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**The Enforcement of EU Competition Law
and Its Compliance with the Right to Fair Trial**

**Vymáhání soutěžního práva EU Evropskou Komisí
a jeho soulad s právem na spravedlivý proces**

Master Thesis

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I hereby declare that I have written this master thesis on my own, that I have duly referred to all the sources and literature used, and that this master thesis was not used to obtain any other academic degree.

In Prague

Signature.....

I would like to thank my supervisor doc. JUDr. Václav Šmejkal, Ph.D. for valuable comments and input and for his admirable patience. I also give my thanks to Zuzi for being here with me.

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List of abbreviations

AG – Advocate General

Charter – Charter of Fundamental Rights of the European Union

CJEU – Court of Justice of the European Union

Court or ECJ – the relevant formation of the Court of Justice of the European

Commission – the European Commission

ECSC Treaty – Treaty on the European Coal and Steel Community

EEC Treaty – Treaty on the European Economic Community

ECHR or the Convention – Convention for protection of Human Rights and

ECtHR – European Court of Human Rights

EU – European Union and all its legal predecessors

Regulation – Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty

TEU – Treaty on the European Union

TFEU – Treaty on the Functioning of the European Union

Union or formerly Court of Justice of the European Communities

Fundamental Freedoms

Treaties – TEU & TFEU and their predecessors

1 Introduction

This thesis tries to tackle the issue of procedural justice in the area of EU competition law. The enforcement of competition rules in the Union on one hand fights the inefficiency on the markets caused by cartel agreements and abuses of dominant positions, but subjects the wrongdoers to unprecedented and sometimes indeed extreme fines on the other. There is in principle nothing strange about punishments for wrongdoings but the necessary prerequisite is to create certain level of guarantees within the legal system that will hinder any potential abuse of power by the enforcement authorities.

In the EU, it is common ground that every person – legal or natural – facing a civil claim or a criminal charge has a whole list of procedural rights which are guaranteed by the public authorities. This is true even more in the time when the Union adopted its own Charter of Fundamental Rights and has a legal obligation to access to the Convention which would make also the whole case law of the European Court of Human Rights binding upon the Union institutions. The core of these rights can be found in article 6 of the ECHR and articles 47-49 of the Charter.

However, in the field of competition law partly due to the technical and economic nature of the subject-matter partly due to the institutional setting some of these rights might seem to be endangered. Namely, given the extremely dominant position of the European Commission which acts in this field as the rule maker (enacts the delegated regulations in which it codifies its own practices, competences and the rights of the subjects), the investigator (investigates the individual infringements) and the „judge” since it issues enforceable decisions in individual cases. Yet, this is not a completely unique system in Europe and many of the national competition authorities also possess extensive powers.

The topic of fair trial in EU competition law includes many different aspects. Usually they are divided into three main groups – pre-trial rights, trial or hearing rights and post-trial or appeal rights. Sometimes, when it is referred to fair trial in competition law it includes all these aspects. However, there is also a narrower definition of the

topic which reflects only the third group of rights – the appeal rights. This narrower definition of the topic touches namely upon the issue of judicial review of the decision issued by the Commission performed by the judiciary of the EU, in particular by the Tribunal.

The author being aware of the understanding and scope of the right to fair trial in EU competition law uses the term in its narrower understanding. Therefore, in this thesis it will be dealt with the topic of judicial review, its depth, how it is exercised by the judiciary of the EU and how that approach changed in time. Due regard will be paid also to the case law of the ECtHR and to its influence in the EU.

1.1 Research question

This thesis submits that (i) the (*triune*) role of the Commission in the process of enforcement of EU competition law is not decisive from the perspective of post-trial rights and (ii) with the possibility of full judicial review the system of EU competition law enforcement does not constitute any threat to the protection of fundamental rights. That shows that the difficulty in the system lies with the Court. Although the CJEU reviewed the procedural aspects of competition decisions taken by the Commission as well as all parts of the decision on sanction, in its longstanding case law it established the *doctrine of marginal review* under which it did not fully review the substantive parts of the decisions on the infringement as such. This constitutes the core of the problem. The right to be heard by an independent and impartial judge would be in this manner indeed marginalised to a mere technicality and would not fit the substantive standards required by the Convention and the Charter. The question therefore is: does the Court exercise only a marginal review in competition cases and if so, does that render the system of judicial review non-compliant with art. 47 of the Charter and art. 6 of the ECHR?

1.2 Hypothesis

Competition law is one of the most important policies in the EU which is “founded on the values of respect for [...] the rule of law and respect for human rights” and also now with the Charter applicable it would be a logically incoherent system if it

allowed for factual lowering of the standards guaranteed even on the national level. The author will therefore submit that the system of EU competition law enforcement is compatible with the mentioned human rights guarantees as far as the Union courts provide private parties with the current level of scrutiny which is also required by the Charter and the Convention.

The thesis will, firstly, introduce the system of procedural guarantees of fair trial in the EU and then their role in the competition policy of the Union. Secondly, it will describe and analyse the role of the central authority in the field - the Commission. Thirdly and mainly it will examine the main concepts in the field such as the legal basis of the action for annulment, *marginal* and *full review*, it will analyse the developments of the case law of the Court of Justice of the European Union and the European Court for Human Rights and show the relatively recent changes in the approach of the CJEU which responded to severe and not only academic criticism. Finally, the thesis will make a conclusion regarding the question asked at the beginning - whether the right to fair trial of individuals in competition cases is protected sufficiently.

The idea is to sum up the topic of protection of fair trial in the area of competition law, put it in the context of the case law of the CJEU as it developed in the time, confront it with the legal requirements stemming from the ECHR and find out whether the Union is indeed a community founded on values such as the rule of law and respect for fundamental rights.

2 The protection of fundamental rights in the EU

The original focus of the European integration project was security in Europe, economic cooperation and the recovery of a destroyed continent. A brief look into the history of the process of integration one can see already from the names of the respective treaties that centre of gravity lied for decades with the trade in key industrial resources, establishment of a common market, customs union, etc. The question of the protection of fundamental rights was in such an environment not an issue and was neither debated nor regulated on this level.

However, this had changed under the influence of the European judiciary. In the year 1969 the Court very briefly stated in the *Stauder* case that „fundamental human rights” are a part of the general principles of the EU and such are protected by the ECJ.¹ But given the prominence and extent of human rights protection in European states (namely in Germany) it was doubted that the Court will be able and willing to secure the high national standard of protection. It elaborated on that topic in 1970 in the case *Internationale Handelsgesellschaft*.² It is true that the Court stated again that „respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community“.³

However, the Court set out another (and perhaps more important) principle when saying that „the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure“.⁴ In other words, the Court expanded the principle of primacy of EU law to the extent that it was to take precedence over national constitutional law (including fundamental rights) as well. Implicitly that meant that EU law as interpreted by the

¹ Judgement of the ECJ in the case 26/69 *Stauder* [1969] ECLI:EU:C:1969:57, para. 7.

² Judgement of the ECJ in the case 11/70 *Internationale Handelsgesellschaft* [1970] ECLI:EU:C:1970:114.

³ *Ibid.*, para. 4.

⁴ *Ibid.*, para. 3.

Court may prevail over the national human rights safeguards as understood by respective constitutional courts. It is not hard to imagine that this might have been an indeed unpleasant prospect for many national constitutional judges. Even more so, when, at that time, there was no explicit human rights catalogue on the EU level. To certain extent these concerns were justified already by the ruling in *Internationale Handelsgesellschaft* itself. The Court did not agree with the German administrative court that the EU measure in question was in breach of the German constitution and upheld it. For some that was a sign that the level of protection of fundamental rights on EU level is not as high as on national level.

One could therefore not be surprised when in the year 1974 the German constitutional court issued its famous judgement *Solange I*. In it the *Bundesverfassungsgericht* reserved the right to review all acts of the Union, as long as the level of protection of fundamental rights in the Union will be lower than the level guaranteed by the German constitution.⁵ However, that would constitute a fundamental problem for a legal order which saw itself as autonomous and self-referential.⁶ The only institution authorised to review the legality of the acts of the Union and give a binding interpretation on EU law is the CJEU.⁷

The Court of Justice reacted to the *Solange* case already the same year with its decision in *Nold*. The Court stated that when protecting the fundamental rights, it has to observe the constitutional traditions common to the member states and therefore cannot uphold a measure which would be in conflict with fundamental rights protected by the national human rights catalogues.⁸ Moreover, the Court also expressed its opinion that certain international treaties which were signed and ratified by the member states can also serve as a guidance in this field. Thanks to this decision the EU transformed from a

⁵ The judgement of the Bundesverfassungsgericht in the case *Solange I*, 2 BvL 52/71, 271 ff.

⁶ Pribáň, J., 2009. The Self-Referential European Polity, its Legal Context and Systemic Differentiation: Theoretical Reflections on the Emergence of the EU's Political and Legal Autopoiesis. *European Law Journal*, Vol. 15, No. 4, pp. 442–461.

⁷ Art. 19 TEU, 267 TFEU, judgement in the case C-314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECLI:EU:C:1987:452.

⁸ Judgement of the ECJ in the case 4/73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities* [1974] ECLI:EU:C:1974:51, para 13.

purely economic community to „an entity devoted to the protection and enforcement of fundamental rights”.⁹

2.1 Three pillars of fundamental rights protection in the EU

The protection of fundamental rights in Europe stands therefore on three main pillars. For the purpose of this thesis two of the instruments will be the relevant ones.

First of all, the EU legal order has its own Charter of fundamental rights which shall have the same legal force as the Treaties.¹⁰ One must read the rights stemming from the Charter in accordance with its art. 52. Paragraph three of the said article stipulates that where the specific right in the Charter corresponds with a right in the Convention, „the meaning and scope of those rights shall be the same as those laid down by the said Convention”. However, Union law may provide for a more extensive protection.

The Convention, being the second relevant instrument, is not only the text of the international treaty itself which is binding upon the Contracting Parties. It must be read in the light of all the case law of the ECtHR which is via art. 52(3) also binding when interpreting the relevant provisions of the Charter. The rights emanating from the Charter must also be interpreted „in harmony with” the traditions/general principles of EU law.¹¹ In the opinion of the author, very illustrating here is the approach of the German constitutional court which developed the doctrine of *Strahlwirkung* of the human rights through the legal system, i.e. every single rule in a legal system as well as the system as a whole must be interpreted in conformity with the human rights catalogue.¹² This is exactly the approach which is delineated in art. 52(4) of the Charter. Moreover, the EU is legally bound to accede to the Convention itself which makes all the questions raised in this thesis even more pressing.

⁹ DE VRIES, S., BERNITZ, U., WEATHERILL, S., 2013. The Origin of Fundamental Rights Protection in Europe. DE VRIES, Sybe, BERNITZ, Ulf, WEATHERILL, Stephen (eds.): *The Protection of Fundamental Rights in the European Union after Lisbon.*, p. 1.

¹⁰ Art. 6(1) of the TEU.

¹¹ Art. 52(4) of the Charter.

¹² The judgement of the Bundesverfassungsgericht in the case *Lüth*, 1 BvR 400/51, para. 198.

Yet, the first attempt to negotiate an accession agreement was rejected by the ECJ mainly for reasons of constitutional structure of the Union.¹³ Once the Union will accede (and due to the formulation of art. 6(2) TEU it is rather a question of ‘when’ than ‘if’) the bodies and agencies of the Union will be bound as to the final interpretation of the Convention by the judgments of the ECtHR and therefore in their decision-making they will have to respect the scope of the rights stemming from the ECHR as interpreted by the Strasbourg court.

However, after the Court’s Opinion 2/2013 it seems that the accession to the Convention will be rather a difficult political balancing exercise between the specificities of the EU legal order as a new legal order of international law and the requirement that even the bodies of the EU can be made accountable to another judicial institution which is external to the system of the Treaties. Nonetheless, the fact that the EU has not yet acceded to the Convention does not change anything substantial.¹⁴

At this stage, it must be also noted that there is a line of case law of the ECtHR according to which there is a rebuttable presumption of equivalent protection of fundamental rights in the EU and under the Convention. The ECtHR formulated this idea in the famous *Bosphorus* case where it was deciding on the effects of a restrictive measure of the Union towards a third-state national.¹⁵ The ECtHR decided on the basis of the fact that the protection of fundamental rights is embedded in the EU legal order in the form of general principles of EU law, with regard to the Convention having a special position in the case law of the Court and also knowing about the development of a EU’s own charter of fundamental rights. The ECtHR considered also the procedural possibilities of the review of acts of the organs of the Union satisfactory and therefore it stated that „[i]n such circumstances, the Court finds that the protection of fundamental

¹³ To that end see Opinion 2/2013 of the ECJ [2014] ECLI:EU:C:2014:2454, paras. 153-258.

¹⁴ The first explicit reference to the Convention made by the Court was in the year 1975 in the judgement of the ECJ in the case *Rutili v Ministre de l’Interiori* 36/75 [1975] ECLI:EU:C:1975:137. In the same year, France acceded to the Convention as the last member state of the Union.

¹⁵ Judgement of the ECtHR in the case *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, Application No. 45036/98.

rights by Community law can be considered to be, and to have been at the relevant time, “equivalent” [...] to that of the Convention system”.¹⁶

2.2 Subject-matter of the right to fair trial

The right to fair trial specifically is enshrined in art. 47 of the Charter which stipulates in its second indent: “Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented”. The Charter speaks of one effective judicial remedy for “everyone whose rights and freedoms guaranteed by the law of the Union are violated”.¹⁷

In comparison, the Convention offers two different levels of protection. First paragraph of art. 6 of the Convention provides for a general norm which applies to judicial proceedings when determining civil rights or obligations or any criminal charges against a person. Such a person is “entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”¹⁸ However, the Convention provides also special guarantees for persons charged with a criminal offence in paragraphs two and three of art. 6 and in art. 7. These guarantees entail namely the presumption of innocence, right to be heard in a language which the person charged understands, right to defence, no punishment without law, etc.

The Charter stipulates the same norms in art. 48 and 49, nonetheless it seems to be a general conclusion that art. 47 of the Charter and art. 6 of the Convention are correspondent and that „in all respects other than their scope, the guarantees afforded by the ECHR apply in a similar way to the Union”.¹⁹ The different structure of art. 47 of the Charter only leaves it up to the relevant court to ensure that in the particular proceedings the remedy it is offering, is effective and the trial is fair, by which it must take into account all the specific circumstances of the case at hand.

¹⁶ Ibid., para. 165.

¹⁷ Art. 47(1) of the Charter.

¹⁸ Art 6(1) of the Convention

¹⁹ Peers, S., Hervey, T., Kenner, J., Ward, A. (Eds.), 2014. *The EU Charter of Fundamental Rights: A Commentary*, Oxford: Hart Publishing, pp. 1197-1198.

The obvious question, however, is the scope of the civil and criminal part of art. 6 of the Convention. What does it mean ‘determination of *civil* rights’ and how is a ‘*criminal* offence’ established? The ECtHR tends to give the notions used in the Convention their autonomous meaning independent from the content they may have in the domestic legal orders of the Contracting Parties.²⁰ In the context of criminal charges, ECtHR was in the position of using one standard of safeguards (art. 6) to national legal systems which know only criminal offences as well as to systems which know also a specific type of public offences which are not called nor considered criminal (namely the administrative offences). Therefore, the ECtHR developed a longstanding line of case law in which it had to define the scope and a general guideline on the application of the notion *criminal charges*.

For the ECtHR, the national categorisation of the respective offence is not determining but rather a starting point for its further considerations. It also takes into account the nature of the offence and gravity of the sanction which can be imposed upon the perpetrator.²¹ It is clear from the case law of the ECtHR that even an administrative proceeding which can result into a financial or other sanction could in principle fall under the criminal prong of art. 6 of the Convention.²² This line of case law of the ECtHR is valid also in the specific field of competition law in Europe and in the EU.²³

This is valid also despite the fact that art. 23(5) of the Regulation explicitly stipulates that „decisions [on fines] shall not be of criminal nature”. From the perspective of the ECtHR the said norm is the ‘national’ characterisation and as such it is not determining. The above-mentioned *Engel* criteria apply here in the same manner as in the context of any national law. The Court accepted moreover the case law of the

²⁰ White, R., Ovey, C., 2010. *The European Convention on Human Rights*, Oxford: OUP, p. 42 ff.

²¹ Judgement of the ECtHR in the case *Engel and others v the Netherlands*, Application No. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72.

²² Judgement of the ECtHR in the case *Öztürk v. Turkey*, Application No. 22479/93.

²³ Judgement of the ECtHR in the case *Société Stenuit v. France*, Application No. 11598/85.

ECtHR referred to above in *Hüls* where it was deciding on the applicability of the presumption of innocence in competition proceedings.²⁴

Yet, there are still evident differences between classical criminal proceedings and administrative proceedings which can result into some form of punishment (although such punishment can be a severe one as it can be shown on the data of the EC).²⁵ In the case law of the ECtHR the term *hard core* criminal proceedings describes such type of proceedings which lie indeed in the core of criminal law, are aimed at prosecuting the most serious offences, the possible sanction can amount to imprisonment, etc. In the German legal tradition, these would be the proceedings based on the criminal code and code of criminal procedure. All the other type of proceedings led by administrative bodies which could result into a sanction would fall outside the *hard core* criminal proceedings.²⁶

This differentiation is not a mere academic exercise. From the perspective of application of fair trial guarantees, in both cases there must exist a possibility of a judicial review of both law and facts of the case (i.e. full review) but in case of *non-hard core* criminal proceedings, there can be an administrative body deciding about the sanction in the first instance if there is a follow-up possibility of full judicial review.²⁷ However, the requirement of a court exercising full review is in the end a condition *sine qua non* of the right to fair trial.²⁸ From this perspective it is easy to see how it fits the application of competition law in the EU.

²⁴ Judgement of the ECJ in the case C-199/92 P *Hüls v Commission* [1999] ECLI:EU:C:1999:358, para 150.

²⁵ See the statistical data of the Commission accessible at <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>.

²⁶ Judgement of the ECtHR in the case *Jussila v. Finland*, Application No. 73053/01.

²⁷ *Ibid.*, para. 43; see also e.g. Wouter, W., 2004. The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis. *World Competition*, (2004) 27, pp. 202-224.

²⁸ Geradin, D., Petit, N., 2010. Judicial Review in European Union Competition Law: A Quantitative and Qualitative Assessment. *TILEC Law and Economics Discussion Paper*, No. 2011-008, p. 15.

2.3 Fundamental rights and EU competition law

The role of competition law in the European legal order is central. The EU and its predecessors came into existence as entities uniting the nations of Europe on economical basis. The articles of the Treaties protecting free competition within the internal market existed since the very beginning and their wording changed only very little in time.²⁹ There are multiple objectives which are pursued by these provisions and they were discussed in depth at different occasions but it is important to realise that even a field of law which from a national perspective is not of constitutional importance has a different position in EU law.³⁰

This is to stress that protection of fundamental rights is even more important in the field where there has been a major intervention of public bodies, law and decision-making into private relationships. Combined with the development of EU law in the field of protection of fundamental rights, rule of law and protection of values the Union is founded upon, there is no room left for doubt what interests are here at stake and should be protected.³¹ Since it is also clear that the standards as set out above are to be applied in the competition law context, the Commission and the courts of the EU which are endowed with the powers to enforce the competition law must uphold these standards in their decision-making.

The area of competition law is a fertile ground for litigations in which the argument of fundamental rights has been raised regularly. Given the fact that the Commission possesses strong investigatory powers the parties have often claimed that both their substantive and procedural fundamental rights were violated. In the early case of *Hoechst*, the issue at stake was whether an undertaking, a legal person, enjoys the right to private and family life within the meaning of art. 8 of the ECHR.³² In other

²⁹ See art. 85 and 86 of the EEC Treaty, accessible at <http://www.gleichstellung.uni-freiburg.de/dokumente/treaty-of-rome>.

³⁰ To that end see e.g. Craig, P., De Búrca, G., 2015. *EU Law: Text, Cases and Materials*, Oxford: OUP, pp. 959-1071.

³¹ The development from no fundamental rights protection through *Solange I&II* to a Charter and protection and promotion of values as a founding principle set out in the Treaties after Lisbon.

³² Judgement of the ECJ in the joint cases 46/87 and 227/88 *Hoechst AG v Commission of the European Communities* [1989] ECLI:EU:C:1989:337.

words the applicants claimed that their business premises are protected equally as a private home. The Court stated unequivocally that a dawn raid in the business premises cannot be looked at through the lens of private and family life. According to the Court „The protective scope of [art. 8 ECHR] is concerned with the development of man's personal freedom and may not therefore be extended to business premises”. The Court also pointed out that there was no case law of the ECtHR on that subject and it had therefore no guidance for a different interpretation.³³ However, the ECtHR later clarified on that topic that in some cases even business premises can be protected under art. 8 ECHR.³⁴ The ECJ adjusted its case law much later in the case *Roquette* where it accepted that under certain circumstances also business premises can enjoy the same level of protection as a private home of a person.³⁵ It is an illustrative example of the dynamic of the system of protection of fundamental rights in Europe where the ECtHR has been setting up particular standards and the Court always had to react to these developments.

The sometimes-diverging conclusions of the two courts can be explained by their different background. While the ECtHR was founded as a purely human rights court protecting the rights set out in the Convention, the ECJ was a judicial body of an economic community which, at the beginning, did not have the ambition to decide on human rights matters – it was rather an economic than human rights court.

³³ Ibid., para. 18.

³⁴ Judgement of the ECtHR in the case *Niemitz v. Germany*, Application no. 13710/88, para 29.

³⁵ Judgement of the ECJ in the case C-94/00 *Roquette Frères v Directeur général de la concurrence, de la consommation et de la répression des fraudes* [2002] ECLI:EU:C:2002:603.

3 Role of the European Commission in the structure of EU law enforcement

Although the EU presents itself as an entity of non-state nature³⁶ it provides certain guarantees which are typical for liberal democratic states like the principle of division of powers. That means that there is a more or less clear line between the legislative branch, executive branch and judiciary and their roles within the system. The different roles of the executive and the judiciary in the EU are crucial from the point of view of the right to fair trial in competition law.

The institution endowed with the power to ensure that in the interpretation and application of the Treaties the law is observed, is the Court of Justice of the EU.³⁷ That means that the Court has in fact monopoly on final and binding interpretation and determination of validity of EU law. The general approach of the Court is that individual rights guaranteed by EU law have to be protected effectively and in equivalent manner as the rights guaranteed by the national legal orders.³⁸ It was already stated above that fundamental guarantee in EU legal order as laid down in art. 47 of the Charter is a guarantee of an *effective judicial remedy*. Therefore, it is up to the Court to review i.a. the decisions of the Commission when it acts as the enforcement authority in the field of competition law. In that regard, the Court is surely an independent and impartial tribunal within the meaning of the Charter.³⁹

In contrast, although the Commission (more specifically the DG Competition) possesses also certain type of decision making powers and determines rights and obligations of persons in the field of competition law, it acts as an authority of

³⁶ Opinion 2/2013 of the ECJ [2014] ECLI:EU:C:2014:2454, para. 49.

³⁷ Art. 19(1) of the TEU.

³⁸ See e.g. judgement of the ECJ in the case C-93/12 *ET Agroconsulting-04-Velko Stoyanov v Izpalnitelen direktor na Darzhaven fond «Zemedelie» - Razplashatelna agentsia* [2013] ECLI:EU:C:2013:432 or judgement of the ECJ in the case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECLI:EU:C:2011:389 in competition law context.

³⁹ An enumeration of certain attributes which together constitute a court or tribunal was given by the Court in e.g. judgement in the case C-54/96 *Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH* [1997] ECLI:EU:C:1997:413. Although there it was for the purpose of art. 267 TFEU, there is no apparent reason why the same attributes could not be applied to the CJEU in this context. For the same conclusion see e.g. Peers, S., Hervey, T., Kenner, J., Ward, A. (Eds.), 2014. *The EU Charter of Fundamental Rights: A Commentary*, Oxford: Hart Publishing, p. 1214.

administrative nature and is an inherent part of the executive branch. Article 17 TEU entrusts the Commission i.a. with ensuring the application of the Treaties, and of measures adopted by the institutions pursuant to them and it is also designated to oversee the application of Union law under the control of the Court of Justice of the European Union.⁴⁰ In connection with other tasks enshrined in art. 17 TEU the executive role of the Commission is clearly embedded in the fundamental structure of the EU. In the field of competition law, it is reiterated in articles 103 and 105 TFEU. It is the Commission who ensures the application of the competition law rules. The specific powers of the Commission are then laid down by the Regulation 1/2003 adopted on the basis of what is now art. 103 TFEU.

3.1 Commission as the Competition Authority

The role of the Commission today is to evaluate the factual situation on the market and its structure, the position of the respective undertakings and their real economic influence in a specific segment of the market, it specifies the relevant market for a particular proceeding, calculates the economic performance of the undertakings (namely their turnover and profit), calculates the impacts of certain actions on the market on the consumer, assesses the barriers to entry on a market or a possible foreclosure of a market and conducts other highly specialised activities of economic and non-legal nature.

Besides, based on art. 103 TFEU the Commission proposes also to the Council draft regulations or directives to give effect to the principles set out in arts. 101 and 102 TFEU, it can also adopt implementing regulations based on art. 105(3) TFEU and it also produces a series of *soft law* documents which all together create the normative framework in the field of competition law in the EU. A look in some of the *soft law* documents the Commission produces to increase the transparency of its actions, allows to see that the concepts the Commission uses require a high level of competence in the field of economics. Although these concepts are introduced in the legal language they are of non-legal nature.

⁴⁰ Art. 17 (1) of the TEU.

The Commission also makes certain political decisions. From the wording of Art. 17 TEU it is clear that the Commission as a whole is a political body which „promotes the general interest of the Union and takes appropriate initiatives to that end”.⁴¹ In the field of competition law it makes policy choices like which sector of the economy it will oversee more closely (given the limited resources it has and number of complaints lodged with it in accordance with art. 7 of the Regulation) and therefore whether its actions will potentially have an effect directly on the consumer (e.g. the telecom market) or whether the impact on the consumer will be more indirect (e.g. a probe into the steel production market). Other type of such policy decisions is whether the Commission orders an interim measure which can significantly disturb the activities of the undertaking in question or even the relevant market as such.⁴² The Commission also decides whether it will rather impose a fine, in case it finds a violation of the rules or whether it will choose the possibility of commitments or whether it will grant the leniency programme in a particular case.⁴³ If the Commission decides to impose a sanction it is within its discretionary powers whether it will be a fine or periodic penalty payments and when they are due.⁴⁴

Co-creating the normative framework, prosecuting the perpetrators and imposing sanctions all done by a single institution puts the Commission in a very specific, *triune* position when it comes to safeguarding the right to fair trial.⁴⁵

It is true however that the procedure in front of the Commission also went through significant developments. Today the Commission tries to effectively guarantee certain level of fair trial rights even in the investigation phase. Namely, the investigation is done by the employees of DG Competition whereas the role to assess and evaluate the evidence in an oral hearing is conferred upon a Hearing Officer which is an independently acting person with a direct mandate from the College of the

⁴¹ Art. 17(1) of the TEU.

⁴² Art. 8 of the reg. 1/2003.

⁴³ Art. 9 and 23 of the reg. 1/2003.

⁴⁴ Art. 23 and 24 of the reg. 1/2003.

⁴⁵ To that end see also a later criticism from AG Sharpston in her opinion to the case C-272/09 P *KME Germany AG, KME France SAS and KME Italy SpA v European Commission* [2011] ECLI:EU:C:2011:810, para. 68.

Commissioners who appoint them and whose powers and prerogatives are laid down by a specific legal basis.⁴⁶ The Hearing Officer also safeguards the effective exercise of procedural rights laid down by the Regulation, Treaties or the Court and decides potential disputes between the parties regarding such rights or e.g. access to the file. The Hearing Officers then draft the final report which are submitted to the Commissioner for competition and responsible Director-General. Moreover, based on such report the final decision is not taken solely by the Commissioner but by the College of Commissioners pursuant to the Rules of Procedure of the Commission.

However, from the perspective of the narrow understanding of the right to fair trial as defined at the beginning, it does not change the situation very much. All the safeguards, which are for sure unprecedented for an enforcement body of administrative nature, are still regulated within and by the executive branch of power. Therefore, it does not constitute the necessary standard of protection which can be secured only by a judicial review from an independent and impartial court or tribunal.

The administrative decisions have a direct and significant impact on the subjective rights of the undertaking(s), their owners, employees and other stakeholders. The problems of the decision-making process in the field of EU competition law are well described by Nicolas Petit from the Université de Liege who identifies following main groups - (i) serious interference with fundamental rights (namely right to property, right to choose an occupation or conduct business, protection of personal data and others), (ii) sophisticated normative standards (retreat from formal standards in favour of economic analysis which is particularly challenging), (iii) subject-matter complexity (e.g. the complex markets of technological products), (iv) high cost of errors, (v) evidentiary hurdles (e.g. heavy reliance on *ex post* circumstantial evidence) and finally also (vi) the lack of conceptual homogeneity in enforcing the rules.⁴⁷

The role of the Commission as it was already suggested is very specific and although it did not stay deaf towards these objections, it can be in no way designated as

⁴⁶ Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings (2011/695EU).

⁴⁷ Geradin, D., Petit, N., 2010. Judicial Review in European Union Competition Law: A Quantitative and Qualitative Assessment. *TILEC Law and Economics Discussion Paper*, No. 2011-008, pp. 9-10.

an independent court or tribunal with full jurisdiction. It is therefore absolutely necessary that the undertakings have a possibility to counter the decisions in a court of law if they perceive that their rights were violated by the Commission. This implies that the right to fair trial plays here a crucial role. The negative effect of this is however, Petit submits, that a detailed judicial scrutiny limits the margin of discretion of the Commission and hence can cause a „decisional ossification”.⁴⁸ The question of level of judicial review becomes then a policy choice itself and as such is answered by courts and not by a prima facie political body. This is however a broader problem of judicialisation of politics and politicisation of courts which is beyond the topic of this thesis and has been discussed on different occasions.⁴⁹

The different standards of review are closely connected to either procedural or substantive definition of rule of law. In the procedural paradigm, the courts review whether legislative or executive procedures have been followed. In the substantive one, the courts are obliged to review the substance and content of the act and particularly whether fundamental rights guarantees have been observed. The disadvantage of the latter obviously being the lack of democratic legitimacy and the danger of a *government of judges*.⁵⁰ President of the Court Lenaerts however shows in one of his papers how the Court has taken the ‘structuralist’ approach in the past, which does not favour the requirement of substantive review.⁵¹

⁴⁸ Ibid., p. 8.

⁴⁹ See e.g. in czech Kosař, D., 2017. *Judicializace justiční politiky Evropským soudem pro lidská práva*, Praha: Wolters Kluwer.

⁵⁰ Schütze, R., 2015. *European Constitutional Law*, Cambridge: CUP, p. 350.

⁵¹ Lenaerts, K., 2012. The European Court of Justice and Process-Oriented Review. *College of Europe: Research Papers in Law*, 1/2012.

4 Judicial review in competition cases

The question of intensity of the judicial review seems today to be one of the key elements of the notion of effective judicial remedy.⁵² To find out whether the enforcement of EU competition law is in compliance with the right to effective judicial remedy or the right to fair trial as it was set out above, it is necessary to focus on the level of review performed by the CJEU. The key criterion is whether the review performed by the CJEU satisfies the requirements laid down by the ECtHR on *full jurisdiction* or whether it is rather a *marginal* or *deferential review* of the Commission decisions.

The legal basis for judicial review of competition cases is twofold. Commission decisions can be challenged on the basis of the general provision for actions for annulment (art. 263 TFEU) and also on the basis of art. 261 TFEU in conjunction with art. 31 of the Regulation which provides for another possible way. The difference between these two provisions is significant.

Review under art. 263 TFEU is a classical legality review which has its model in the French *contrôle de légalité*. Such degree of review allows the Court to comment on formal or technical aspects of the Commission decisions and on the manner how the Commission exercised its prerogatives as provided for by art. 263(2) TFEU (i.e. 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).⁵³ The general approach of the Court is indeed to substitute the decision on questions of law not on questions of fact. However, the Court often treats the terms such as worker, services, goods, capital or agreement as questions of law.⁵⁴

It is necessary to note that „control of legality is conceptually distinct from, and more limited than, a full ‘appeal on the merits’ where the appellate court has full jurisdiction to review the facts, the law and all aspects of the overall correctness of the

⁵² Peers, S., Hervey, T., Kenner, J., Ward, A. (Eds.), 2014. *The EU Charter of Fundamental Rights: A Commentary*, Oxford: Hart Publishing, p. 1227.

⁵³ Art. 263(2) TFEU.

⁵⁴ Craig, P., De Búrca, G., 2015. *EU Law: Text, Cases and Materials*, Oxford: OUP, p. 577.

decision”.⁵⁵ However to differentiate the two types in practice is not an easy task since the border line is not always clear cut „a review of legality may well shade into a review which is virtually indistinguishable from an ‘appeal on merits’”.⁵⁶

4.1 Grounds for review under art. 263 TFEU

As to the lack of competence, this requirement seems to be relatively clear. Based on the principle of conferral, whenever an EU institution is acting it has to be able to point to a legal basis which authorises its action.⁵⁷ Yet, it must be said that the Court interpreted the powers of the Union broadly and purposively in order to achieve Treaty objectives and therefore a competence of a body of the Union does not have to be always necessarily expressly stated in the text of the Treaties.⁵⁸

The second ground for review - the infringement of an essential procedural requirement - is for the Court to define and with regard to individualised decisions it seems to include many of the aspects of procedural due process.⁵⁹ According to professor Craig the term essential procedural requirement includes namely the right to be heard, the right to consultation and participation and the duty to state reasons.⁶⁰ If any of these elements are missing, the Court is not hesitant to annul the act which was the result of such faulty procedure.⁶¹

The term ‘infringement of the Treaties or of any rule of law relating to their application’ is the broadest of the grounds for review under art. 263 and served as the vehicle for the development of the principals of judicial review.⁶² While the infringement of the Treaty refers to all provisions of the Treaties as amended, the

⁵⁵ Bellamy, C., 2012. ECHR and competition law post Menarini: An overview of EU and national case law. *e-Competitions*, No 47946, accessible at <http://awa2013.concurrences.com/business-articles-awards/article/echr-and-competition-law-post>.

⁵⁶ Bellamy, C., 2012. ECHR and competition law post Menarini: An overview of EU and national case law. *e-Competitions*, No 47946, accessible at <http://awa2013.concurrences.com/business-articles-awards/article/echr-and-competition-law-post>.

⁵⁷ Art. 5(2) TEU.

⁵⁸ Craig, P., De Búrca, G., 2015. *EU Law: Text, Cases and Materials*, Oxford: OUP, p. 545.

⁵⁹ Craig, P., 2012. *EU Administrative Law*, Oxford : OUP, chs. 11-12.

⁶⁰ Craig, P., De Búrca, G., 2015. *EU Law: Text, Cases and Materials*, Oxford: OUP, pp. 545-549.

⁶¹ See the note above and the case law referred therein.

⁶² Craig, P., De Búrca, G., 2015. *EU Law: Text, Cases and Materials*, Oxford: OUP, p. 550

meaning of ‘any rule of law relating to their application’ remains somewhat blurry. The intent probably was that the decision-making should not only comply with primary law as phrased by the Treaties but also with other regulations, directives, decisions and also with the rules developed in relation to their application by the Court.⁶³ In any event, it allowed the Court to introduce many of the *general principles of law* into the EU legal order, which now function as a threshold for annulling an act of a body or institution of the EU.⁶⁴ These general principles include i.a. proportionality, legal certainty and legitimate expectations, non-discrimination, transparency, etc.⁶⁵

It can be argued that via *general principles* the otherwise procedural ground for review can be turned into a substantive one – namely with regard to the principle of proportionality.⁶⁶ Professor De Búrca however points out in that context that „the way the proportionality principle is applied by the Court of Justice covers a spectrum ranging from very deferential approach, to quite a rigorous and searching examination of the justification for a measure which has been challenged”.⁶⁷ It appears that the most deferential approach is taken by the Court in cases where the body of the Union exercises a broad discretion entailing „political, economic and social choices on its part, and in which it is called upon to undertake complex assessments.”⁶⁸ In such cases the relevant threshold of i/legality of the measure is whether the measure is „manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue”.⁶⁹ Although it might seem that review of proportionality is question of facts instead of question of law and hence such a ground for review is rather a substantive one, the *British American Tobacco* case shows that even this might be only very limited review in practice not amounting to a substantive one.

⁶³ Craig, P., De Búrca, G., 2015. *EU Law: Text, Cases and Materials*, Oxford: OUP, p. 550.

⁶⁴ Weatherill, S., 2010. *Cases and Materials on EU Law*, Oxford: OUP, p. 224

⁶⁵ Craig, P., De Búrca, G., 2015. *EU Law: Text, Cases and Materials*, Oxford: OUP, p. 550-576.

⁶⁶ Schütze, R., 2015. *European Union Law*, Cambridge: CUP 2015, p. 351-353.

⁶⁷ De Búrca, G., 1993. The Principle of Proportionality and its Application in EC Law. *Yearbook of European Law*, 13 YBEL 105, p. 111.

⁶⁸ Judgement in the case C-491/01 *R v Secretary of State for Health, ex p British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* [2002] ECLI:EU:C:2002:741, para. 123.

⁶⁹ Judgement in the case C-491/01 *R v Secretary of State for Health, ex p British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* [2002] ECLI:EU:C:2002:741, para. 123.

On the other hand, in cases where an individual (fundamental) right is being restricted the Court scrutinizes the proportionality of the measure more vigorously.⁷⁰ In these cases the relevant standard of review rather seems to be whether the alleged disproportionality „impinges upon the very substance of the [fundamental] right”.⁷¹ Such a standard would definitely allow the Court to go into questions of fact and perform a substantive review even under art. 263 TFEU.

Both *BAT* and *Hauer* were however judgements on legislative measures. The decisions of the Commission which are the main issue of this thesis are of executive nature and the Court took to them a different approach although they possess both characteristics mentioned above – the Commission exercises broad expert assessments on one hand but restricts individual rights on the other hand. It will be shown further that the Court did not use this case law and developed a distinctive line of argumentation which moreover underwent a significant development throughout the time.

Generally speaking, the *general principles of EU law* could serve the Court as a way to turn the procedural grounds of art. 263 TFEU into more substantive ones but it will be shown that the Court chose another way how to face the requirements of the right to fair trial.

Regarding the misuse of power, it can be said that the Court uses this ground of review to cover the adoption of a measure by an EU institution „with the exclusive or main purpose of achieving an end other than stated, or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case”.⁷²

Article 263 TFEU provides for grounds of review which are typically procedural and are referred to as *contrôle de légalité*. They relate to the way how a measure was adopted rather than to its specific content. However, the Court interpreted them in a

⁷⁰ To that end see e.g. judgement of the ECJ in the case 44/79 *Hauer v Land Rheinland-Pfalz* [1979] ECLI:EU:C:1979:290 or judgement of the ECJ in the case C-353/99 P *Council v Hautala* [2001] ECLI:EU:C:2001:661.

⁷¹ judgement of the ECJ in the case 44/79 *Hauer v Land Rheinland-Pfalz* [1979] ECLI:EU:C:1979:290, para. 23.

⁷² Craig, P., De Búrca, G., 2015. *EU Law: Text, Cases and Materials*, Oxford: OUP, p. 576.

rather broad way and created within these procedural grounds room for substantive considerations. Although it is not very systematic it could be useful to address some of the concerns raised in the context of review competition decisions of the Commission.

4.2 Review under art. 261 TFEU and art. 31 of the Regulation

On the other hand, review exercised on the basis of art. 31 of the Regulation 1/2003 is a full jurisdiction review (*contentieux de pleine juridiction*). The aforementioned article states that “The Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed”.⁷³ Judge of the ECtHR Pinto de Albuquerque puts in following terms: „Full judicial review is properly characterised by its exhaustiveness, as it can and must encompass all aspects, both factual and legal, of the liability imputed to the offender. Jurisdiction is not ‘full’ unless it is exhaustive. The ‘full’ nature of jurisdiction necessarily implies its exhaustiveness”.⁷⁴ AG Sharpston described the term full jurisdiction in one of her later opinions „as including ‘the power to quash in all respects, on questions of fact and law, the decision of the body below’. A judicial body charged with review ‘must in particular have jurisdiction to examine all questions of fact and law relevant to the dispute before it.’”.⁷⁵ This makes the EU review system a hybrid one since it gives the judges different powers with regard to different parts of the Commission’s decision.⁷⁶

4.3 Mixed review

Regarding the decision on illegality of the practice in question, the Court uses the grounds for review provided for by art. 263 TFEU as it was suggested above. It will be shown in the next chapter that although the legislative text did not change much, the

⁷³ Art. 31 of the Regulation.

⁷⁴ Dissenting opinion of the judge Pinto de Albuquerque in the case *Menarini*, Application No. 43509/08, para. 3.

⁷⁵ Opinion of AG Sharpston to the case C-272/09 P *KME Germany AG, KME France SAS and KME Italy SpA v European Commission* [2011] ECLI:EU:C:2011:810, para 69.

⁷⁶ M.B. Gerard, D., 2011. Breaking the EU antitrust enforcement deadlock: re-empowering the courts? *European Law Review*, 36(4), p. 7.

approach of the Court changed significantly over time. However, the starting point and longstanding practice of the Court was a formal approach towards the review which was also suggested by the wording and origin of the said article and its predecessors. In such a situation, the decision was to be assessed only as to its formal aspects, substantive findings were not to be re-evaluated and the Court could not substitute the Commission's decision with its own. However, it will be argued that this is not entirely the case anymore.

It is a common ground among both academics and practitioners that with respect to the sanction the Court can and indeed does perform a full review.⁷⁷ The Court can fully review the part of a Commission decision which sets the fine and if the Court deems appropriate it can substitute this part of the decision with its own as a way of remedy or sanction. Nonetheless, the decision about the sanction cannot be fully separated from the rest of the decision regarding the alleged breach of the articles of the Treaty as such and taking into account the complexity of the whole decision, it is virtually impossible to review fully only the part on the sanction.

If the standard of fair trial is to be met by the Court, the Tribunal must be able to exercise the full jurisdiction regarding the decision as a whole. Yet, the doctrine is of the opinion that the Court never doubted that its standards of review even under the action according to art. 263 TFEU fully satisfy the demands established by the ECtHR regarding the right to effective remedy.⁷⁸

⁷⁷ See e.g. Lenaerts, K., Maselis, I., Gutman, K., 2014. *EU Procedural Law*, Oxford: OUP, p. 394 or Prek, M., Lefevre, S., 2016. Competition Litigation before the General Court: Quality if not Quantity? *Common Market Law Review*, 53, p. 79.

⁷⁸ Peers, S., Hervey, T., Kenner, J., Ward, A. (Eds.), 2014. *The EU Charter of Fundamental Rights: A Commentary*, Oxford: Hart Publishing, p. 1227.

5 Development of the standard of review

The practice of the Court went of course through a long development. One of the first cases which is also mentioned in the literature is the *Consten and Grundig* case from 1966.⁷⁹ This case belongs to the basics of EU competition law in the field of exclusive agreements and their abolishment.

The German company Grundig concluded an exclusive distribution agreement for the French market with a company called Consten and in practice this agreement was an illegal barrier on the free movement of goods as guaranteed by the Treaties because it impeded the re-exports of the respective goods from Germany to France and vice versa. The Commission found the agreement in conflict with the ban on cartel agreements and issued an appropriate decision. In court the companies contested a series of aspects of the decision.

Firstly, a formal and procedural aspect which consisted of the form of the decision and the procedure leading to issuing it, namely they alleged a breach of their right of access to the file by the Commission and secondly, substantive aspects such as the scope of the relevant Treaty provision in the field of distribution agreements, the scope of the exceptions from the prohibition of cartel agreements and the interpretation of certain terms such as *effect on the trade between member states*.

The legal evaluation of the alleged breaches committed by the Commission was following: (i) a lack of competence on the side of the Commission, (ii) infringement of an essential procedural requirement and (iii) infringement of the Treaties. This was also the limit for the review performed by the Court.

The Court did not pay any special attention in rejecting the procedural arguments. As to the substantive arguments of both parties the Court used a phrase which became a mantra of judicial review in competition law cases: „Furthermore, the exercise of the Commission's powers necessarily implies complex evaluations on

⁷⁹ To that end see Wahl, N., 2009. Standard of Review - Comprehensive or Limited? *European Competition Law Annual: The Evaluation of Evidence and its Judicial Review in Competition Cases*, pp. 285-295.

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. This review must in the first place be carried out in respect of the reasons given for the decisions which must set out the facts and considerations on which the said evaluations are based”.⁸⁰

The Court has in this way defined a part of the Commission’s decision consisting of economic considerations which are characteristic by a high level of complexity of facts and their evaluation. The review of this part of the decision is to be limited to a review of the relevance of the facts in question and the legal conclusions drawn from them.

In other words, the Court examined the mere relevance of the facts taken into consideration by the Commission, and whether these facts allowed the Commission to come to its conclusions. The Court decided in this case not to subject to a comprehensive analytical scrutiny such parts of the decision in which the Commission performs a complex assessment of economic matters.

5.1 Original legislative framework

To see the whole picture of the state of judicial protection in the field of EU competition law at that time it is necessary to consider the Treaties which defined the competences of the Court and thus created the borders within which Court could operate. In the sixties when the case was decided by the at that time High Authority and subsequently by Court the Treaties were in force in the form as they were enacted in Paris in 1951 (ECSC Treaty) and in Rome in 1957 (EEC Treaty); the Merger Treaty was only on its way (1965). The relevant provisions on the protection of free competition on the common market together with the provisions on action for annulment of the decisions of the High Authority in this field were enacted in the EEC Treaty.⁸¹ Nonetheless, art. 33 of the ECSC Treaty included also a provision allowing to

⁸⁰ Judgement of the ECJ in the case C-56/64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community* [1966] ECLI:EU:C:1966:41, page 347.

⁸¹ Art. 85 EEC Treaty, art. 86 EEC Treaty and art. 173 EEC Treaty.

bring an action against a decision of the High Authority taken within the scope of the Treaty.

The action could be based on following grounds: „lack of legal competence, substantial procedural violations, violation of the Treaty or of any rule of law relating to its application, or abuse of power”.⁸² However, the aforementioned article includes also an explicit exclusion of a (judicial) review of the decision of the High Authority when it comes to „conclusions [...] drawn from economic facts and circumstances, which formed the basis of such decisions or recommendations, except where the High Authority 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”.⁸³ Economic evaluations are to be reviewed therefore only to a very limited extent and the literature started to use for it the name *marginal review*.⁸⁴

AG Nils Wahl is of the opinion that it was indeed art. 33 of the ECSC Treaty which served as an inspiration for the Court’s reasoning.⁸⁵ The action against the High Authority was brought on the basis of art. 173 EEC Treaty since the decision was taken within the scope of this treaty and not the ECSC Treaty and although the grounds for review are the same under both treaties the exclusion of review of economic evaluations is missing under the EEC Treaty. Moreover, the grounds of review seem to be rather of a procedural nature and according to Wahl, that was a window of opportunity for the Court which without an explicit ground in the Treaties formulated the mentioned paragraph and created a new legal standard.⁸⁶

⁸² Art. 33 of the ECSC Treaty.

⁸³ Ibid.

⁸⁴ Marquis, M., 2009. Rules That Govern Rules: Evidence, Proof and Judicial Control in Competition Cases. *European Competition Law Annual: The Evaluation of Evidence and its Judicial Review in Competition Cases*, page xxxvii.

⁸⁵ Wahl, N., 2009. Standard of Review - Comprehensive or Limited? *European Competition Law Annual: The Evaluation of Evidence and its Judicial Review in Competition Cases*, p. 285.

⁸⁶ Ibid., p. 286.

5.2 Development of the case law in the field of merger control

It follows from what has been said that there was a clear tension between the right to fair trial and the practice of the Court which excluded a certain part of factual and legal considerations of the Commission from the judicial review with the argument of complexity and specific expertise. This is the main discrepancy which lies at the very core of the problem.

The Court followed this case law until the end of the century. There are cases where there is seemingly a change in the judicial rhetoric but the essence stays the same. For example in the case *Remia* there is a formulation where the Court on one hand states that „as a general rule [it] undertakes a comprehensive review of the question whether *the conditions for the application of art. 85(1) are met*” but on the other hand it limits the „appraisal of complex economic matters to whether 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”.⁸⁷ This was a clear refusal to conduct a thorough comprehensive review of all points of the decision of the Commission. The action was afterwards dismissed, among others, on the ground that the Court did not find 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”.⁸⁸ This results in a strange situation where the conditions of application of the respective article of the Treaties and its scope was to be reviewed fully as well as the decision on the sanction but as an exception from the rule a certain (substantial) part of considerations leading to the decision was to be reviewed only marginally.⁸⁹

5.2.1 Possible motivations for the change in the case law

One can ask why did not the Court change its approach for a long period of time and at the same time why did the critique of the Court’s approach emerge in larger

⁸⁷ Judgement of the ECJ in the case C-42/84 *Remia BV and others v Commission of the European Communities* [1985] ECLI:EU:C:1985:327, para 34.

⁸⁸ *Ibid.*, para 36.

⁸⁹ Lenaerts, K., Maselis, I., Gutman, K., 2014. *EU Procedural Law*, Oxford: OUP, p. 392.

amount only at the beginning of the new millennium. The author thinks that the explanation is twofold.

First argument is an administrative-economical one, which from the viewpoint of fundamental rights protection cannot withstand but can shed some light on the situation. It was only in the year 1988 when the Court of First Instance was established pursuant to the Single European Act.⁹⁰ It was described as a kind of a branch of the Court of Justice which was endowed with the competence to adjudicate on the competition cases in the first instance together with other agenda mainly of very technical nature to relieve the burden on the ECJ.⁹¹

Until that time there was only one instance which was to solve all questions of validity and interpretation of all EU acts, decisions, etc., both the agenda of preliminary references and direct actions. Moreover, in the 80's there was a considerable growth in cases coming to the Court.⁹² Until the establishment of the CFI the Court might have been motivated to deal with the complex and technical competition cases in a rather expeditious manner with the argument of effective functioning of the institution and hence of the effective functioning of EU law as such. One way to achieve that, would be to entrust the Commission with a margin of discretion regarding which the Court would exercise only a deferential review. It is of course arguable to what extent such practice of the Court is justifiable by judicial efficiency namely when it can result in potential cases where fundamental rights of individuals are not protected to a sufficient degree which would be a failure of the basic function of the Court as an institution.

Second argument which explains to large extent the emergence of this debate at that time is that the Commission started imposing monetary sanctions of unprecedented amounts. Whereas in the 70's the sanctions were in millions of Accounting Units in the most serious cases (the former Regulation No. 17/62 (EEC) stipulated in its art. 15 that

⁹⁰ Council Decision 88/591, [1988] OJ L319/1.

⁹¹ Craig, P., De Búrca, G., 2015. *EU Law: Text, Cases and Materials*, Oxford: OUP, p. 60.

⁹² Cowen, T., 2010 'Justice Delayed is Justice Denied': The Rule of Law, Economic Development and the European Community Courts. *The Rule of Law in International and Comparative Context*, p. 52.

the sanctions are to be imposed in the European Accounting Units)⁹³, at the end of the 80's the fines imposed were in the orders of millions or lower tens of millions EAU⁹⁴ and at the end of the 90's and at the beginning of the new century the amounts imposed were hundreds of millions of EUR and more.⁹⁵ In the year 2003 the Commission stated publicly that only for *hard core* cartels from 2001 until 2003 it imposed fines in the sum of EUR 3.2 billions.⁹⁶ This is not a futile exercise in statistics but to illustrate how the gravity of the sanction, which is perhaps the central element among the *Engel* criteria, changed dramatically over time. If with the beginning of the new millennium the sanctions started to reach the mentioned amounts they also started to be perceived as criminal in nature and the tendency to apply the ECtHR case law even in EU competition cases emerged.

5.2.2 First shifts in the case law and the *Tetra Laval* formula

The shift in the case law of the Court in such a situation was rather a question of time and it is traceable originally to the field of merger control. It must also be put forward that the case law from the area of merger control is relevant here since art. 16 of the merger regulation lays down the same rules for judicial review of the merger decisions made by the Commission as the Regulation.⁹⁷ Yet, it is paradoxical that whereas the merger control regulation gives the Commission explicitly a margin of discretion in economic assessments which also necessarily means a certain limitation for the Court, the Regulation is not phrased in such a manner and the margin of discretion enjoyed by the Commission can be only more broadly inferred.⁹⁸

⁹³ E.g. In the year 1973 the Commission imposed in an international sugar cartel a fine in the amount of 9M EAU; to that end see Fifth Report on Competition Law Policy, page 26, Brux-Lux, April 1976.

⁹⁴ Eighteenth Report on Competition Policy, page 64. Nineteenth Report on Competition Policy, page 14.

⁹⁵ XXIXth Report on Competition Policy, page 32, page 36. XXX Competition Policy Report, page 25.

⁹⁶ XXXIII Report on Competition Policy, page 23. For a graphic overview of levels of sanctions imposed between 1990 and 2009 see Gerard, D. M. B., 2011. Breaking the EU antitrust enforcement deadlock: re-empowering the courts? *European Law Review*, 36(4), p 459.

⁹⁷ Art. 16 of the Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings

⁹⁸ Art. 2 of the Council Regulation (EEC) No 4064/89 and Council Regulation (EC) No 139/2004.

Marc Jaeger in his article *Marginalisation of Marginal Review* points out several cases from which, in his opinion, the change of the approach of the Court emerged.⁹⁹ As a primary illustration he points the attention to the case *Kali und Salz* from the year 1998. The Tribunal in its evaluations of the concentration of undertakings manufacturing and distributing potash stated on the general level that the Commission has a certain margin of discretion „with respect to assessments of economic nature” which has to be respected by the judiciary.¹⁰⁰ Nonetheless, in the next paragraph the Court goes further when saying „[t]hat being so, it must be held that the Commission's analysis of the concentration and of its effects on the market in question is flawed in certain respects which affect the economic assessment of the concentration”.¹⁰¹ The Court continued then the critical assessment of the factual evidence submitted by the Commission and concludes that „that the Commission has not established to the *necessary legal standard* the existence of a causal link between K+S and SCPA's membership of the export cartel and their anticompetitive behaviour on the relevant market”.¹⁰²

It is the requirement of a specific substantive legal standard, which is to be met by the Commission, which seems to be a significant shift from a mere marginal review performed in the *Remia* case where the Court only examined whether the Commission based its decision on incorrect findings of fact or committed a manifest error in its appraisal.

However, there are also opinions that this change in the formulation in the case law was rather a specification of the burden of proof born by the Commission than an increase of the standard of review of the economic assessments.¹⁰³

⁹⁹ Jaeger, M., 2011. The Standard of Review in Competition Cases Involving Complex Economic Assessment: Towards the Marginalisation of the Marginal Review? *Journal of European Competition Law and Practice*, Vol. 2, No. 4, p. 299.

¹⁰⁰ Judgement of the ECJ in the case C-19/74 *Kali und Salz AG and Kali-Chemie AG v Commission of the European Communities* [1975] ECLI:EU:C:1975:58, paras. 223-224.

¹⁰¹ *Ibid.*, 225.

¹⁰² *Ibid.*, para. 228, emphasis added.

¹⁰³ Essens, O., Gerbrandy, A., Lavrijssen, S. (Eds.), 2009. *National Courts and the Standard of Review in Competition Law and Economic Regulation*. Groningen: Europa Law Publishing, p.19.

This development in the case law on merger control culminated in the appellate decision in the case *Tetra Laval* in which the Court of Justice even broadened the formulation by saying „Whilst 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. Not only must the Community Courts, 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”.¹⁰⁴ This standard has been fully accepted by the Tribunal and has been used ever since as the standard of review of Commission’s decisions.

Moreover, in the case *General Electric* the Tribunal stated that „[a]lthough those principles apply to all appraisals of an economic nature, effective judicial review is all the more necessary when the Commission carries out a prospective analysis of developments which might occur on a market as a result of a proposed concentration”.¹⁰⁵

In practice, in the field of merger control the Tribunal reviews not only whether the arguments laid down by the Commission are consistent and sufficiently persuasive but also whether they truthfully reflect the factual situation, it reviews their credibility and authenticity, whether the factual findings are complete (that the Commission couldn’t have found and submitted other relevant facts which might have an influence on the decision) and the Tribunal also evaluates whether the factual findings correspond to the evidence in the file. In the opinion of the author, performing such scrutiny the Tribunal performs in practice full review of the factual part of the Commission’s decision.

In the situation where the Tribunal also adds to the aforementioned also a review of the legal qualification of all facts submitted in the case, it can be concluded that

¹⁰⁴ Judgement of the ECJ in the case C-12/03 P *Commission of the European Communities v Tetra Laval BV* [2005] ECLI:EU:C:2005:87, para. 39.

¹⁰⁵ Judgement of the ECJ in the case T-210/01 *General Electric Company v Commission of the European Communities* [2005] ECLI:EU:T:2005:456, para. 63.

without pointing out explicitly its former case law on review of economic and factual appraisals of the Commission, it changes *de facto* its approach on this matter and leans towards the full review.

The question is then, to what extent that might cause an imbalance in the division of powers between the Commission and the judiciary of the EU. The Court is faced with a constant balancing of two basic principles. On one hand, it reviews all the elements that led the Commission to a certain conclusion to make sure that fundamental rights of the individuals are protected and that the judicial control is not „theoretical or illusory but practical and effective”.¹⁰⁶ On the other hand, the Court has to accept a certain margin of discretion enjoyed by the Commission which is conferred upon it by the legislator and which prevents the Court from substituting the economic appraisals of the Commission with the Court’s.¹⁰⁷ This is a challenge the judges will be faced with when deciding every single individual case.

5.3 Unclear case law on cartels and abuse of dominance

Although this line of case law existed in the field of merger control, with respect to the application of articles 101 and 102 TFEU the situation was in no way as clear. For instance in the case *GlaxoSmithKline* in 2006 the Tribunal fully refers to its *Remia* line of case law in one part of the decision and then performs a relatively comprehensive review of the economic appraisals of the Commission regarding the analysis of parallel trading and its impact on the internal market.¹⁰⁸ Interestingly, the Court of Justice on appeal upheld the *GSK* judgement as to the depth of review although it stated on the general level that the Tribunal „correctly stated that, when dealing with an application for annulment of such a decision, it carries out a restricted review of its merits”.¹⁰⁹ This shows that the approach of the Court was ambiguous if not confusing

¹⁰⁶ Judgement of the ECtHR in the case *Airey v Ireland*, Application No. 6289/73, para. 24.

¹⁰⁷ Jaeger, M., 2011. The Standard of Review in Competition Cases Involving Complex Economic Assessment: Towards the Marginalisation of the Marginal Review? *Journal of European Competition Law and Practice*, Vol. 2, No. 4, p. 305.

¹⁰⁸ See judgement of the ECJ in the case T-168/01 *GlaxoSmithKline Services Unlimited v Commission of the European Communities* [2006] ECLI:EU:T:2006:265, para. 241 and para. 109-119.

¹⁰⁹ Judgement of the ECJ in the joint cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services Unlimited v Commission of the European Communities and Commission of the European Communities v GlaxoSmithKline Services Unlimited and European Association of Euro*

and that the judges on one hand knew the limits of the legislative framework and its own case law but on the other they realised the unsatisfactory protection of the fundamental procedural guarantees.

An illustration of the approach of the Court when applying art 102 TFEU is the *Microsoft* case of 2007.¹¹⁰ The Commission was assessing to what extent and under what conditions an owner of intellectual property rights who is in a dominant position on the relevant market can be forced to licence such rights. To be able to make such an assessment the Commission had to define the relevant product market which is a consideration of economic nature and as such it was supposed to be reviewed only marginally. Nonetheless, the Tribunal without any explicit remark went against its own practice and subjected this question to a full review.¹¹¹ It seems therefore that it is correct to conclude that at that time the approach of the Court to review of Commission's decisions in the field of articles 101 and 102 TFEU was at least hard to predict since there was a discrepancy between what the Court stated explicitly and what it did in certain cases but not in others.

Although the Court decides on a case-by-case basis it is a common ground that its legitimacy is at least partly based on the fact that cases with similar factual background are decided in similar ways. It is not necessarily a requirement of the result but rather of the process by which the Court arrives to its conclusions. Such system must therefore be based on the common law principle of *stare decisis* where the courts are either bound by their own preceding case law or they depart from it on the basis of *distinguishing* explicitly the present case from the previous one.¹¹²

Similarly one of the aspects of the fair trial - the right to a well-reasoned judicial decision - allows that „the exercise of justice is not arbitrary nontransparent and that the

Pharmaceutical Companies (EAEPIC) v Commission of the European Communities and Asociación de exportadores españoles de productos farmacéuticos (Aseprofar) v Commission of the European Communities [2009] ECLI:EU:C:2009:610, para. 84.

¹¹⁰ Judgement of the ECJ in the case T-201/04 *Microsoft Corp. v Commission of the European Communities* [2007] ECLI:EU:T:2007:289.

¹¹¹ *Ibid.*, paras 479-532.

¹¹² To that end see e.g. Christie E.,G., 2011. *Philosopher Kings? The Adjudication of Conflicting Human Rights and Social Values*. Oxford: OUP, p. 132.

judicial decision-making is controllable by the broader public”.¹¹³ It is the longstanding case law of the ECtHR that the right to fair trial is composed of multiple aspects which if breached cumulatively can amount to a violation of the right to fair trial as such.¹¹⁴ Therefore, the approach of the Court taken in the cases mentioned above is to be criticised as a potential to disturb the protection of fair trial on another level.

Nonetheless the case law of the Court either hinted to a gradual shift from marginal review to a higher standard or it was only to be regarded as an incoherence or disharmony within the Court’s interpretation of the law. Even from a broader perspective there was no apparent reason for a different approach to merger cases on one hand and 101&102 cases on the other.

Regarding the application of articles 101 and 102 TFEU, one of the first cases where a clear shift in the argumentation of the Court can be observed is the case of *Amann & Söhne and Cousin Filterie*.¹¹⁵ The Tribunal did grant the Commission a margin of discretion but it emphasised that such a margin can never be unlimited and repeated its *Tetra Laval* case law on accuracy and completeness of the facts submitted reliability of the evidence and consistency of the Commission’s arguments.¹¹⁶ That showed at least that the Court was willing and ready to use its merger control case law in the area of application of articles 101 and 102 TFEU.

The Tribunal took an interesting step perhaps in the right direction in the case *Clearstream*.¹¹⁷ It used the formulation 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. However, this does not prevent the Community judicature from examining the Commission’s assessment of

¹¹³ In Czech: Kmec, J., Kosař, D., Kratochvíl, J., Bobek, M., 2012. *Evropská úmluva o lidských právech. Komentář*. Praha: C.H.Beck, p. 757. Translation by the author.

¹¹⁴ Judgement of the ECtHR in the case *Barbera, Messegue and Jabardo v. Spain*, Application No. 1590/83, para. 89.

¹¹⁵ Judgement of the ECJ in the case T-446/05 *Amann & Söhne GmbH & Co. KG and Cousin Filterie SAS v European Commission* [2010] ECLI:EU:T:2010:165.

¹¹⁶ *Ibid.*, para 131.

¹¹⁷ Judgement of the ECJ in the Case T-301/04 *Clearstream Banking AG and Clearstream International SA v Commission of European Communities* [2009], ECLI:EU:T:2009:317.

economic data”.¹¹⁸ The Court played a little word game here and instead of reviewing *economic assessments* which it did not do in the past, in the present case it reviewed the Commission’s *assessment of economic data*.

The assessment *economic data* can be understood in a narrower fashion than *economic assessments* since these can include also the economic theory and assumptions based on which the Commission gathers and evaluates the data. It is probably mostly the assumptions and theories the Commission departs from that includes the biggest part of policy choices where the margin of discretion has its justification. Therefore, if the Court is to review the assessment of the economic data but does not evaluate the policy choices made by the Commission it might be a satisfying compromise which respects both the division of powers and protection of fundamental rights of the parties.

In *Clearstream* the Court took every single argument of the claimants, confronted them with the facts and findings submitted by the Commission and came to the relevant factual and legal conclusions.¹¹⁹ It is one of the cases where it seemed that the approach of the Court was shifting towards a deeper review.

5.4 Impact of the *Menarini* case

A contribution, perhaps a decisive one, to the debate which could not be ignored was the *Menarini* judgement of 2011.¹²⁰ Although the case as such did not bring anything entirely new or groundbreaking into the debate it is worth analysing it since it underscored the direct relevance of the ECHR in competition law cases. In *Menarini* the ECtHR put together all the pieces of the puzzle and reiterated its previously stated principles regarding the criminal nature of some administrative offences, the role of an administrative enforcement body and the scope of judicial review.

¹¹⁸ Ibid, para 47.

¹¹⁹ Judgement of the ECJ in the Case T-301/04 *Clearstream Banking AG and Clearstream International SA v Commission of European Communities* [2009], ECLI:EU:T:2009:317, paras 48-74

¹²⁰ Judgement of the ECtHR in the case *Menarini*, Application No. 43509/08.

An Italian company was fined EUR 6 million by the Italian competition authority for being a member of a cartel on medical diagnostic equipment. The company challenged the fine before the Italian administrative courts and appealed to the *Consiglio di Stato* but both unsuccessfully. Both judicial instances had under Italian law the possibility to perform a review of legality which meant that they did not review the factual findings and could not substitute the decision of the administrative authority.¹²¹ The company therefore applied to the ECtHR with the argument that its case was never heard by a court with full jurisdiction and hence its right to fair trial guaranteed by art. 6 of the Convention was breached.

In the judgement the ECtHR first confirmed that it was a case where art. 6 of the Convention was at stake and that indeed proceedings such as to one in the case at hand is of a criminal nature given the gravity and punitive purpose of the sanction.¹²² Secondly, the ECtHR reiterated that an administrative authority which is itself not an independent and impartial tribunal can decide in such cases in the first instance and this fact taken in isolation is not incompatible with the Convention.¹²³ Thirdly, the judgement confirmed that the possibility of an administrative penalty of criminal nature imposed by an administrative body is not contrary to art. 6 only under the condition that an independent and impartial tribunal exercising a full jurisdiction can review the decision at stake.¹²⁴ That means that such judicial body must have the competence to substitute the decision of the lower body with its own on all points both of law and fact and it must have the jurisdiction over all points of fact and law relevant to the dispute before it.¹²⁵

Eventually, the majority of the Second Chamber was of the opinion that Italian administrative courts were able to consider all the questions of law and fact and determine whether the Italian competition authority used its discretionary power in an

¹²¹ Judgement of the ECtHR in the case *Menarini*, Application No. 43509/08., paras. 5-21.

¹²² *Ibid.*, paras. 38-45.

¹²³ *Ibid.*, paras. 57-58.

¹²⁴ *Ibid.*, para. 59.

¹²⁵ *Ibid.*

appropriate manner.¹²⁶ Furthermore, according to the ECtHR, the review of Italian courts was not limited to a simple control of legality. In the case at hand the Italian courts were able to review whether the choices of the authority were well founded and proportionate and they also could examine the technical evaluations.¹²⁷ Further consideration for the ECtHR was also that the courts were able to assess the adequacy of the sanction and could replace it. According to the ECtHR, the *Consiglio di Stato* examined the logical coherence of the administrative decision on the sanction, its adequacy and proportionality and, in conjunction with all the above-mentioned considerations, the court in Strasbourg concluded that such system is compliant with the requirements of art. 6 ECHR.¹²⁸

5.4.1 Dissenting opinion in *Menarini*

The *Menarini* case was decided by a majority of 6 to 1 and the judge Pinto de Albuquerque presented a strong and persuasive dissenting opinion according to which „the Italian administrative courts did not exercise genuine ‘full jurisdiction’”.¹²⁹

In the opinion judge Pinto de Albuquerque writes that „[a]ccording to their own interpretation of Italian law as applicable prior to the entry into force of the new Code of Administrative Procedure, the administrative courts could not ‘exercise powers of substitution to the point of applying their own technical assessment of the facts in place of that of the administrative authority’. This meant that the main core of the judgment was removed from the jurisdiction of the Italian administrative courts. The decision as to the attribution of liability fell in reality to the independent administrative authority and not to the administrative courts”.¹³⁰

Interestingly, the *Consiglio di Stato* recognised four different stages of the administrative decision-making process („(1)the ‘establishment of the facts’, (2) ‘the ‘contextualisation’ of the competition rule which, referring to ‘indeterminate legal

¹²⁶ Ibid, para. 63.

¹²⁷ Judgement of the ECtHR in the case *Menarini*, Application No. 43509/08., para. 64.

¹²⁸ Ibid., paras. 65-67.

¹²⁹ Dissenting opinion of the judge Pinto de Albuquerque in the case *Menarini*, Application No. 43509/08, para. 3.

¹³⁰ Ibid, para. 4.

concepts' (such as the relevant market, abuse of a dominant position, restrictive agreements), call[ed] for precise individual determination of the ingredients of the imputed offence', (3) the assessment of the facts in the light of the previously contextualised parameter, and (4) the imposition of sanctions") from which it could fully review only the first and fourth stage and towards the rest it had only very limited powers of review. Yet, it is the remaining two stages where the technical discretion of the administrative authority plays a decisive role.¹³¹

Judge Pinto de Albuquerque points to the fact that the Italian court itself stated that „with regard to the legal characterisation of the facts adopted by the [competition authority], the Administrative Court's review was exclusively confined to examining the lawfulness of the decision. [...] with regard to the second and third stages of the logical procedure followed by the [competition authority], the judicial review is 'weak' as the court's task is confined to verifying that the decision adopted is logical and technically coherent, without imposing its own disputable technical assessment in place of that of the [competition authority]. [...] the effectiveness of the defence undoubtedly suffered as a result of the fact that the court was debarred from conducting an intrinsic review. [...] the court may not substitute its own findings for those of the [competition authority] (for instance regarding the determination of the market); likewise, the court may apply only the rules identified by the [competition authority] and cannot replace them with others; it cannot alter the characteristics of the investigation or even, accordingly, alter the decision adopted. It may merely verify its lawfulness.”¹³²

This shows that such a situation where an administrative court is able to perform full review with regard to how and what facts were established and how and what sanction was imposed but unable to fully review the subsumption of the facts under the respective norm of law, the specification of the legal concepts in the factual circumstances of a particular case and their application to the facts, is for the ECtHR compliant with art. 6 of the Convention.

¹³¹ Dissenting opinion of the judge Pinto de Albuquerque in the case *Menarini*, Application No. 43509/08, para 5.

¹³² Dissenting opinion of the judge Pinto de Albuquerque in the case *Menarini*, Application No. 43509/08, para. 6.

5.4.2 Standard of review after *Menarini*

It cannot be ignored that the considerations of the majority seem to be at least lenient to the Italian system, compared to the previous case law of the ECtHR as described above. It seems that the majority did not follow consistently the requirements of art. 6 and the court's own case law. If the judges were to follow the strict requirement of full review, there would have been a clear requirement of review of the facts of the alleged infringement, review of the assessment of the substantive concepts such as the relevant market, agreement restricting competition and other purely factual elements which were exactly the two parts of the decision-making process excluded from the full review as described above. Needless to say that the competence to substitute the decision of the administrative authority was lacking entirely. Christopher Bellamy puts it in his article bluntly: „[Some] fundamental concepts [...] were effectively outside the effective control of the courts, who in practice had to bow before the all-powerful administrative authorities”.¹³³

As the requirements of the ECtHR are phrased in *Menarini*, they indeed resemble much more the former case law of the ECJ. The terminology of „well-founded and proportionate choices” and „logical coherence of the decision” reminds one much of the *Tetra Laval* formula of „factual accuracy, reliability and consistency” of the decision. That does not seem to be necessarily an increase of the standard of protection. Seen from the perspective of *Menarini*, the case law of the CJEU might not have been in breach of the Convention as it was argued by many academics and practising lawyers.

5.4.3 Depth of review and principle of division of powers

Judge Pinto de Albuquerque touches upon one more important point. Claiming that assessments of an administrative authority must be fully reviewable by a court implies that such authority does not possess a certain amount of decision-making autonomy, i.e. the court can always „replace” the administrative decision with its own. Since the authority is a part of a different branch of power than the court, such approach

¹³³ Bellamy, C., 2012. ECHR and competition law post *Menarini*: An overview of EU and national case law. *e-Competitions*, No 47946, accessible at <http://awa2013.concurrences.com/business-articles-awards/article/echr-and-competition-law-post>.

might be at odds with the principle of division of powers. He is of the opinion that „[a]ccording to [the principles of separation of powers and the principle of the lawfulness of penalties], the imposition of publicly enforceable penalties goes beyond the traditional remit of the administrative authorities and should be a matter for the courts. Were the verification of the factual circumstances surrounding the imposition of a publicly enforceable penalty to be left to an administrative body, without subsequently being subjected to rigorous scrutiny by the courts, these principles would be wholly distorted”.¹³⁴

It is true that once we accept that we are finding ourselves in the realm of criminal law, a more stringent set of procedural rules applies (e.g. the administrative acts are presumed to have legal effect although entailing legal faults or administrative judicial actions generally do not have a suspensive effect which does not apply for criminal proceedings). Yet, firstly, competition law does not fall within the *hard core* of criminal law as it was argued above and secondly, the (European) legislation explicitly confers a certain margin of discretion upon the administrative enforcement body and that cannot be simply ignored and overruled by a judicial decision.

As it was already mentioned above, the dichotomy of a procedural v. substantive review coincides with the distinction of procedural and substantive rule of law, of which the division of powers is of course an intrinsic part. Procedural rule of law can be then understood under what Judge Lenaerts describes the structuralist theory. That is „a theory of U.S. constitutional adjudication according to which courts should seek to improve the decision-making process of the political branches of government so as to render it more democratic”.¹³⁵ The point of structuralism „lies in the fact that it does not require courts to second-guess the policy decisions adopted by the political branches of government. Instead, they limit themselves to enforcing the constitutional structure within which those decisions must be adopted”.¹³⁶

¹³⁴ Dissenting opinion of the judge Pinto de Albuquerque in the case *Menarini*, Application No. 43509/08, para. 9.

¹³⁵ Lenaerts, K., 2012. The European Court of Justice and Process-Oriented Review. *College of Europe: Research Papers in Law*, 1/2012, p. 2.

¹³⁶ *Ibid.*

That is exactly the objection which could be raised against the last argument of judge Pinto de Albuquerque. It is not necessarily the role of the courts to substitute the technical and factual appraisals of administrative bodies to the greatest detail („exhaustively” as judge Pinto de Albuquerque puts it). Such appraisals can form a part of policy-making processes of the executive branch of power and as such they cannot be simply dismissed with one stroke of the judicial pen.

If the right to fair trial and the principle of division of powers are to be reconciled, the judiciary must be allowed to exercise a comprehensive review over all parts of the administrative decision including the sanction. However, with regard to the substitution of the factual assessments, the contextualisation of the norms and final subsumption it must proceed with great caution and rather hesitantly.

A partial conclusion from the *Menarini* case is that the ECtHR wanted to confirm its former case law on the criminal nature of competition law proceedings as well as the fact that an administrative body is not an independent court or tribunal but it can decide in such cases in the first instance provided that an effective possibility of full judicial review exists. The ECtHR however did not take another step and the case is rather conciliatory towards the system of competition law enforcement in Europe and in Italy in particular. The judges in Strasbourg seem not to have transposed the rhetoric of exhaustive judicial review into the case law of the ECtHR and are seemingly willing to accept many aspects of the *contrôle de légalité* from the national courts.

As a final remark to this case, an attentive reader of the judgement might have noticed the concurring opinion of judge Sajó.¹³⁷ He agreed with the majority that art. 6 ECHR was not violated but with respect to the matter of judicial review he fully agreed with Judge Pinto de Albuquerque. For him the deciding element was that although the *Consiglio di Stato* formally proclaimed that it enjoys only a *weak* jurisdiction, *de facto* it performed such an analysis which, in the opinion of judge Sajó, satisfied the requirements of art. 6 ECHR. This discrepancy between what the courts say and what they do in fact should be remembered for a later moment since it will be relevant in the context of the case law of the Court of Justice of the EU.

¹³⁷ Dissenting opinion of the judge Sajó in the case *Menarini*, Application No. 43509/08.

5.5 Advocates-General as the prophets of a more comprehensive review

An approach which would be perhaps more „ECHR-compliant” even pre-*Menarini* was suggested by the Advocate Generals of the Court of Justice already in the year 2009. In the case *Papierfabrik August Köhler AG* Yves Bot expressed his opinion that exactly because of the *quasi-criminal* nature of the competition proceedings and with regard to art. 6 of the ECHR „the Community judicature must conduct a very detailed judicial review to ascertain whether the Commission has observed the procedural rights of the parties. In other words, I consider that it should draw all the necessary conclusions where the Commission, in exercising its prerogatives, fails to observe the fundamental rights afforded to undertakings [...]”.¹³⁸ AG Bot criticises here the Court for not exercising a sufficient level of review and suggests a more comprehensive approach.

Yet, the Court of Justice did not follow his opinion on this matter. In 2010 AG Bot opined again in a competition case on the same matter.¹³⁹ Although he again refused to take up the rhetoric of „stricto sensu criminal matter” and opts rather for the term *quasi-criminal* proceedings, he comes to the conclusion that given the fact that „[t]he fines referred to in Article 23 of Regulation No 1/2003 are comparable in nature and size to criminal penalties and the Commission’s role, given its investigatory, examination and decision-making functions, is primarily one typical of criminal proceedings against undertakings” and „the procedure is therefore covered by ‘criminal’ within the meaning of Article 6(1) of the European Convention for the protection of human rights and fundamental freedoms and must therefore be subject to the guarantees provided for by the criminal justice component of that provision”.¹⁴⁰ The competition law proceedings, in the opinion of AG Bot, given their aim to protect economic public

¹³⁸ Opinion of AG Yves Bot in the joint cases C-322/07 P, C-327/07 P a C-338/07 P *Papierfabrik August Köhler AG, Bolloré SA and Distribuidora Vizcaina de Papeles SL v Commission of the European Communities* [2009] ECLI:EU:C:2009:216, para. 134.

¹³⁹ Opinion of AG Yves Bot in the case C-352/09 P *ThyssenKrupp Nirosta GmbH v European Commission* [2010] ECLI:EU:C:2010:635.

¹⁴⁰ Opinion of AG Yves Bot in the case C-352/09 P *ThyssenKrupp Nirosta GmbH v European Commission* [2010] ECLI:EU:C:2010:635, para. 49.

policy, the punitive and preventive effect of the financial sanctions and their amount, must be subject to guarantees provided for by the ECHR.¹⁴¹ Interestingly, the AG also points out the older case law of the Court in which it had no problem to apply a different aspect of the protection guaranteed in criminal proceedings, namely the presumption of innocence.¹⁴²

Later a similar opinion was voiced by AG Eleanor Sharpston in the case *KME* in February 2011.¹⁴³ AG Sharpston first points to the relevance of the ECHR, hence the ECtHR and especially to its *Engel* line of case law.¹⁴⁴ In the light of the *Engel* criteria, she has only „little difficulty in concluding that the procedure [...] falls under the ‘criminal head’ of Article 6 ECHR”.¹⁴⁵ For her the main arguments are that „[t]he prohibition and the possibility of imposing a fine are enshrined in primary and secondary legislation of general application; the offence involves engaging in conduct which is generally regarded as underhand, to the detriment of the public at large, a feature which it shares with criminal offences in general and which entails a clear stigma; a fine of up to 10% of annual turnover is undoubtedly severe, and may even put an undertaking out of business; and the intention is explicitly to punish and deter, with no element of compensation for damage”.¹⁴⁶ In other words, the criminal-like nature of the offence and of the sanction is what matters to the Court of Justice when assessing what degree of review, it has to perform.

This is practically an adoption of the *Engel* criteria to the case law of the Court of Justice. Importantly, AG Sharpston makes also the distinction between the case at hand and the hard core criminal law within the meaning of *Jusila* case law and concludes therefore that „the criminal-head guarantees will not necessarily apply with their full stringency. That implies, in particular, that it may be compatible with Article

¹⁴¹ Ibid., para. 50.

¹⁴² Judgement in the case C-199/92 P *Hüls v Commission* [1999] ECLI:EU:C:1999:358.

¹⁴³ *Menarini* was decided in September 2011

¹⁴⁴ Opinion of AG Sharpston to the case C-272/09 P *KME Germany AG, KME France SAS and KME Italy SpA v European Commission* [2011] ECLI:EU:C:2011:810, paras. 60-62.

¹⁴⁵ Ibid, para. 64.

¹⁴⁶ Opinion of AG Sharpston to the case C-272/09 P *KME Germany AG, KME France SAS and KME Italy SpA v European Commission* [2011] ECLI:EU:C:2011:810, para 64.

6(1) ECHR for criminal penalties to be imposed, in the first instance, not by an ‘independent and impartial tribunal established by law’ but by an administrative or non-judicial body which does not itself comply with the requirements of that provision, provided that the decision of that body is subject to subsequent control by a judicial body that has full jurisdiction and does comply with those requirements”.¹⁴⁷

This conclusion also has some relevant implications for the argument submitted by the claimant that the Commission has a triple role of investigator, prosecutor and decision-maker in competition law enforcement procedures. Taken into considerations the arguments presented above, from the perspective of post-trial rights the problem indeed does not lie in the nature of the Commission but whether the Tribunal exercised a full review as it is required by the ECtHR.

This was a first clear word on that matter by a member of the Court. Moreover, the judges themselves in this respect fully accepted the opinion submitted by AG Sharpston and the Court in its judgement simply repeated what the AG suggested. However, all this is said with the important caveat that case was focused on the issue of sufficient judicial control over the imposition of the fines. All these conclusions were therefore valid for art. 261 TFEU and even AG Sharpston herself was not ready to extend them any further.¹⁴⁸ From that perspective, her opinion was rather unsurprising and perhaps conservative.

In 2013 AG Kokott opined in the case *Schenker* and the consideration that competition proceedings have „character similar to criminal law” is a starting point of her analysis.¹⁴⁹ Although in *Schenker* the question was whether the principle *nulla poena sine culpa* applies in EU competition law, it shows that the Court takes today for granted that principles of criminal law must be guaranteed also in competition

¹⁴⁷ Ibid., para. 67.

¹⁴⁸ Opinion of AG Sharpston to the case C-272/09 P *KME Germany AG, KME France SAS and KME Italy SpA v European Commission* [2011] ECLI:EU:C:2011:810, para. 70.

¹⁴⁹ Opinion of AG Kokott in the case C-681/11 *Bundswettbewerbsbehörde and Bundeskartellanwalt v Schenker & Co. AG and Others* [2013] ECLI:EU:C:2013:404, para. 40.

proceedings. Further illustration of this claim could be the *Toshiba* case or *OTIS* with regard to the *ne bis in idem* principle.¹⁵⁰

5.6 Court's reply to *Menarini* – the cases *KME* and *Chalkor*

The judgements in cases *KME* and *Chalkor* were to be understood as direct response to *Menarini* since they were published just three months after the decision of the ECtHR although the Court did not use any references to *Menarini*.¹⁵¹ As stated above the central issue in both *KME* and *Chalkor* was the review of fine and there was no appeal on the merits but still the Court used it as a vehicle to express its opinion beyond what was necessary to solve the dispute at hand - in order to address *Menarini*, one could argue.

Firstly, it stated that with respect to the review of the sanctions, the Treaty itself foresaw a full review.¹⁵² But there was never really any doubt that with regard to the sanction the Tribunal has the full jurisdiction. The question therefore was rather, whether the review was exercised effectively or whether the Tribunal relied on the discretion of the Commission.

The Court of Justice stated the following: „in order to determine the amount of a fine, it is necessary to take account of the duration of the infringements and of all the factors capable of affecting the assessment of their gravity, such as the conduct of each of the undertakings, the role played by each of them in the establishment of the concerted practices, the profit which they were able to derive from those practices, their size, the value of the goods concerned and the threat that infringements of that type pose to the European Community. The Court has also stated that objective factors such as the content and duration of the anti-competitive conduct, the number of incidents and their intensity, the extent of the market affected and the damage to the economic public order

¹⁵⁰ Judgement of the ECJ in the case C-17/10 *Toshiba Corporation and Others v Úřad pro ochranu hospodářské soutěže* [2012] ECLI:EU:C:2012:72 and judgement of the ECJ in the case C-199/11 *Europese Gemeenschap v Otis NV and Others* [2012] ECLI:EU:C:2012:684.

¹⁵¹ Judgement of the ECJ in the case C-272/09 P *KME Germany AG, KME France SAS and KME Italy SpA v European Commission* [2011] ECLI:EU:C:2011:810 and judgement of the ECJ in the case C-386/10 *Chalkor AE Epexergias Metallon v European Commission* [2011] ECLI:EU:C:2011:815.

¹⁵² Judgement of the ECJ in the case C-272/09 P *KME Germany AG, KME France SAS and KME Italy SpA v European Commission* [2011] ECLI:EU:C:2011:810, para. 93.

must be taken into account. The analysis must also take into consideration the relative importance and market share of the undertakings responsible and also any repeated infringements”.¹⁵³ This seems to satisfy the requirement of full review entirely, provided that the Tribunal can substitute the decision of the Commission.

5.6.1 *Obiter dictum* in *KME*

Regarding the review of legality of the decision according to art. 263 TFEU (which was neither a plea submitted by the applicant nor an issue directly related to the case at hand and should therefore be regarded as a mere *obiter dictum*) the Court held that „whilst, in areas giving rise to complex economic assessments, the Commission has a margin of discretion with regard to economic matters, that does not mean that the Courts of the European Union must refrain from reviewing the Commission’s interpretation of information of an economic nature. Not only must those Courts establish, among other things, 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**”.¹⁵⁴

Moreover, the Court rightly pointed out that it has to review the case on the basis of the pleas and evidence submitted by the applicant and „[i]n carrying out such a review, the Courts cannot use the Commission’s margin of discretion – either as regards the choice of factors taken into account in the application of the criteria mentioned in the Guidelines or as regards the assessment of those factors – as a basis for dispensing with the conduct of an in-depth review of the law and of the facts”.¹⁵⁵

Saying that, the Court not only reaffirms the *Tetra Laval* case law also in the field of art. 101 TFEU but emphasises that even the margin of discretion the Commission enjoys must not work as a kind of a *black box* which is fed with some

¹⁵³ Ibid., paras. 96-97.

¹⁵⁴ Judgement of the ECJ in the case C-272/09 P *KME Germany AG, KME France SAS and KME Italy SpA v European Commission* [2011] ECLI:EU:C:2011:810, para. 94, emphasis added.

¹⁵⁵ Ibid, para. 102.

economic data and produces a decision resulting into a severe fine and that it cannot justify a lowered standard of review.

5.6.2 New standard of review of the Court – *Tetra Laval*+

It seems that the key to solve the problem of degree of review performed by the CJEU lies in the interconnectedness of the decision on the violation of the respective competition rule and the decision on the sanction. That is at least the approach the Court seems to adopt to overarch the differences between articles 261 and 263 TFEU and to guarantee a fair trial within the meaning of art. 6 ECHR.

The Court constructs a type of review which is based on two different legal provisions which, in its opinion, supplement each other: „[t]he review of legality is supplemented by the unlimited jurisdiction which the Courts of the European Union were afforded by Article 17 of Regulation No 17 and which is now recognised by Article 31 of Regulation No 1/2003, in accordance with Article 261 TFEU. That jurisdiction 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.”¹⁵⁶

In other words, via reviewing the amount of the fine the Court looks, the argument goes, into the factual findings of the alleged infringement, legal qualification and conclusions drawn from it and decide. This was also the proposition of AG Sharpston in her opinion. The Court of Justice tries in *KME* to create a clear and indisputable connection and interdependence between the finding of an infringement and decision on the sanction.

It is no wonder that it concludes that „[t]he review provided for by the Treaties thus involves 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. The review of legality provided for under Article 263 TFEU, supplemented by the unlimited jurisdiction in respect of the amount

¹⁵⁶ Judgement of the ECJ in the case C-272/09 P *KME Germany AG, KME France SAS and KME Italy SpA v European Commission* [2011] ECLI:EU:C:2011:810, para. 103.

of the fine, provided for under Article 31 of Regulation No 1/2003, is not therefore contrary to the requirements of the principle of effective judicial protection in Article 47 of the Charter”.¹⁵⁷

This clearly shows that when reviewing the decision on the sanction the Court also reviews all the circumstances which must have been and were indeed decisive for the Commission when it was adopting the decision on the infringement as such. The same line of reasoning appeared also in the case *Chalkor*.

5.6.3 Formal v. substantive approach towards the review

It was mentioned above that the courts might come into situations where they verbally perform certain activity but in fact do a different one. This was the reason why judge Sajó voted with the majority in *Menarini* - the *Consiglio di Stato* expressed its deference towards the decision of the administrative body but then, according to Sajó, it engaged in a full review. Interestingly, in *KME* the Court of Justice observed that „although the General Court repeatedly referred to the ‘discretion’, the ‘substantial margin of discretion’ or the ‘wide discretion’ of the Commission, including in paragraphs [...] of the judgment under appeal, such references did not prevent the General Court from carrying out the full and unrestricted review, in law and in fact, required of it”.¹⁵⁸ Is such approach compliant with the right to fair trial? In *Menarini* for judge Sajó it was perfectly sufficient. The rest of the majority did not even consider this to be an issue and they approved the practice of the Italian court without any comment on that topic. This might show that the European courts tend to take a substantive rather than formal approach towards the degree of review and use the abductive type of reasoning: if it looks like a duck, swims like a duck, and quacks like a duck, than it probably is a duck. Regardless how others are calling it.

¹⁵⁷ *Ibid.*, para. 106.

¹⁵⁸ Judgement of the ECJ in the case C-272/09 P *KME Germany AG, KME France SAS and KME Italy SpA v European Commission* [2011] ECLI:EU:C:2011:810., para. 109.

Conclusion

The question of procedural guarantees of fair trial in EU competition law is an old question. With the Lisbon Treaty and the enactment of the Charter of Fundamental Rights of the EU into the primary law one could ask whether the situation changed substantively towards more protection and higher human rights standards. This thesis tried to show that it is a complex issue and the answer does not lie with one single legal instrument, a particular human rights catalogue or one decision of a court. The question whether the right to fair trial is guaranteed in EU competition proceedings went through a gradual and complicated development. Yet, it must be said that the main actors were the European courts.

The European Convention on Human Rights and the case law of the European Court of Human Rights played certainly a catalysing role. The recognition of the ECHR in the EC and later EU legal order was growing with the pressure from the part of national constitutional courts and with the need for a coherent and self-referential legal order. Among those lines the European Court of Justice accepted gradually the case law of the ECtHR on the criminal nature of certain competition proceedings. The Court also admitted that the Commission does not constitute an impartial court or tribunal which would be suitable for deciding on sanctions of criminal nature by itself. The remedy of that contradiction of fact and legal requirements of the right to fair trial is to have a court with full review over the decision of the administrative body.

The problem lies of course in the definition of a full jurisdiction and its application in individual cases. The ECtHR defined over time a court with full jurisdiction as a court which has the competence to review all questions of fact and law and can uphold, quash or substitute the decision of the administrative body. The Court adopted a more cautious approach and formulated over time multiple requirements for the reviewing court which were arguably, from the perspective of the ECtHR, unsatisfactory. Some academics even argued that the system of enforcement of EU competition law has the shortcomings embedded deeply in its *legislative DNA* and must be completely rebuilt.

However, the *Menarini* case showed that the ECtHR might not be as strict in concrete cases as previously thought. Although the Italian courts themselves submitted that they were allowed to perform rather a control of legality than a full appeal on merits, the ECtHR was satisfied with the level of review they performed. Doing so, it might have reformulated its previous standard of full review to a less stringent one - review of factual findings as to their accuracy, proportionality and logical coherence and review of all aspects of the fine. It seems also that with regard to the former it is enough, according to the ECtHR, when the reviewing court has only the competence to quash the decision on the alleged infringement itself if it can substitute fully the decision on fine. In the opinion of the author, the ECtHR showed in *Menarini* that it is willing to close an eye a little in that respect. There is also another hint of a less strict approach in the concurring opinion of judge Sajó, in which it is suggested that it is more important the degree of review performed *de facto* in the particular case than a verbal approach of the reviewing court.

The Court of Justice responded to this with its judgements in *KME* and *Chalkor*. It fully accepted the premises of the ECtHR but it had to respect the boundaries of the legislative framework of EU competition law and judicial review.

Articles 263 and 261 TFEU simply presuppose a different type of review with respect to different parts of the decision and the Court cannot ignore that fact. Whereas the review of the fine under art. 261 TFEU is clearly ECHR compliant, art. 263 TFEU was seen as too narrow and not suitable for the needs of full review. Therefore, the Court had to make quite a long step to adjudicate that even under art. 263 the Tribunal must assess much more than the mere 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.

This requirement goes in the same direction as the ECtHR's one and the author would argue that, after *Menarini*, the Court went even further. The Court makes it clear that it wants to use the interconnectedness of a decision in competition matters and basically through the full review provided for by art. 261 TFEU make an examination of the facts leading to the finding of an infringement and hence to the fine, which goes beyond what is provided for by art. 263 TFEU. Again, with regard to what was

suggested by judge Sajó and implicitly by the majority of the ECtHR in *Menarini*, such approach might be all right from the perspective of this thesis.

The author therefore submits that the system of judicial review in the field of competition law in the EU is currently compliant with the requirements of the right to fair trial as guaranteed by the Charter, Convention and the case law of the ECtHR.

However, this is in no way a desirable method and position for the Court. Namely it is highly at odds with the basic predictability of judicial decision-making, transparency of the judiciary and the rule of law (which should not mean rule of judges). Christopher Bellamy suggests in his article a possible way how to remedy the situation. In his opinion it would be most desirable if art. 261 TFEU and art. 31 of the Regulation were amended to read:

New art. 261 TFEU - „Regulations ... may give the Court of Justice unlimited jurisdiction with regard to all aspects of the decisions imposing the penalties provided for in such regulations”.

New art. 31 of the Regulation - „The Court of Justice shall have unlimited jurisdiction to review all facts and matters in decisions whereby the Commission has fixed a fine or periodic penalty payment. It may reformulate the decision or cancel, reduce or increase the fine or periodic penalty payment imposed”.¹⁵⁹

This is for sure a desirable proposal but it must be born in mind that the procedure of the amendment of the Treaties is politically extremely sensitive especially in today’s Europe and it is very hard to imagine that i.a. the lengthy process of approval by all member states would be undergone for such an issue which could be regarded as marginal, unimportant and unworthy the struggle by political leaders. The idea should be however remembered for the next round of revision of the Treaties.

¹⁵⁹ Bellamy, C., 2012. ECHR and competition law post *Menarini*: An overview of EU and national case law. *e-Competitions*, No 47946, accessible at <http://awa2013.concurrences.com/business-articles-awards/article/echr-and-competition-law-post>.

Abstract in Czech

I. Základní práva v EU a právo na spravedlivý proces

Evropská unie je společenství států založené na společných hodnotách, mezi které patří mimo jiné hodnota právního státu (ve smyslu *rule of law*) a úcta k lidským právům.¹ Tyto hodnoty musí být reflektovány ve všech oblastech, ve kterých má Unie pravomoc ve smyslu doktríny prozařování vyvinuté zejména německým spolkovým ústavním soudem.

Unie má také svou lidskoprávní chartu - Listinu základních práv EU - která sama ve svém čl. 51 stanovuje, že vždy, když orgány Unie nebo členských států aplikují unijní právo, musí dbát standardů ochrany v Listině zakotvených.² Listina v zásadě inkorporuje zdroje základních práv, které v EU platily před jejím přijetím do primárního práva v roce 2009. Mezi těmito instrumenty měla určující postavení Úmluva o ochraně lidských práv a základních svobod a s tím související judikatura ESLP. Vztah k Úmluvě je velmi těsný, protože rozsah a smysl těch práv, které odpovídají právům zakotveným v Úmluvě má být dokonce stejný, pokud Unie neposkytne standard vyšší.³ Rozsah práv obsažených v Úmluvě je pak samozřejmě určován rozhodovací praxí ESLP. Touto cestou se tak judikatura ESLP nepřímou stává pramenem unijního práva a příslušná práva obsažená v Listině by měla být čtena ve smyslu rozhodovací praxe štrasburského soudu.

Toto je také případ práva na spravedlivý proces (tedy čl. 47 Listiny), které odpovídá čl. 6 Úmluvy. Samotné slovo “odpovídá” je pochopitelně vágní pojem a bylo by zajímavé, kdyby k němu vznikla příslušná judikatura. Konstrukce tohoto práva v Listině a Úmluvě se totiž liší, a zatímco Úmluva rozlišuje explicitně proces, ve kterém se jedná o “občanských právech nebo závazcích” a proces projednávající “trestní obvinění”⁴, Listina naproti tomu hovoří o “právu na účinné prostředky nápravy před soudem”⁵ a to bez rozlišení, zda se jedná o civilněprávní, trestněprávní či jinou oblast, čímž spíše připomíná čl. 13 Úmluvy. V dalších odstavcích však Listina vyjmenovává (a jedná se nejspíše o výčet taxativní) konkrétní záruky, kterými má být účinný prostředek nápravy zajištěn. I přes tyto spíše formulační

¹ Čl. 2 Smlouvy o fungování EU.

² Čl. 51 odst. 1 Listiny; slovo “aplikují” však musí být vykládáno poněkud širěji ve smyslu judikatury Soudního dvora C-617/10 *Åkerberg Fransson* [2013] ECLI:EU:C:2013:105.

³ Čl. 52 odst. 3 a 4 Listiny.

⁴ Čl. 6 odst. 1 Úmluvy.

⁵ Čl. 47 odst. 1 Listiny.

rozdíly lze však pravděpodobně uzavřít, že články 47 Listiny a 6 Úmluvy si navzájem odpovídají, a tedy že i judikatura ESLP k čl. 6 (potažmo 13) Úmluvy je určující pro rozsah čl. 47 Listiny. Toto jsou základní premisy, které jsou směrodatné pro následující analýzu lidskoprávních záruk v kontextu vymáhání soutěžního práva EU.

II. Role Komise jako odborného orgánu při vymáhání čl. 101 a 102

Orgánem ustanoveným k vymáhání soutěžněprávních pravidel v EU je Evropská komise resp. Generální ředitelství pro hospodářskou soutěž.⁶ Komise tedy posuzuje strukturu trhu, postavení jednotlivých soutěžitelů na něm, posuzuje jejich reálný ekonomický vliv v daném segmentu trhu, vymezuje relevantní trh pro jednotlivá řízení, vypočítává ekonomickou výkonost soutěžitelů, počítá dopady určitých jednání na spotřebitele, odhaduje prostupnost tržních struktur pro různé soutěžitele, posuzuje bariéry vstupu na určitý trh a dělá celou řadu dalších vysoce specializovaných činností v ekonomické oblasti. Při pohledu do některých soft law dokumentů, které Komise vydává pro větší transparentnost svého rozhodování, je patrné, že koncepty, se kterými pracuje a které uplatňuje vůči soutěžitelům vyžadují vysokou míru odbornosti v oblasti ekonomie, a přestože jsou tyto koncepty zavedeny právním jazykem, jedná se o činnost jasně neprávní povahy.

Krom ekonomických posudků pak Komise rovněž provádí do určité míry politická rozhodnutí. Z čl. 17 SEU je patrné, že Evropská komise jako celek je politickým orgánem, který “podporuje obecný zájem Unie a k tomuto účelu činí vhodné podněty”.⁷ V oblasti ochrany hospodářské soutěže se politická rozhodnutí (ve smyslu policy choices) projevují například v tom, že s omezenými zdroji dá preferenci ve stíhání potenciálně protiprávních jednání buď v sektoru internetových služeb (sektor, který má velký dopad přímo na spotřebitele) nebo v sektoru infrastrukturních staveb (sektor, který má potenciál více zasáhnout například státní plány na rozvoj dopravy na určitém území). Specifičtějším druhem takovýchto rozhodnutí pak je například to, jestli se Komise rozhodne spíše ukládat pokuty, zda případně přijme závazky od příslušných “hříšníků”, nebo jakým způsobem uděluje výhody plynoucí z leniency programu. Pakliže se rozhodne uložit pokutu, je v rámci diskreční pravomoci Komise, jakým způsobem rozhodne o způsobu jejího placení - jak vysoké budou např. splátky a do jakého časového období budou rozloženy. Takováto rozhodnutí plynoucí ze správního řízení se tedy dotýkají naprosto zásadním způsobem

⁶ Čl. 105 Smlouvy o fungování EU.

⁷ Čl. 17 odst. 1 Smlouvy o EU.

subjektivních práv a zájmů samotného soutěžitele, majitelů, ale i zaměstnanců a dalších zúčastněných osob.

Problémy rozhodování v oblasti soutěžního práva velmi dobře popisuje jeden z předních evropských odborníků v této oblasti Nicolas Petit z Université de Liege a rozděluje je do několika okruhů - zásah do základních práv jako právo vlastnit majetek, právo podnikat, právo na ochranu osobních údajů a další, sofistikované normativní standardy, velmi komplexní předmět rozhodování, vysoká cena chyb v hodnocení, specifické překážky v procesu dokazování a nakonec i nedostatek dlouhodobé koncepční homogenity při vymáhání soutěžního práva.⁸ Proto je nesmírně důležité, aby soutěžitelé měli možnost napadnout příslušná rozhodnutí pořadem práva, domnívají-li se, že Komise při své činnosti pochybila. Právo na spravedlivý proces zde proto evidentně sehrává klíčovou roli. Stinnou stránku však představuje argument, že podrobný přezkum limituje prostor pro uvážení Komise, čímž může rozhodovací praxe “kostnatět”.⁹

III. Právo na spravedlivý proces v kontextu soutěžního práva

Rozhodování Komise v případě porušení čl. 101 a 102 SFEU bychom u nás nazvali správním trestáním. ESLP trvale judikuje, že pojmy Úmluvy musí být vykládány v autonomním významu a nemohou být zaměňovány za třeba i jazykově stejné pojmy v národních právních řádech.¹⁰ V rámci autonomní interpretace pojmu “trestní obvinění” pro ESLP není určující označení předmětného národního řízení či sankce v daném právním řádu (toto je pouze “výchozí bod” pro posouzení ESLP). Do úvahy ESLP bere krom (i) domácí klasifikace také (ii) povahu spáchaného skutku a (iii) závažnost sankce, které daná osoba čelí.¹¹ Z judikatury ESLP vyplývá, že i řízení před správními orgány, jejichž výsledkem je finanční nebo jiná sankce může principiálně spadat pod trestněprávní část čl. 6 Úmluvy.¹²

⁸ Geradin, D., Petit, N.: Judicial Review in European Union Competition Law: A Quantitative and Qualitative Assessment. *Tilburg Law and Economics Center (TILEC) Law and Economics Discussion Paper*, č. 008/2011 a *Tilburg Law School Legal Studies Research Paper*, č. 01/2011, str. 9-10.

⁹ *Ibid.*, str. 8.

¹⁰ Stížnost č. 5100/71; 5101/71; 5102/71; 5354/72; 5270/72 *Engel a ostatní v. Nizozemí* [1976], bod 81.

¹¹ *Ibid.*, bod 82

¹² Viz např. případy stížností č. 8544/79 *Öztürk v. Německo* [1984] nebo přímo v oblasti práva hospodářské soutěže stížnost č. 11598/85 *Societe Stenuit v. Francie* [1992].

Nelze však nevidět rozdíly mezi klasickým trestním řízením a řízením před správním orgánem, v jehož pravomoci je uložení určité (třeba i velmi vysoké¹³) sankce.

Z tohoto důvodu ESLP odlišuje v rámci trestních řízení ještě tzv. *hard core* trestní řízení, kterými jsou myšlena klasická trestní řízení, což by v českém právním řádu odpovídalo řízení na základě trestního zákoníku a trestního řádu a poté ta řízení, ve kterých je uložena veřejnoprávní sankce, ale nejedná se o striktně trestní věci.¹⁴ Praktický rozdíl mezi těmito dvěma typy řízení z pohledu standardů garantovaných čl. 6 Úmluvy je zejména ten, že přestože v obou případech musí rozhodovat soud s plnou jurisdikcí, u jiných než *hard core* řízení existuje možnost, aby o uložení sankce v prvním stupni rozhodoval správní orgán a soud s plnou jurisdikcí taková rozhodnutí přezkoumával.¹⁵ Požadavek na soud s plnou jurisdikcí je však ve finále podmínkou práva na spravedlivý proces ve všech případech.¹⁶

IV. Soudní ochrana práva na spravedlivý proces

Jak již bylo řečeno, vymáhání soutěžněprávních pravidel EU probíhá formou správního řízení, které vede Komise, přičemž finální rozhodnutí Komise lze napadnout žalobou na neplatnost podle čl. 263 resp. čl. 261 SFEU ve spojení s čl. 31 Nařízení Rady (ES) č. 1/2003 o provádění pravidel stanovených v člancích 81 a 82 Smlouvy. Role Komise v oblasti soutěžního práva je poněkud specifická a rozhodně ji nelze označit za nezávislý soud s plnou jurisdikcí.

Na základě Nařízení má komise rozsáhlé vyšetřovací pravomoci a již zmíněnou možnost ukládání pokut. Krom toho však Komise na základě čl. 103 SFEU předkládá legislativní návrh na implimentaci zásad uvedených v čl. 101 a 102 SFEU a je tak součástí legislativního procesu, může vydávat implementující nařízení ve smyslu čl. 105 SFEU a v

¹³ Představu je možné získat ze statistik vedených Komisí a dostupných na webové stránce <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>, naposledy přistoupeno 7. 4. 2017.

¹⁴ Stížnost č. 73053/01 *Jussila v. Finsko* [2006], bod 43.

¹⁵ Stížnost č. 12547/86 *Bendenoun v. Francie* [1994], bod 46 nebo Stížnost č. 34619/97 *Janosevic v. Švédsko* [2003], bod 81; K tomuto závěru také např. Wils, W.: The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis. *World Competition*, č. 27/2004, str. 202-224.

¹⁶ Geradin, D., Petit, N.: Judicial Review in European Union Competition Law: A Quantitative and Qualitative Assessment. *Tilburg Law and Economics Center (TILEC) Law and Economics Discussion Paper*, č. 008/2011 a *Tilburg Law School Legal Studies Research Paper*, č. 01/2011, str. 15.

neposlední řadě vydáváním *soft law* dokumentů vytváří normativní prostředí v oblasti hospodářské soutěže v EU.

Pro odpověď na otázku, zda vymáhání soutěžního práva v EU je v souladu s právem na spravedlivý proces, jak bylo popsáno, se je třeba zaměřit na úroveň přezkumu prováděného Soudním dvorem EU.¹⁷ Klíčovým požadavkem pak je, zda prováděná úroveň přezkumu naplňuje představu ESLP o plné jurisdikci nebo zda se jedná spíše o přezkum legality rozhodnutí Komise (v anglických textech se můžeme setkat s různou terminologií - na jedné straně stojí *full review/jurisdiction* a na druhé pak *marginal/deferential review*, kterýžto pojem považují za přesnější než “přezkum legality”).

Plná jurisdikce, jak je chápána ESLP, znamená, že soud “disponuje pravomocí rozhodnutí vydané nižší instancí zrušit v kterémkoliv bodě, v otázkách práva i faktů. Musí mimo jiné mít pravomoc přezkoumat všechny otázky práva i faktů relevantních v předmětném sporu”.¹⁸ Jak již bylo řečeno, Tribunál přezkouvává soutěžně-právní rozhodnutí Komise na základě obecného ustanovení SFEU o žalobě na neplatnost. Přezkum sankce má zvláštní právní základ v čl. 31 Nařízení a tento umožňuje neomezený přezkum rozhodnutí, kterým Komise stanoví pokutu nebo penále. Pokuta nebo penále tak může být Tribunálem zrušena, snížena nebo zvýšena.¹⁹ Co se tedy týče rozhodnutí o uložení pokuty nebo penále, panuje mezi praktiky soutěžního práva i akademiky v zásadě shoda, že vzhledem k tomuto výroku Tribunál disponuje plnou jurisdikcí.²⁰ Nicméně vzhledem k tomu, že pro výrok o pokutě či penále je potřeba výroku o porušení čl. 101 či 102 SFEU, a tedy vzhledem ke komplexnosti rozhodnutí je nemožné, aby úplnému přezkumu podléhala pouze jeho jedna (navíc druhou přímo podmíněná) část. Tedy pakliže má být právu na spravedlivý proces učiněno zadost, musí Tribunál disponovat a vykonávat plnou jurisdikci s ohledem na celé rozhodnutí Komise.

¹⁷ Podle čl. 19 Smlouvy o EU je Soudní dvůr EU tvořen Soudním dvorem, Tribunálem a specializovanými soudy. V souladu s terminologií Smluv je tedy v této práci pojem “Soudní dvůr EU” používán výhradně jako označení celé soudní instituce, “Soudní dvůr” pouze pro vyšší instanci SDEU a všemi ostatními označeními je myšlen dnešní Tribunál samozřejmě při zahrnutí historického vývoje této instituce. Z tohoto důvodu také v kontextu výkladu situace před rokem 1989 toto terminologické dělení pozbývá relevance.

¹⁸ Stížnost č. 43509/08 *A. Menarini Diagnostics S.R.L. v. Francie*, bod 59.

¹⁹ Čl. 31 Nařízení 1/2003.

²⁰ Prek, M., Lefevre, S.: Competition litigation before the General Court: Quality if not quantity? *Common Market Law Review*, č. 53/2016, str. 75. Nebo Maselis, I., Gutman, K., Lenaerts, K.: *EU Procedural Law*. Oxford: OUP, 2014, str. 856.

V. Soutěžněprávní proces lucemburským pohledem

Praxe SDEU pochopitelně procházela vývojem. Jedním z prvních případů, ze kterého je zjevně patrná míra přezkumu tehdejší ESD, je případ 58/64 *Consten a Grundig* z roku 1966. Německá společnost Grundig uzavřela výhradní distribuční smlouvu pro území Francie s firmou Consten a tato dohoda tak fakticky bránila volnému pohybu zboží, jelikož neumožňovala reexport předmětného zboží z Německa do Francie ani naopak. Komise shledala předmětnou dohodu v rozporu se zákazem kartelových dohod a vydala příslušné rozhodnutí. Při soudní obraně proti rozhodnutí Komise strany napadaly celou řadu argumentů. Právní kvalifikace porušení jejich práv je však v zásadě trojí - překročení pravomocí Komise, porušení základních procedurálních požadavků a porušení Smluv. Tím byla také nastavena meze přezkumu vykonávána ESD. Soud k substantivní argumentaci stran (týkající se porušení smluv) přikročil formulací, která se od té doby stala mantrou přezkumu soutěžních rozhodnutí Komise: “Furthermore, 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. This review must in the first place be carried out in respect of the reasons given for the decisions which must set out the facts and considerations on which the said evaluations are based.”²¹

Tedy ESD vymežil v rozhodnutí Komise určitou oblast ekonomických úvah, které jsou charakteristické vysokou mírou komplexity faktů a jejich hodnocení. Přezkum těchto úvah Komise má být omezena na přezkum relevance faktů a právních důsledků z toho vyvozených. Jinými slovy soudní přezkum sledoval, zda fakta, která Komise hodnotila, byla relevantní a zda tato fakta umožňují vyvodit příslušné právní závěry. ESD v tomto případě rozhodl, že rozhodnutí Komise v oblasti *komplexních hodnocení ekonomických otázek* nebude podrobovat zevrubnému analytickému přezkumu.

Stav soudní ochrany v předmětné oblasti však byl závislý na tehdejší znění Smluv. V době, kdy Soud rozhodoval o případu *Consten a Grundig* byly stále ještě v účinnosti zakládající Smlouvy ve znění Římských smluv - tedy konkrétně Smlouva o založení Evropského společenství uhlí a oceli a Smlouva o založení Evropského ekonomického

²¹ Spojené případy 56 a 58/64 *Établissements Consten S.à.R.L. a Grundig-Verkaufs-GmbH v. Komise Evropského hospodářského společenství* [1966] ECLI:EU:C:1966:41, strana 347.

společenství. Ustanovení o ochraně hospodářské soutěže stejně jako žaloba na neplatnost aktů Komise v této oblasti byla upravena čl. 173 Smlouvy o EES. Nicméně čl. 33 Smlouvy o ESUO obsahuje rovněž ustanovení o možnosti napadnout rozhodnutí Vysoké autority (staré pojmenování Komise v oblasti dohledu nad trhem s uhlím a ocelí podle Smlouvy o ESUO), který vymezoval tyto důvody neplatnosti: “nedostatek pravomoci, porušení podstatných pravidel řízení, porušení Smlouvy nebo kteréhokoli jiného právního pravidla, které se týká jejího provádění”.²² Článek 33 Smlouvy o ESUO však obsahuje také explicitní vyloučení soudního přezkumu rozhodnutí Vysoké autority v případě, že se jedná o “hodnocení situace vyplývající z hospodářských skutečností anebo okolností, vzhledem k nimž byla zmíněná rozhodnutí nebo doporučení učiněna, ledaže se proti Komisi namítá, že se dopustila zneužití moci anebo že zřejmým způsobem zanedbala ustanovení smlouvy nebo jakékoli jiné právní pravidlo, které se týká jejího provádění”.²³

Dnešní generální advokát Nils Wahl se domnívá, že právě ustanovení čl. 33 Smlouvy o ESUO mohlo být inspirací pro výše uvedenou úvahu Soudu.²⁴ Ač tedy v čl. 173 Smlouvy o ESS chybí vyloučení hodnocení situací vyplývajících z hospodářských skutečností, důvody přezkumu legality rozhodnutí Komise rovněž vymezuje jako nedostatek příslušnosti, porušení podstatných formálních náležitostí, porušení této smlouvy nebo jakéhokoli právního předpisu týkajícího se jejího provádění anebo pro zneužití pravomoci. Toto jsou důvody, které by se mohly zdát jako převážně procesního rázu, čehož Soud patrně využil a bez explicitní opory ve Smlouvách zavedl onu výše zmíněnou formulaci poskytující Komisi prostor pro uvážení při hodnocení některých ekonomických otázek.

Z uvedeného vyplývá pnutí mezi právem na spravedlivý proces ve formě požadavku na tribunál s plnou jurisdikcí, jak vyžaduje EÚLP a praxe, kdy ESD nepřezkoumává určitou část faktických a právních úvah v rozhodnutí Komise s odkazem na jejich komplexitu a specifickou odbornost. Právě toto je diskrepance, která je jádrem celého problému.

Soudní dvůr EU navíc v principu svůj přístup nezměnil až do přelomu tisíciletí. Na některých kauzách je sice patrná určitá změna rétoriky, ale podstata věci zůstala stejná.

²² Čl. 33 Smlouvy o ESUO v překladu dostupném na webovém portálu euroskop http://www.euroskop.cz/gallery/2/753-smlouva_o_esuo.pdf, naposledy přistoupeno 7. 4. 2017.

²³ Ibid.

²⁴ Wahl, N.: Standard of Review – Comprehensive or Limited? In: Ehlermann, C., Marquis, M. (eds.): *European Competition Law Annual 2009: The Evaluation of Evidence and its Judicial Review in Competition Cases*. Oxford a Portland, Oregon: Hart Publishing, 2011, str. 285

Například v kauze *Remia* se objevuje formulace kterou Soud na jedné straně říká, že principem je úplný přezkum toho, zda jsou splněny podmínky pro aplikaci soutěžněprávních pravidel, na druhé straně však dle názoru Soudu přezkum ekonomických hodnocení a úvah Komise musí být limitován na to, zda byla dodržena relevantní procesní pravidla, zda odůvodnění je adekvátní, zda fakta byla přesně popsána a zda-li se Komise nedopustila zjevného pochybení v uvážení či zneužití pravomoci.²⁵

Žaloba v tomto případě pak byla skutečně zamítnuta mimo jiné z toho důvodu, že Soud neshledal, že by “Komise rozhodla na základě nesprávného posouzení faktů či práva nebo že by se dopustila zjevného pochybení v hodnocení faktů případu jako celku”.²⁶ Důsledkem tedy byla situace, kdy otázka působnosti příslušného soutěžního článku Smlouvy a podmínky jeho aplikace principiálně podléhala plnému přezkumu stejně jako rozhodnutí o sankci, nicméně coby výjimka z pravidla určitá část úvah, o které se opíralo výsledné rozhodnutí Komise, byla přezkoumávána pouze marginálně.²⁷

VI. Marginalizace marginálního přezkumu

Posun v judikatuře však z určitých důvodů časem nastal a je vystopovatelný původně do oblasti kontroly spojování podniků. Marc Jaeger ve svém článku *Marginalisation of Marginal Review*²⁸ upozorňuje na řadu případů, ze kterých se podle jeho názoru začala odvíjet změna přístupu v judikatuře přičemž jako první ilustrativní případ volí *Kali und Salz* z roku 1998.

Tribunál v hodnocení předmětné koncentrace podniků zabývající se výrobou a distribucí potaše uvádí k míře přezkumu rozhodnutí Komise v obecné rovině, že Komise disponuje určitým prostorem pro uvážení při posuzování ekonomických okolností a soudní moc musí tento prostor respektovat.²⁹ Nicméně v následujícím odstavci Tribunál konstatuje, že “analýza Komise předmětného spojení a jeho účinků na trh je chybná v jistých ohledech,

²⁵ Případ 42/84 *Remia BV a ostatní v Komise Evropských společenství* [1985] ECLI:EU:C:1985:327, bod 34.

²⁶ *Ibid.*, bod 36.

²⁷ Maselis, I., Gutman, K., Lenaerts, K.: *EU Procedural Law*. Oxford: OUP, 2014, str. 858.

²⁸ Jaeger, M.: The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of the Marginal Review? *Journal of European Competition Law & Practice*, č. 4(2)/2011, str. 299.

²⁹ Spojené případy C-68/94 a C-30/95 *Francie a Société commerciale des potasses and de l'azote and Entreprise minière and chimique v Komise* [1998] ECLI:EU:C:1998:148, bod 224.

které mají vliv na ekonomické hodnocení spojení”.³⁰ Následuje kritika týkající se Komisi předložených důkazů a závěr, že “Zjištění Komise se proto [...] nezdají být podpořena dostatečně přesvědčivým a konzistentním souborem důkazů. [...] Za těchto okolností se zdá, že Komise dostatečně neprokázala existenci příčinné souvislosti [...]”.³¹ Právě požadavek Tribunálu na předložení dostatečně přesvědčivého a konzistentního souboru důkazů se zdá být poměrně významným posunem od kauzy *Remia*, kde Soud zkoumal, zda nedošlo k nesprávnému posouzení faktů či práva či zjevnému pochybení v hodnocení faktů. Objevily se však i názory, že tato změna v dikci soudu byla spíše upřesněním důkazního břemene Komise než zvyšování standardu přezkumu ekonomických aspektů rozhodnutí Komise.³²

Vývoj judiaktury v oblasti kontroly spojování podniků vyvrcholil odvolacím rozsudkem v kauze *Tetra Laval*, ve kterém Soud formulaci z případu *Kali und Salz* rozšířil o vyjádření, že přestože “Soudní dvůr přiznává Komisi určité volné uvážení v hospodářské oblasti, neznamená to, že soud Společenství nesmí přezkoumávat výklad údajů hospodářské povahy provedený Komisí. Soud Společenství totiž musí zejména ověřit nejen věcnou správnost dovolávaných důkazních materiálů, jejich věrohodnost a jejich soudržnost, ale rovněž přezkoumat, zda tyto skutečnosti představují veškeré relevantní údaje, jež musí být při posuzování komplexní situace vzaty v úvahu, a zda o ně lze opřít vznesené závěry”.³³ Tento standard byl plně akceptován Tribunálem a je v současnosti používaným standardem přezkumu rozhodnutí Komise.

V případě *General Electric* pak Tribunál dokonce stanovil, že “Komisi sice musí být přiznán určitý prostor pro volné uvážení pro účely uplatnění hmotněprávních pravidel nařízení č. 4064/89, neznamená to však, že soud Společenství nesmí přezkoumávat právní kvalifikaci údajů hospodářské povahy provedenou Komisí”.³⁴ V praxi tedy Tribunál v oblasti spojování podniků přezkoumává nejen dostatečnou přesvědčivost a konzistentnost důkazů, ale i věcnou správnost, věrohodnost, zda důkazy představují všechna relevantní

³⁰ Ibid., bod 225.

³¹ Ibid., bod 228; Daleko výstižnější znění je však anglická formulace “that the Commission has not established to the *necessary legal standard*”, která vystihuje podstatu toho, že Tribunál dává Komisi určitou latku - standard.

³² Meij, A.: *Judicial Review in the EC Courts: Tetra Laval and Beyond*. In: Essens, O., Gerbrandy, A., a Lavrijssen, S. (eds): *National Courts and the Standard of Review in Competition Law and Economic Regulation*. Groningen: Europa Law Publishing, 2009, str. 19.

³³ Případ C-12/03 P *Komise Evropských společenství v. Tetra Laval* [2005] ECLI:EU:C:2005:87, bod 39.

³⁴ Případ T-210/01 *General Electric Company v. Komise Evropských společenství* [2005] ECLI:EU:T:2005:456, bod 63.

fakta - tedy zda Komise nemohla předložit další fakta, která by v daném řízení mohla změnit obraz situace a Tribunál rovněž hodnotí, zda faktické závěry, které stojí na předešlém jsou správné. Tím Tribunál dle názoru autora vyslovuje svou vůli k úplnému přezkumu faktické stránky rozhodnutí. Pakliže k tomu Tribunál rovněž přidává přezkum právní kvalifikace údajů hospodářské povahy (tedy všech zmíněných faktů), nelze než dojít k závěru, že tímto přístupem významně mění svůj původní náhled na přezkum rozhodnutí Komise, a aniž by explicitně upozorňoval na změnu judikatury, *de facto* tak činí a přiklání se k úplnému přezkumu.

Přestože existovala tato linie případů v oblasti kontroly spojování podniků, v oblasti aplikace čl. 101 a 102 byla situace komplikovanější. Například v případě *GlaxoSmithKline* na jedné straně sice Tribunál explicitně odkazuje na judikaturu *Remia* v určitých aspektech rozhodnutí, na druhé straně však provádí poměrně podrobný přezkum ekonomických úvah Komise týkajících se analýzy paralelních prodejů a jejich dopad na vnitřní trh.³⁵ Zajímavé je, že Soudní dvůr judikaturu *GSK* potvrdil, co do provedené míry přezkumu, avšak v obecné rovině se vyjádřil slovy, že Tribunál “[p]rávem uvedl, že když je mu předložen návrh na zrušení takového rozhodnutí, provádí omezený přezkum, pokud jde o věc samou”.³⁶

V případě aplikace čl. 102 je ilustrativní případ *Microsoft* z roku 2007.³⁷ Komise v tomto případě posuzovala, za jakých podmínek může být dominantní podnik donucen licencovat některá svá práva k duševnímu vlastnictví. Aby toto mohla posoudit, musela vydefinovat relevantní produktový trh, což je odborné ekonomické posouzení, které by mělo podléhat pouze marginálnímu přezkumu. Nicméně aniž by Tribunál deklaroval, že je z nějakého důvodu potřeba změnit judikaturu a tuto otázku podrobit detailnímu přezkumu, učinil tak bez dalšího.³⁸ Zdá se tedy, že v dané době byl přístup Soudního dvora EU v oblasti aplikace čl. 101 a 102 SFEU poměrně špatně předvídatelný, protože existoval rozpor mezi tím, jaký byl explicitně vyjádřený standard přezkumu a do jaké míry Tribunál případy skutečně přezkoumával.

³⁵ Srovnej případ T-168/01 *GlaxoSmithKline v Komise Evropských společenství* [2006] ECLI:EU:T:2006:265, bod 241 s body 109-119 tamtéž.

³⁶ Spojené případy C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services Unlimited v Komise Evropských společenství a Komise Evropských společenství v GlaxoSmithKline Services Unlimited a European Association of Euro Pharmaceutical Companies (EAEPIC) v Komise Evropských společenství a Asociación de exportadores españoles de productos farmacéuticos (Aseprofar) v Komise Evropských společenství* [2009] ECLI:EU:C:2009:610, bod 84.

³⁷ Případ T-201/04 *Microsoft Corp. v Komise Evropských společenství* [2007] ECLI:EU:T:2007:289

³⁸ *Ibid.*, body 479-532.

Paradoxem přitom je, že v oblasti kontroly spojování podniků, které probíhaly v režimu nařízení Rady (EES) No 4064/89, které bylo novelizováno nařízením Rady (ES) No 139/2004, existovalo explicitní ustanovení svěřující Komisi diskreční pravomoc v oblasti posuzování ekonomických okolností, což znamená i určité omezení přezkumu Soudem, jak bylo naznačeno výše. Naproti tomu na poli aplikace čl. 101 a 102 Nařízení 1/2003 takto formulováno není a diskreční pravomoc Komise je pouze obecněji dovoditelná.³⁹ V tomto ohledu tak bylo možné spatřovat buď jakýsi postupný přechod od marginálního přezkumu k vyššímu standardu nebo jednoduše vnitřní rozpornost nebo disharmonii v rámci soutěžně-právní judikatury. Ani z širšího kontextu totiž nevyplývá nějaký podstatný důvod pro rozdílný přístup Soudního dvora EU k rozhodnutím Komise v jednotlivých oblastech regulace hospodářské soutěže.

Co se týče oblasti kartelového práva a zákazu zneužití dominantního postavení, jeden z prvních případů, ve kterém je možné pozorovat určitý posun v judikatuře Soudu, je *Amann & Söhne and Cousin Filterie*.⁴⁰ Tribunál opět přiznal Komisi prostor pro uvážení, ale zdůraznil že takovýto prostor nemůže nikdy být neomezený a pak zopakoval svou judikaturu ve věci *Tetra Laval*.⁴¹ Z toho bylo patrné přinejmenším to, že Tribunál je ochotný použít judikaturu z oblasti kontroly spojování podniků i v rámci aplikace článků 101 a 102. V případě *Clearstream* použil Tribunál formulaci, že přestože komplexní ekonomické úvahy Komise podléhají pouze marginálnímu přezkumu, Tribunál je i tak musí pokaždé přezkoumávat.⁴² Následuje pak opět přezkoumání ekonomických úvah Komise v přibližně třiceti odstavcích, ve kterých Tribunál přezkoumává každý důvod žalobců, konfrontuje ho s důkazy předloženými v napadeném rozhodnutí a vyvozuje z toho příslušné faktické a právní závěry.⁴³

Takovýto přístup se nezdá být ideálním řešením a cestu z něj se snažili naznačit generální advokáti Soudního dvora již od roku 2009. V případě *Papierfabrik August Köhler* GA Yves Bot vyjádřil své přesvědčení že právě z důvodu *kvazi-trestního* charakteru soutěžních řízení a s ohledem na výklad čl. 6 EÚLP “musí soud [Unie] provádět velmi

³⁹ Čl. 2 nařízení Rady (EEC) No 4064/89 i ve znění nařízení Rady (EC) No 139/2004.

⁴⁰ Případ T-446/05 *Amann & Söhne GmbH & Co. KG and Cousin Filterie SAS v Evropská komise* [2010] ECLI:EU:T:2010:165.

⁴¹ *Ibid.*, bod 131.

⁴² Případ T-301/04 *Clearstream Banking AG and Clearstream International SA v Komise Evropských společností* [2009] ECLI:EU:T:2009:317, bod 47.

⁴³ *Ibid.*, body 48-74.

důkladný přezkum toho, zda Komise dodržuje procesní práva účastníků”, přičemž v marginálním přezkumu spatřuje újmu na účastníkově právu být slyšen.⁴⁴ Soudní dvůr však stanovisko generálního advokáta v tomto bodě nenásledoval. Podruhé zazněl podobný hlas od GA Eleanor Sharpston v případě *KME* v únoru roku 2011.

Generální advokátka shrnuje trestní charakter soutěžněprávního řízení, poukazuje na to, že nepatří do tvrdého jádra trestního práva a že je tedy aplikovatelná výše citovaná judikatura ESLP umožňující v prvním stupni rozhodovat správnímu orgánu, který sám není nezávislým soudním orgánem. Bez zajímavosti není, že na rozdíl od GA Bota odkazuje v těchto věcech nejen na standard ochrany zaručený EÚLP nýbrž také na Listinu a ustanovení čl. 6 Úmluvy a čl. 47 Listiny tak jednoznačně v této věci dává naroveň. GA Sharpston také akceptuje nezbytnost úplného přezkumu v takovém rozsahu, jak jej vyžaduje ESLP. Nicméně podstatným aspektem tohoto konkrétního případu je fakt, že kasační opravný prostředek, respektive žaloba na neplatnost rozhodnutí Komise směřovala proti výši pokuty. Pro generální advokátku tak bylo velmi jednoduché říct, že “není pochyb o tom, že pravomoc soudního přezkumu v plné jurisdikci přiznaná Tribunálu článkem 229 ES a článkem 17 nařízení č. 17 splňuje tyto požadavky, pokud jde o prostředky nápravy proti výši uložené pokuty”.⁴⁵

Soudní dvůr v tomto případě v zásadě přesně opakuje stanovisko GA. Nejprve konstatuje, že co se týče přezkumu sankcí, byl Smlouvami zamýšlen přezkum v plné jurisdikci.⁴⁶ Co se týče přezkumu legality rozhodnutí podle článku 263 SFEU, uvedl Soudní dvůr “že ačkoliv Komise má v oblastech, ve kterých se provádí komplexní hospodářské posouzení, určitý prostor pro uvážení, neznamená to, že unijní soud nesmí výklad hospodářských údajů provedený Komisí přezkoumávat. Unijní soud totiž musí zejména ověřit nejen věcnou správnost dovolávaných důkazních materiálů, jejich věrohodnost a soudržnost, ale musí rovněž přezkoumat, zda tyto skutečnosti představují veškeré relevantní údaje, jež musí být při posuzování komplexní situace vzaty v úvahu, a zda lze

⁴⁴ Stanovisko GA Yvese Bota ve Spojených věcech C-322/07 P, C-327/07 P a C-338/07 P Papierfabrik August Koehler AG, Bolloré SA a Distribuidora Vizcaína de Papeles SL v Komise Evropských společenství [2009] ECLI:EU:C:2009:216, body 134-136.

⁴⁵ Stanovisko GA Eleanor Sharpston ve věci C-272/09 P *KME Germany AG, KME France SAS a KME Italy SpA* v Evropská komise [2011] ECLI:EU:C:2011:63, body 60-70.

⁴⁶ Případ C-272/09 P *C-272/09 P KME Germany AG, KME France SAS a KME Italy SpA* v Evropská komise [2011] ECLI:EU:C:2011:810, bod 93.

o ně opřít závěry, které z nich byly vyvozeny”.⁴⁷ Tím potvrzuje judikaturu *Tetra Laval* i pro oblast čl. 101 SFEU a klade důraz na to, že prostor pro uvážení Komise nesmí fungovat jako *black box*, do kterého vejdou ekonomické údaje a vypadne z něj rozhodnutí, na základě kterého je udělena pokuta.

VII. Důsledky judikatorního posunu

Právě provázanost rozhodnutí o protiprávním jednání a rozhodnutí o pokutě se zdá být klíčem k zodpovězení otázky, zda přezkum soutěžněprávních rozhodnutí Komise prováděný Tribunálem resp. Soudním dvorem EU jako celkem je v souladu s požadavkem na soud s plnou jurisdikcí, jak je vyžadován ESLP. I podle názoru GA Sharpston pojem “plná jurisdikce” ve smyslu judikatury ESLP zahrnuje rovněž prostředky ochrany proti rozhodnutí konstatující samotné protiprávní jednání.⁴⁸ Tedy aby Tribunál byl považován za soud s plnou jurisdikcí ve smyslu ESLP, musí vykonávat plnou jurisdikci nad celým rozhodnutím Komise ve všech jeho bodech.

Vzhledem k tomu, jak byl přezkum rozhodnutí o pokutě a zbytku rozhodnutí popsán výše, snaží se Soudní dvůr v rozsudku *KME* vytvořit dostatečné propojení, zdůraznit závislost výroku o sankci na zbytku rozhodnutí, když zdůrazňuje, “že pro stanovení výše pokut je třeba zohlednit dobu trvání protiprávních jednání a všechny skutečnosti, které mohou ovlivnit posouzení jejich závažnosti, jako je jednání každého z podniků, jejich role při zavádění jednání ve vzájemné shodě, zisk, který mohou z těchto jednání mít, jejich velikost a hodnota dotčeného zboží, jakož i nebezpečí, které představují protiprávní jednání tohoto druhu pro Evropské společenství”.⁴⁹ Soudní dvůr rovněž uvedl, že musí být zohledněny objektivní skutečnosti, jako je obsah a doba trvání protisoutěžních jednání, jejich počet a intenzita, rozsah dotčeného trhu a zhoršení hospodářského veřejného pořádku. Analýza musí rovněž zohlednit relativní význam a podíl odpovědných podniků na trhu, jakož i případné opakování protiprávního jednání”.⁵⁰ Tento svůj názor vyjádřil Soudní dvůr rovněž v ten samý den publikované kauze *Chalkor*.

⁴⁷ Ibid., bod 94.

⁴⁸ Stanovisko GA Eleanor Sharpston ve věci C-272/09 P *KME Germany AG, KME France SAS a KME Italy SpA v Evropská komise* [2011] ECLI:EU:C:2011:63, bod 70.

⁴⁹ Případ C-272/09 P C-272/09 P *KME Germany AG, KME France SAS a KME Italy SpA v Evropská komise* [2011] ECLI:EU:C:2011:810, body 96-97.

⁵⁰ Ibid.

Toto faktické propojení či zdůraznění vzájemné závislosti obou částí rozhodnutí se zdá být jakýmsi “tunelem” či cestou, jak překonat právní nedostatek a objektivní rozdíl v konstrukci přezkumu rozhodnutí o porušení příslušné právní normy a rozhodnutí o udělení sankce a přezkoumávat tak v plné jurisdikci celé rozhodnutí Komise.

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Abstract

Thesis title: The Enforcement of EU Competition Law and Its Compliance with the Right to Fair Trial

The EU is a community based on common values among which the prime role is played by fundamental rights. One of the most important rights which serves also as a vehicle for the protection of other rights is the right to fair trial. That is valid also for the specific field of EU competition law. The European Commission issues in competition proceedings sanctions which are of criminal nature. Such sanction must be either imposed or at least reviewed by an independent court or tribunal with a full jurisdiction. This is a doctrine developed by the ECtHR in Strasbourg under art. 6 of the Convention and it has been well established in its case law for decades. Since the Commission itself is not an independent court or tribunal, its decisions must be reviewed by the ECJ which must exercise the full jurisdiction over the decisions in question. In the past the ECJ was criticised that it did not possess or exercise the full jurisdiction by which it failed to safeguard the standard of fair trial. Although the ECJ accepted the line of case law on criminal nature of Commission's decisions, at times it was indeed rather hesitant to review fully the parts of the decision where the Commission assessed the factual circumstances and decided on the matter of existence of the infringement of relevant competition rules. This thesis shows the development of the case law from the very deferential approach of the ECJ in cases like *Consten Grundig* and *Remia* to more comprehensive review in recent years in the cases like *KME* or *Chalkor*. Although the ECJ never doubted that it fulfils the standards of art. 6 of the Convention and later art. 47 of the Charter, the analysis of the case law shows that the standard of review exercised by the ECJ did change in time substantially and the ECJ showed some creativity in interpreting the Treaties to create a path for the required full review of Commission's decisions in competition cases.

Abstrakt

Název diplomové práce: Vymáhání soutěžního práva EU Evropskou Komisí a jeho soulad s právem na spravedlivý proces

Evropská Unie je společenství založené na společných hodnotách a úctě k základním právům. Jedním z nejdůležitějších základních práv, které je zároveň nástrojem pro ochranu všech dalších práv, je právo na spravedlivý proces. To platí také v poměrně technické oblasti soutěžního práva EU. V soutěžněprávních řízeních ukládá Evropská Komise sankce, které jsou svou povahou trestního charakteru. Z toho plyne povinnost, že takováto sankce musí být uložena nebo aspoň přezkoumána soudem disponujícím plnou jurisdikcí. To je doktrína vyvinutá Evropským soudem pro lidská práva v rámci čl. 6 Úmluvy, která je hluboce zakořeněná v judikatuře tohoto soudu již po desetiletí. V minulosti byl SDEU kritizován za to, že plnou jurisdikcí nedisponoval nebo ji odmítal vykonávat a tím pádem byly narušovány standardy ochrany spravedlivého procesu. Ačkoliv ESD vzal zmiňovanou judikaturu ESLP za svou a akceptoval, že rozhodování Komise může mít trestněprávní charakter, často spíše odmítal provádět plný přezkum těch částí rozhodnutí Komise, ve kterých posuzovala faktické a odborné otázky a rozhodovala o tom, jestli samotná soutěžněprávní pravidla byla či nebyla porušena. Tato práce ukazuje vývoj judikatury od velmi formálního přezkumu jako například v kauzách *Consten Grundig* a *Remia* až po daleko zevrubnější substantivní přezkum v posledních letech v kauzách *KME* či *Chalkor*. Rozebrána jsou rovněž klíčová rozhodnutí ESLP, která měla největší dopad do judikatury ESD. Přestože ESD nikdy nepochyboval, že splňuje z tohoto pohledu standardy čl. 6 Úmluvy a později čl. 47 Listiny EU, předložená analýza judikatury ukazuje, že úroveň přezkumu prováděného ESD se v čase měnila výrazně a ESD také prokázal značnou míru kreativity při interpretaci ustanovení smluv, aby si vytvořil nástroj k potřebnému plnému přezkumu rozhodnutí Komise v soutěžněprávních případech.

Key words

competition law, fair trial, judicial review

Klíčová slova

soutěžní právo, právo na spravedlivý proces, soudní přezkum