t]he appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102’; and that these regulations or directives can ‘define the respective functions of the Commission and of the Court of Justice of the European Union in applying the provisions [of Articles 101 and 102 TFEU]’. Nor could the new powers be attributed to the new agency by delegation from the Commission as this would escape any permissible delegation powers of the Commission.<sup>548</sup> In any event, independently of whether this proposal would require or not any Treaty amendment, it is still controversial whether it would obtain the necessary political support. In this regard, it must be recalled that in 1997 an attempt was made to create a ‘European Cartel Office’ which would have had the powers to apply Articles 101 and 102 TFEU and the Merger Regulation. This proposal failed due to the lack of support from Member States, practitioners and academics. The main fears concerned with the creation of a separate competition body were that competition policy could be marginalized from other economic policies pursued by the Commission and that there was the risk that competition rules could be applied inconsistently *vis-à-vis* the EC Treaty as a whole.<sup>549</sup> A similar proposal was reiterated within the Convention responsible for drafting the EU Constitutional Treaty but was also unsuccessful.<sup>550</sup>

The proposal which foresees not the creation of a new agency, but rather only a functional separation within DG Competition, would instead have the advantage of not requiring Treaty amendments as the ultimate decision-making power remains with the

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<sup>546</sup> This was the conclusion of Working Group III in the Report produced for the GCLC conference of 11-12 June 2009; see WAELBROECK D., *The Enforcement System for Articles 81 and 82 EC: Time for a Redefinition of Decision-Making in EC Competition Law*, in *Concurrences*, No. 3, 2009, p. 18.

<sup>547</sup> LANG J. T., *Three Possibilities for Reform of the Procedure of the European Commission in Competition Cases under Regulation 1/2003*, CEPS Special Report, 18 November 2011, pp. 216 and 219-220.

<sup>548</sup> LANG J. T., *Three Possibilities for Reform of the Procedure of the European Commission in Competition Cases under Regulation 1/2003*, CEPS Special Report, 18 November 2011, p. 216.

<sup>549</sup> ANDREANGELI A., *EU Competition Enforcement and Human Rights*, Edward Elgar, 2008, pp. 239-240.

<sup>550</sup> NASCIMBENE B., *Fair Trial and the Rights of the Defence in Antitrust Proceedings before the Commission: A Need for Reform?*, 2013, *ELR*, No. 4, 2013, pp. 573-582.

Commission. Here a new procedural regulation, internal delegation and internal restructuring are considered sufficient to achieve this solution.<sup>551</sup>

### 3. PROPOSALS FOR REFORM CONCERNING THE STANDARD OF JUDICIAL REVIEW IN COMPETITION CASES

According to certain commentators, in order to enable the EU Courts to carry out a thorough review of the Commission's competition decisions, there are strong arguments that no Treaty or institutional reforms are required. Advocates of this position claim that it would be sufficient if the EU Courts spontaneously exercised a rigorous approach to judicial review by considering all evidence underlying a decision and the conclusions drawn therefrom.<sup>552</sup> This view would also be supported by the ECtHR jurisprudence as, following the *Menarini* ruling (*see supra* subsection 4.2.5 in Section II of Chapter 1), it can be argued that compliance with the right to a fair trial does not require any structural revolution, being enough if within the boundaries of the review of legality, the degree of such review is intense and exhaustive.<sup>553</sup> The extent to which the principle of effective judicial protection leaves room for the existence of deferential judicial review (*i.e.* the limited review standard within the framework of the review of legality) is however still an open debate, with views ranging from who considers that '[t]he conclusion is inescapable [...] under the current system, deferential judicial review is incompatible with the principle of effective judicial protection,<sup>554</sup> to the more nuanced views of the EU judges in *KME* and *Chalkor* which, while advocating for more

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<sup>551</sup> NAZZINI R., *Administrative Enforcement, Judicial Review and Fundamental Rights in EU Competition Law: A Comparative Contextual-functional Perspective*, in CMLR, 2012, Vol. 49(3), p. 1003. According to Andreangeli, this solution is a less controversial alternative and could follow the example of the internal rules that govern the organization and functioning of the European Anti-Fraud Office (which has no decision-making powers but has the power to gather evidence concerning allegations of fraud) and provide for safeguards that guarantee its independence; *see* ANDREANGELI A., *EU Competition Enforcement and Human Rights*, Edward Elgar, 2008, pp. 241-243.

<sup>552</sup> *See, inter alia*, VENIT J. S., *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*, European University Institute, Robert Schuman Centre for Advanced Studies, EU Competition Law and Policy Workshop/Proceedings, 2009, p. 4.

<sup>553</sup> This is due to the circumstance that the '*Italian model of judicial review [...] is largely similar to the EU system*' and thus the conclusions of the ECtHR in *Menarini* can be transposed to the EU competition system; *see* GRASSANI S., *Jurisdictional vs. "Juris...Fictional" Review in the Land of Menarini, (June 7, 2012)*, 19th St.Gallen International Competition Law Forum ICF - June 7th and 8th 2012; available at SSRN: <http://ssrn.com/abstract=2190929>, p. 5.

<sup>554</sup> NAZZINI R., *Administrative Enforcement, Judicial Review and Fundamental Rights in EU Competition Law: A Comparative Contextual-functional Perspective*, in CMLR, 2012, Vol. 49(3), p. 998.

intense review, still consider legitimate the existence of a margin of appreciation, and thus discretion, for the Commission for certain kinds of assessments.

Within the boundaries of the review of legality, and without having to proceed to any institutional or structural change to the EU architecture of competition enforcement, a number of proposals have thus been made to increase the degree and intensity of review by the EU Courts, thus affording more extensive and exhaustive protection to the interests of parties to judicial proceedings. The following subsections are dedicated to the description and analysis of those solutions which are meant to address, and possibly resolve, the problems raised by the current limited judicial review standard exercised by the EU Courts in competition cases, without recurring to structural changes to the EU architecture of competition law enforcement. Essentially, these proposals are centred on the analysis of the instruments that the EU judges already have at their disposal and could be used by them to expand and intensify their review in competition cases. These solutions range from an increased use of the measures of procedural inquiry, such as the use of expert evidence and reports, in order to have the technical ability to review also the Commission's complex economic and/or technical assessments, to the reduction of the use of the manifest error standard only to certain Commission assessments, to the abandonment by the EU Courts of the limited review standard and manifest error test altogether.

From a practical point of view these solutions would not encounter significant difficulties, as in the past EU judges have shown to have an important margin of manoeuvre in defining and exercising their powers of review within the boundaries of the review of legality. From the examination of the case law carried out in Chapters 2 and 3, it emerges that the existence of the limited standard has not impeded the EU Courts from carrying out an in-depth review in certain cases, going in so far as substituting their assessment for that of the Commission when they considered themselves knowledgeable enough.<sup>555</sup> In any event, the very circumstance that the 'limited' review standard is not mandated by the Treaties and that the EU Courts '*have been drawing self-imposed distinctions in the intensity of their legality review*' would demonstrate that the Courts are perfectly capable of

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<sup>555</sup> CASTILLO DE LA TORRE F., *Evidence, Proof and Judicial Review in Cartel Cases*, in *World Competition Law and Economics Review*, No. 4, December 2009, pp. 339-340.

stretching the intensity of their review as far as they consider necessary.<sup>556</sup> Whether they are willing to do so is another concern. It is evident in fact that the success of each proposal will depend ultimately on the EU Courts' willingness to pursue a certain solution rather than another.

### ***3.1. Expanding the EU Courts' powers of review within the review of legality ex Article 263 TFEU: Limiting the 'limited' standard of review***

In light of the widespread criticism that the 'limited' review standard has caused for a multiplicity of reasons which will not be recalled here (*see supra* Section II in Chapter 1), a variety of concrete proposals have been made to curb the problem and give it a satisfactory answer. The proposal to limit the use of the 'limited' review standard stems from the recognition that in the past the EU Courts have made a too extensive and far-reaching use of this standard, a practice which should instead be circumscribed to what is only strictly necessary. In particular, the concern is that, in light of the difficulties in identifying when an appraisal is economically or technically complex, there is a concrete risk that the EU Courts subject to 'limited' control an excessive number of Commission assessments, including appraisals which due to their nature should not benefit from this more deferential approach. As stated by one commentator '*the EU Courts could also reduce the number of Commission assessments which they consider "complex", and engage more openly with economic facts even though they may be technically difficult*'.<sup>557</sup>

Against this framework should be understood the proposal made in 2011 by the President of the GC Mr. Jaeger to limit the use of the 'limited' standard of review to assessments that entail economic policy choices. Although the President of the GC was making only his personal views known, given his authoritative role within the EU judiciary, the incentive effect of this proposal cannot be underestimated. In particular, Mr. Jaeger stressed the need to bring more clarity in the use of the limited review standard in order to increase legal certainty and avoid that '*control that is too loose [apply] to situations that deserve a*

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<sup>556</sup> BRONCKERS M, VALLERY A., *Fair and Effective Competition Policy in the EU: Which Role for the Authorities and Which Role for the Courts after Menarini (July 5, 2012)*, in *European Competition Journal*, Vol. 8, No. 2, 2012, available at SSRN: <http://ssrn.com/abstract=2137524>, p. 11.

<sup>557</sup> BRONCKERS M, VALLERY A., *Fair and Effective Competition Policy in the EU: Which Role for the Authorities and Which Role for the Courts after Menarini (July 5, 2012)*, in *European Competition Journal*, Vol. 8, No. 2, 2012, available at SSRN: <http://ssrn.com/abstract=2137524>, p. 10.

*stricter standard of review*'.<sup>558</sup> According to Judge Jaeger, it is an error to confuse complex economic assessments with complex calculations, studies or data. For these types of assessments the Commission should not benefit from a margin of discretion. For him the notion of 'complex economic assessments' should cover only those situations where the Commission has made an economics-based choice of policy. Only when the Commission's appraisal can be ascribed to the boundaries of an economic policy choice may the marginal review standard find application.

It must however be pointed out that this solution is unsatisfactory for who considers that the ECHR jurisprudence on the right to a fair trial requires EU Courts to re-assess without limits issues of facts and law, including reconsidering complex economic and/or technical appraisals, even those based on policy choices.<sup>559</sup> According to this view, if Judge Jaeger's proposal is to be welcomed for having brought renewed attention to the possible risks of an over-expansion of the limited review standard, it is still far from compliant with the requirements of effective judicial protection, given that it still legitimates a certain discretion for the Commission, even if only over economic-policy choices.

In addition, Judge Jaeger emphasized that the EU Courts have the necessary tools to undergo a detailed examination of all of the Commission's assessments that don't fall under the category of 'economic-policy choices'. His reference was to the measures of inquiry that EU judges have at their disposal, in particular the means to get assistance from experts on a permanent or *ad hoc* basis. More generally, in light of the expansion of the importance of economic analysis in competition cases, the use of these instruments is capable of assisting the EU Courts and of making them more willing to engage in the appraisal of complex economic and/or technical assessments.<sup>560</sup>

One of the recommendations that is accordingly made to EU judges in order for their review to be adequate and effective, is to avail themselves of all the instruments they have

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<sup>558</sup> JAEGER M., *The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of the Marginal Review?*, in *Journal of European Competition Law & Practice*, Vol. 2, No. 4, 2011, p. 313.

<sup>559</sup> GRASSANI S., *Jurisdictional vs. "Juris...Fictional" Review in the Land of Menarini*, (June 7, 2012), 19th St.Gallen International Competition Law Forum ICF - June 7th and 8th 2012; available at SSRN: <http://ssrn.com/abstract=2190929>, p. 5.

<sup>560</sup> See *contra* AZIZI who considers that '[e]ven though, in principle, the GC has far-reaching powers to supplement, by itself, the findings of fact made by the Commission or may even completely reassess the Commission's findings of fact, for example, by using various measures of inquiry [...] actual use of such legal options remains highly theoretical and unrealistic'; see AZIZI J., *The Limits of Judicial Review concerning Abuses of a Dominant Position: Principles and Specific Application to the Communications Technology Sector*, in *Today's Multi-layered Legal Order: Current Issues and Perspectives, Liber amicorum in honour of Arjen W.H. MEIJ*, Paris Legal Publishers, Paris 2011.



at their disposal to this end. This will avoid that competition cases may be too complicated for them to adjudicate on, leading them to refrain from in-depth analysis and to rely too heavily on the Commission's assessments.

### *3.2. Expanding the EU Courts' powers of review within the review of legality ex Article 263 TFEU: Abandoning the 'limited' standard of review altogether*

Another solution to address the shortcomings of the 'limited' review standard revolves around the EU Courts' willingness to abandon this standard altogether. As mentioned, in the competition field, the 'limited' standard of review, as currently applied, translates in the recognition of discretion for the Commission which entails the impossibility for the EU Courts to substitute a different assessment for that of the Commission, where the factual and evidential circumstances of the case allow for different appraisals and the Commission has opted for one in particular.<sup>561</sup> Formally speaking, the parties have to demonstrate that the explanation given by the Commission is vitiated by a serious error, one that leads to invalidate the entire decision and thus justifies its annulment. The circumstance that a more reasonable explanation may exist or is proven to be a more adequate or 'fitting' explanation, in light of the relevant facts and evidence, is irrelevant, in so far as the parties are not capable of demonstrating that the Commission's theory contains gross errors. This ties down the parties, obliges them to limit their claims to an attack against the specific theory of harm developed by the Commission.

As mentioned *supra* in subsection 4.2.5 in Section II of Chapter 1, according to certain commentators, the existence of this margin of discretion of the Commission runs counter to the right to a fair trial as enshrined in Article 6(1) ECHR, as interpreted by the ECtHR in the *Menarini* case, circumstance which justifies its abandonment altogether. In light of *Menarini*, certain commentators argue that '[a]s a minimum, courts should be free not only to re-assess without limits issues of facts and law of any given case, but to likewise tackle one of the uncovered

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<sup>561</sup> As seen *supra* in Chapter 1, the limited review standard entails that in the presence of complex economic and/or technical assessments the EU Courts will only check whether the relevant rules on procedure and on stating reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers. To this end, EU judges will not only have to establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that 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. As indicated, one of the main problems raised by the 'manifest error test' is that in case of equally plausible views concerning a complex economic or technical situation, the Commission's appraisal will prevail unless it contains a 'manifest' mistake.

*nerves of EU antitrust review: to wit, to openly reconsider complex technical/economic appraisals made by antitrust agencies?*<sup>562</sup> It has therefore been claimed that ‘*the EU courts could abandon the “complex appraisals” formula and devise a new description of what they actually do*’.<sup>563</sup>

It can also be contended that this would be a more adequate solution from a competition policy perspective, in the sense that the final objective is and should remain that of ensuring that competition in the internal market is not distorted, thus all the solutions that go in this direction, including reducing the risk of type II errors (prohibiting what should be allowed), should be valued. This entails that parties should be given every possibility to prove the correctness and harmlessness of their actions.

This is all the more true from a ‘fairness’ perspective. Considering the intense debate on equality of arms, due process, respect of procedural rights and so forth, these principles remain useless and abstract if interested parties are not given all the judicial weapons available in order to dismantle the Commission’s claims.

In light of the above, when there are two equivalent, reasonable and plausible explanations, it can be argued that the Courts should scrutinize more closely and allow the parties to prove their case, *i.e.* leave them the opportunity to demonstrate that their appraisal of a complex economic or technical situation is more valid than the Commission’s, even in the absence of errors in the latter’s assessment.

It could also be argued that this solution would not necessarily run counter to the principle of separation of powers, which represents the classical explanation for the ‘limited’ review standard. The Courts have in the past afforded the Commission discretion over economic and/or technical assessments, in the sense that they have decided to not engage in an analysis of such issues, in order to not have to substitute their appraisals for those of the Commission. However, if the Courts were to allow parties in judicial proceedings to present on an equal footing a different point of view from that of the Commission (no longer leaving a margin of appreciation to the latter), from a practical standpoint it could be argued that the classical explanation for deference, *i.e.* preserving the institutional balance along with the recognition that it is the Commission’s competence to

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<sup>562</sup> GRASSANI S., *Jurisdictional vs. “Juris...Fictional” Review in the Land of Menarini*, (June 7, 2012), 19th St.Gallen International Competition Law Forum ICF - June 7th and 8th 2012; available at SSRN: <http://ssrn.com/abstract=2190929>, p. 5.

<sup>563</sup> BRONCKERS M, VALLERY A., *Fair and Effective Competition Policy in the EU: Which Role for the Authorities and Which Role for the Courts after Menarini* (July 5, 2012), European Competition Journal, Vol. 8, No. 2, 2012, available at SSRN: <http://ssrn.com/abstract=2137524>, p. 10.

shape competition policy, would not necessarily be compromised. It would not in fact be the Courts developing *ex novo* their own theories, but rather the parties (which are in any event in the position to have a profound understanding of the markets in which they operate and of the consequences of their activities) which are given the chance to offer a different explanation from that put forward by the Commission. Allowing the parties to present alternative explanations wouldn't necessarily interfere in the separation of powers discourse, as it would not be the Courts developing alternative economic theories or theories of harm, but rather the Courts recognizing the greater plausibility of an alternative theory presented by the parties (when this theory is more accurate and 'fitting' than the Commission's). In substance, this would amount to the recognition that the Commission's theory is somehow vitiated, in the sense that, even if its appraisals are not affected by any evident error, the circumstance that there is a different theory that is more adequate to explain facts and evidence would necessarily entail that the Commission has overseen something it shouldn't have ignored.

Finally, compared to a number of proposals examined in the first part of this Chapter, this solution has the advantage of not requiring an amendment of the Treaties or of secondary legislation. All that would be necessary is that the EU Courts agree with the validity of this proposal and that they operate a *revirement* of their previous case law, a mechanism not forbidden by the Treaties and used in the past by the Courts when considered necessary.

The optimal solution would be that in the interest of legal certainty the Courts operate this change openly and transparently, *i.e.* that they engage in a clarification of their past practice and that they declare that in situations where two perfectly plausible scenarios are conceived and presented, respectively by the Commission and the interested party, the Courts have leeway to scrutinize more deeply, analyse more thoroughly and decide which should prevail. If the Courts find the moment is not ripe for such a change, they have the possibility to embrace this solution less openly, but still effectively from the point of view of the players involved. Reference here is made to the way Courts have sometimes applied the 'manifest error' standard in the past. Case law demonstrates that the Courts have in certain cases declared to be using the 'manifest error' standard while effectively scrutinizing situations very thoroughly. All bite this solution sacrifices to a certain extent legal certainty, transparency and brings with it the inherent risk, or perception, of discriminatory application of the 'limited' standard of review, it would on the other hand meet the

interests of the parties concerned, for whom it is less relevant how the Courts define the review they perform, in so far as the analysis effectively conducted in practice is thorough and exhaustive. This could be considered an *interim* step in the path leading to the abandonment altogether of the 'limited' review standard.

## CONCLUSIONS

From the analysis carried out until here of a selection of the relevant judgments concerning the application of the ‘limited’ judicial review standard in antitrust and merger cases, it is not possible to express a uniform view on the extent to which the existence of such standard has influenced the EU Courts’ adoption of a more deferential approach towards the Commission’s complex economic and/or technical assessments. The examination of the scope and intensity of the judicial control carried out and of how the application of the ‘limited’ standard of review has evolved over time has revealed a certain flexibility on the EU Courts’ side. Since its first formulation in the *Consten and Grundig* judgment and its later applications to abuse of dominance and merger cases, the ‘manifest error’ standard has been applied in a variety of forms and intensities, making it extremely difficult to frame this notion in conceptually defined boundaries, beyond mere definitions that say very little on its true content.

Notwithstanding, the EU Courts have continued to refer to this standard and to apply it when faced with Commission’s economically or technically complex assessments, renouncing to exercise comprehensive review in favour of more limited control powers.

While historically this self-imposed limitation found justification in the need to safeguard the EU inter-institutional balance, including the Commission’s prerogatives in the competition field, and found support in the Commission’s more sophisticated economic and technical expertise, in the past years the use of this standard has been the object of a variety of attacks, ranging from arguments based on the Commission’s revised role as competition authority and the EU Courts’ sufficient competition law expertise, to due process arguments focused on the interests of parties to proceedings and compliance with fundamental rights.

Ultimately, the question remains whether the existence of a margin of appreciation for the Commission for certain assessments in competition cases can still be considered admissible or whether it runs counter to binding rules of law or opportunity choices.

Of the reasons illustrated advocating a change or demise of the ‘limited’ judicial review standard, the most stringent continues to remain the possible incompatibility with the

fundamental rights enshrined in the EU Charter and the ECHR, in particular the right to a fair trial. The need to ensure that the interested parties' right to have access to an independent and impartial tribunal capable of guaranteeing effective judicial protection is safeguarded, has been one of the main parameters against which the 'limited' judicial review standard has been tested in recent years.

In 2011 and 2012 a number of international courts, the ECtHR, the ECJ and the EFTA Court, intervened in the debate providing their view on the above issues in a set of landmark cases, *Menarini*, *KME* and *Posten Norge*. If, on the one hand, these judgments are to be welcomed for having brought clarity on the courts' different views on these matters, the diversity of opinions expressed and conclusions reached has not contributed to bring unity to the discussion, a final solution to these questions still far from being reached.

In the EU framework, the EU Courts' approach, confirmed in recent case law, has been that of considering the current characteristics of the system of EU judicial control, including the existence and application of the 'limited' review standard, compatible with the right to a fair trial, notwithstanding the inconsistency of this approach with the opposite conclusions reached in other international forums.

However, in light of the different interpretations of the requirements inherent in the principle of effective judicial protection, it is still to be seen whether the EU Courts' approach would pass the scrutiny of the ECtHR, once brought to the latter's attention after the EU's formal accession to the Strasbourg Convention. Whether the 'limited' judicial review standard is effectively compatible with fair trial requirements remains thus an open question.

In the interest of time, these discrepancies have not gone unnoticed and, together with a number of other arguments that consider changes if not necessary at the least warranted and appropriate, have led to advocate for reforms in the way EU judges exercise their powers of control over the Commission's assessments. While the introduction of full appellate judicial review powers, allowing, depending on the variants proposed, that EU Courts retry or decide cases *ex novo*, would constitute the most appropriate response to most of the concerns raised, on the other hand this solution goes beyond what is currently necessary for compliance with the right to a fair trial under the ECHR system, and encounters insurmountable obstacles in the lack of consensus for changes that potentially encroach on the institutional balance devised by the Treaties and likely require major Treaty amendments.

Another solution advanced is that the EU Courts abandon the ‘limited’ judicial review standard altogether. To the extent this standard is self-imposed and consists in a self-limitation, EU judges, within the framework of their review of legality, could cease to give relevance to the Commission’s discretion or margin of appreciation. This reform, which would amount to a *revirement jurisprudentiel*, would ensure that EU Courts reach a genuine opinion on the entire substance of a competition case and that equally compelling and plausible explanations of the evidence are examined on an equal footing. It would also not require major structural changes to the institutional set up of the competition enforcement system. The analysis of the case law has proven the EU Court’s activeness in the past in defining the contours of the standard of review, thus the success of a similar solution would only depend on the Courts’ willingness to engage in such a change.

The recent statements of the Court of Justice in *KME* and subsequent case law demonstrate however that the EU Courts are not ready to go down this road. While on the one hand the Court of Justice is increasingly more attentive that the Commission’s complex economic and technical assessments are thoroughly reviewed, on the other hand it continues to legitimize the Commission’s discretion over assessments of this nature. The EU Courts’ position is currently to firmly preserve the ‘limited’ judicial review standard in its present formulation.

The abandonment of the limited judicial review standard on the EU Courts’ own initiative being unlikely, another tendency which has taken form, and considered desirable in the absence of more radical reforms to the EU Courts’ powers of review, is to limit or circumscribe its use. A trend started with *KME* and that finds supporters among EU judges advocating restrictions in the recognition of discretion to the Commission, it could be considered an *interim* solution pending a final answer to the question on the system’s legality and on the necessity of more in-depth structural changes.

In parallel, proposals have been made to address the shortcomings of the current system of judicial review that affect the organization of the Commission, rather than of the EU Courts. A number of these foresee a functional separation of powers within the Commission and have the merit of addressing one of the main criticisms to the ‘limited’ review standard, *i.e.* the privileged position enjoyed by the Commission’s assessments in the case of economically or technically complex appraisals. Aside from the uncertainties for the implementation of these solutions that derive from the differing opinions on the need or not for Treaty amendments, similar proposals, if not coupled with other solutions, leave

untouched the current system of judicial review and thus unfettered the criticisms that concern it.

As a final remark, the EU Courts' unwillingness to change the current state of affairs concerning the 'limited' judicial review standard of their own initiative allows to forecast with almost certitude that any future judicial reform will necessarily entail more or less extensive structural changes to the system and time-consuming decision-making processes involving a plurality of EU institutions.



## LEGISLATIVE MEASURES

### EU MEASURES

Council Regulation (EEC) No. 17/1962 of 6 February 1962, 'First Regulation implementing Articles 85 and 86 of the Treaty', in OJ [1962] 13/204;

Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the control of concentrations between undertakings, in OJ [1989] L395/1;

Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, in OJ [2003] L1/1;

Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, in OJ [2004] L24/1;

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

Commission Implementing Regulation (EU) No 1269/2013 of 5 December 2013 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, in OJ [2013] L336/1;

Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities, in OJ [1988] L319/1;

Charter of Fundamental Rights of the European Union, proclaimed in Nice by the European Parliament, the Council and the Commission on 7 December 2000, OJ [2000] C364/1;

Charter of Fundamental Rights of the European Union (2012), in OJ [2012] C326/391;

Treaty establishing European Economic Community (1957);

Treaty establishing the European Coal and Steel Community (1951);

Treaty establishing the European Community (Consolidated version 1992), in OJ [1992] C224/1;

Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ [2007] C306/1;

Treaty on European Union (Consolidated version 2012), in OJ C326/13;

Treaty on the Functioning of the European Union (Consolidated version 2012), in OJ C 326/47.

#### NATIONAL MEASURES

Italian Law No. 287 of October 10, 1990, 'Norme per la Tutela della Concorrenza e del Mercato', in Italian Official Journal No. 240 of 13 October 1990.

#### INTERNATIONAL MEASURES

European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols Nos. 11 and 14, supplemented by Protocols Nos. 1, 4, 6, 7, 12 and 13.

## CASE LAW

### EU CASE LAW

Joined Cases 56 and 58-64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission* [1966] ECR 429;

Case 48/69 *ICI v Commission* [1972] ECR 619;

Case 40/74 *Suiker Unie v Commission* [1975] ECR 1663;

Case 26/76 *Metro SB-Großmärkte GmbH & Co. KG v Commission* [1977] ECR 1875;

Case 85/76 *Hoffmann-La Roche* [1979] ECR 462;

Joined Cases 154, 205, 206, 226 to 228, 263 and 264/78, 39, 31, 83 and 85/79 *SpA Ferriera Valsabbia and others v Commission* [1980] ECR 907;

Case 258/78 *Nungesser v Commission* [1982] ECR 2015;

Case 322/81 *Michelin* [1983] ECR 3461;

Joined Cases 100/80, 101/80, 102/80 and 103/80 *Musique Diffusion Française and Others v Commission* [1983] ECR 1825;

Case 42/84 *Remia BV and others v Commission* [1985] ECR 2545;

Case 222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651;

Joined Cases 142 and 156/84 *British-American Tobacco Company Ltd and R. J. Reynolds Industries Inc. v Commission* [1987] ECR 4487;

Case 347/89 *Orkem v Commission* [1989] ECR 3301;

Case C-260/89 *ERT* [1991] ECR I-2925;

Joined Cases T-1/89 to T-4/89, T-6/89 to T-15/89 *Rhone Poulenc and Others v Commission* [1991] ECR II-867;

Case T-44/90 *La Cinq SA v Commission* [1991] ECR 1;

Joined Cases T-68, 77-78/89 *Società Italiana Vetro SpA and Others v Commission* [1992] ECR II-1403;

Joined Cases C-89/85, C-104/85, C-114/85, C-117/85 and C-125/85 to C-129/85 *Ablström Osakeyhtiö and others v Commission* [1993] ECR I-1307;

Case T-7/92 *Asia Motor France SA, Jean-Michel Cesbron, Monin Automobiles SA, Europe Auto Service SA and SOMACO SA v Commission* [1993] ECR II-669;

Case T-17/93 *Matra Hachette SA v Commission* [1994] ECR II-595;

Joined Cases T-39/92 and T-40/92 *CB and Europay v Commission* [1994] ECR II-49;  
 Case T-3/93 *Air France v Commission* [1994] ECR II-121;  
 Case T-29/92 *SPO and Others v Commission* [1995] ECR II-28;  
 Case C-177/94 *Perfili* [1996] ECR I-161;  
 Case C-299/95 *Kremzow v Austria* [1997] ECR I-2629;  
 Case C-309/96 *Annibaldi v Sindaco del Comune di Guidonia and Presidente Regione Lazio* [1997] ECR I-7493;  
 Joined Cases T-213/95 and T-18/96 *SCK and FNK v Commission* [1997] ECR II-1739;  
 Joined Cases C-68/94 and C-30/95 *French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC) v Commission* ("Kali und Salz") [1998] ECR I-1375;  
 Case C-7/95 P *John Deere v Commission* [1998] ECR I-3111;  
 Case C-185/95 P *Baustablgewebe GmbH v Commission* [1998] ECR I-8417;  
 Case T-374/95 *European Night Services v Commission* [1998] ECR II-3141;  
 Case T-348/94 *Enso Espanola v Commission* [1998] ECR II-1989;  
 Case C-199/92 P *Hüls AG v Commission* [1999] ECR I-4287;  
 Joined Cases T-305 to 307/94, T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *LVM v Commission* (PVC case) [1999] ECR II-931;  
 Case T-102/96 *Gencor v Commission* [1999] ECR II-753;  
 Case T-22/97 *Kesko Oy v Commission* [1999] ECR II-3775;  
 Case T-221/95 *Endemol Entertainment Holding B.V. v Commission* [1999] ECR II-1299;  
 Case T-156/94 *Siderúrgica Aristrain Madrid SL v Commission* [1999] ECR II-645;  
 Case T-65/96 *Kish Glass&Co Ltd v Commission* [2000] ECR II-1885;  
 Case T-41/96 *Bayer v Commission* [2000] ECR II-3383;  
 Joined Cases T-25/95 et al. *Cimenteries CBR and Others v Commission* [2000] ECR II 491;  
 Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, *Limburgse Vinyl Maatschappij (LVM) a.o. v Commission* [2002] ECR I-8618;  
 Case T-342/99 *Airtours plc v Commission* [2002] ECR II-2585;  
 Case T-310/01 *Schneider Electric SA v Commission* [2002] ECR II-4071;  
 Case T-131/99 *Michael Hamilton Shaw and Timothy John Falla v Commission* [2002] ECR II-2023;  
 Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others v Commission* [2003] ECR I-8375;

Case C-194/99 P *Thyssen Stahl v Commission* [2003] ECR I-10821;

Case C-338/00 P *Volkswagen v Commission* [2003] ECR I-9189;

Case T-342/00 *Petrolescence and SG2R v Commission* [2003] ECR II-67;

Joined Cases T-191/98, T-212/98 and T-214/98 *Atlantic Container Line* [2003] ECR II-3275;

Case T-65/98 *Van den Bergh Foods Ltd v Commission* [2003] II-04653;

Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland A/S and Others v Commission* [2004] ECR I-123;

Joined Cases C-2/01 P and C-3/01 P *BAI and Commission v Bayer* [2004] ECR I-23;

Case T-67/00 *JFE v Commission* [2004] ECR II-2501;

Case C-12/03 P *Commission v Tetra Laval BV* [2005] ECR I-987;

Case T-210/01 *General Electric Company v Commission* [2005] ECR II-5575;

Case T-464/04 *Impala v Commission* [2006] II-02289;

Case T-177/04 *Easyjet v Commission* [2006] ECR II-1931;

Case T-168/01 *GlaxoSmithKline Services Unlimited v Commission* [2006] ECR II-2969;

Case C-280/06 *Autorità Garante della Concorrenza e del Mercato v Ente Tabacchi Italiani – ETI Spa* [2007] ECR I-10893;

Joined Cases C-403/04 P and C-405/04 P *Sumitomo Metal Industries and Nippon Steel v Commission* [2007] ECR I-729;

Case T-340/03 *France Telecom* [2007] ECR II-107;

Case T-351/03 *Schneider Electric SA v Commission* (“Schneider IP”) [2007] ECR II-2237;

Case T-170/06 *Alrosa Company Ltd v Commission* [2007] ECR II-2601

Case T-201/04 *Microsoft Corp. v Commission* [2007] ECR II-3601;

Case C-413/06P *Bertelsmann AG and Sony Corporation of America v Independent Music Publishers and Labels Association (Impala)* [2008] I-4951;

Case T-276/04 *Compagnie maritime belge v Commission* [2008] ECR II-1277,

Case T-271/03 *Deutsche Telekom AG v Commission* [2008] ECR II-477;

Case T-69/04 *Schunk GmbH and Schunk Kohlenstoff-Technik GmbH v Commission* [2008] ECR II-2567;

Case T-229/08 *Impala v Commission*, action declared devoid of purpose by Order of the General Court of 30 September 2008;

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Case C-202/07 P *France Télécom SA v Commission* [2009] ECR I-02369;

Case C-440/07 P *Commission v Schneider Electric SA* [2009] ECR I-6413;

Case C-534/07 P *William Prym GmbH & Co. KG and Prym Consumer GmbH & Co. KG v Commission* [2009] ECR I-7415;

Joined Cases C-322/07 P C-327/07 P and C-338/07 P *Papierfabrik August Koehler AG, Bollore SA and Distribuidora Vizcaína de Papeles SL v Commission* [2009] ECR I-7191;

Case T-48/04 *Qualcomm Wireless Business Solutions Europe BV v Commission* [2009] ECR II-2029;

Case T-127/04, *KME Germany AG, KME France SAS and KME Italy SpA v Commission* [2009] ECR II-1167;

Case T-18/03 *CD-Contact Data GmbH v Commission* [2009] ECR II-1021;

Case C-441/07 P *Commission v Alrosa Company Ltd* [2010] ECR I-5949;

Case C-413/08 P *Lafarge SA v Commission* [2010] ECR I-5361;

Case T-25/05, *KME Germany AG, KME France SAS and KME Italy SpA v Commission* [2010] II-91;

Case T-66/01 *Imperial Chemical Industries Ltd v Commission* [2010] II-02631;

Case T-342/07 *Ryanair Holdings plc v Commission* [2010] ECR II-3457;

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Joined Cases T-117 and 121/07 *Areva SA and Others v Commission* [2011] ECR II-633;

Case T-138/07 *Schindler Holding Ltd. and Others v Commission* ECR [2011] II-04819;

Case T-343/06 *Shell Petroleum NV, The Shell Transport and Trading Company Ltd and Shell Nederland Verkoopmaatschappij BV v Commission*, not yet reported;

Case T-336/07 *Telefónica, SA and Telefónica de España, SA v Commission*, not yet reported;

Case C-272/09 P *KME Germany and Others v Commission*, not yet reported;

Case C-389/10 P *KME Germany and Others v Commission*, not yet reported;

Case C-386/10 P *Chalkor AE Epexergasias Metallon v Commission*, not yet reported;

Case C-457/10 P *AstraZeneca AB and AstraZeneca plc v Commission*, not yet reported;

Case C-199/11 *Europese Gemeenschap v Otis NV and Others*, not yet reported;

Case T-79/12 *Cisco Systems, Inc. and Messagenet SpA v Commission* [not yet reported];

Case T-56/09 *Saint - Gobain Glass France and Others v Commission* (pending);

Case C-295/12 P *Telefónica S.A. and Telefónica de España, S.A.U. v Commission* (pending);

Case T-260/13 *Ryanair Holdings v Commission* (pending).

BOT, Opinion in Joined Cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P *Erste Group Bank AG* (C-125/07 P), *Raiffeisen Zentralbank Österreich AG* (C-133/07 P), *Bank Austria Creditanstalt AG* (C-135/07 P) and *Österreichische Volksbanken AG* (C-137/07 P) *v Commission* [2009] ECR I-8681;

BOT, Opinion in Joined Cases C-322/07 P, C-327/07 P and C-338/07 P *Papierfabrik August Koehler AG, Bollore SA and Distribuidora Vizcaina de Papeles SL v Commission* [2009] ECR I-7191;

COSAMS, Opinion in Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECR I-11369;

DARMON, Opinion in Case 374/87 *Orkem v Commission* [1989] ECR 3283;

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LEGER, Opinion in Case C-185/95 P *Baustahlgewebe v Commission* [1998] ECR I-8417;

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