



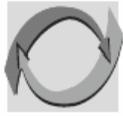
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9th ASCOLA Conference Warsaw 2014 on
PROCEDURAL FAIRNESS IN COMPETITION PROCEEDINGS

The right of fair trial in competition law proceedings: Quo vadis the courts of the new EU Member States?

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CENTRE FOR ANTITRUST AND REGULATORY STUDIES, UNIVERSITY OF WARSAW
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*The right of fair trial in competition law proceedings:
Quo vadis the courts of the new EU Member States?*

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1. Introduction

During the recent years, the debate concerning the compatibility of EU competition enforcement with fundamental rights has gained momentum.¹ Following the judgment of the European Court of Human Rights (ECtHR) in *Menarini*² the academic debate has focused on the compatibility of the standard of judicial review applied by the General Court (GC) and the European Court of Justice (ECJ) in competition law proceedings with the principle of “fair trial”.³ The latter is part of the broader right of defense guaranteed by Article 6 European Convention on Human Rights (ECHR),⁴ as well as by Article 47 EU Charter of Fundamental Rights (EU Charter).⁵ On the other hand, limited attention has been paid to the judicial review exercised by the national courts of the EU Member States (EU MS) in reviewing the Decisions of the National Competition Authorities (NCAs) sanctioning competition law violations.

Following the decentralization of EU competition law enforcement, all EU MS have adopted a national competition law which “mirrors” Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).⁶ On the other hand, the same substantive provisions are enforced under different procedural rules in each EU MS.⁷ As recognized by Lasserre, the increasing number of decisions adopted by NCAs causes a growing involvement of national judiciary in competition law enforcement.⁸ In particular, national courts review the NCAs’ decisions in accordance with the standard of review provided by national procedural law and embedded in the national legal culture. A number of differences exist among the national courts empowered to review decisions of the NCAs: while some countries have opted for a specialized competition tribunal (i.e. UK)⁹, others have assigned this task to the administrative courts (i.e. Italy)¹⁰.

¹ A good summary of this debate is summarized by: R. Nazzini (2012), “Administrative Enforcement, Judicial Review and Fundamental Rights in EU Competition Law: A Contextual-functionalist Perspective” 49 *CML Rev* 971 – 1006.

² ECtHR, *Menarini Diagnostics S.R.L. v. Italy*. Judgement issued on 27.9.2011. Application n. 43509/08.

³ See, for instance: *supra*, Nazzini (2012). M. Bronckers, A. Vallery (2011), “No Longer Presumed Guilty? The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law”. *World Competition*, 34 (4): 535-570.

⁴ Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4.11.1950.

http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention_ENG.pdf.

⁵ Charter of Fundamental Rights of the European Union. OJ C-83/391, 30.3.2010. The Charter was adopted in Nice on 7.12.2000 without binding effects. However; since the entry into force of the Lisbon Treaty, the Charter has become binding for the EU institutions and the EU MS when they “implement” EU law - Art. 51(1).

⁶ Consolidated version of the Treaty of the Functioning of the European Union, OJ C-115/99, 9.5.2008. Entered into force on 1.12.2009.

⁷ M. Bernatt (2012), “Convergence of Procedural Standards in the European Competition Proceedings”. 8(3), *The Competition Law Review* 255-283.

⁸ “...by now more than a thousand cases have been dealt with in the context of the European Competition Network, and more than 800 have been decided by the national enforcers. This means that those cases, when appealed, are resolved before national courts applying Art. 101 and 102.”

B. Lasserre, “Introduction to the Workshop”. Page 4. In C. D. Ehlermann, M. Marquis (eds.) (2011), *European Competition Law Annual 2009. The Evaluation of Evidence and its Judicial Review in Competition Cases*. Hart Publishing, Oxford.

⁹ The UK Competition Appeal Tribunal (CAT) is a specialized court, which has jurisdiction both to hear appeal cases against the Decisions adopted by the Office for Fair Trade (OFT) and other sector-specific regulators on the basis of the 1998 Competition Act and 2002 Enterprise Act, as well as to hear actions for damages caused by a competition law violation.

<http://www.catribunal.org.uk/242/About-the-Tribunal.html>.

¹⁰ In Italy, Decisions of the *Autorita' per la Concorrenza e il Mercato* (Italian NCA) can be appealed to the *Tribunale Amministrativo Regionale* (Regional Administrative Tribunal) of the region Lazio. In Italy, administrative tribunals are organized

Secondly, while in some EU MS the first instance court reviews the decisions of the NCAs (i.e. Italy¹¹), in other countries the appellate courts have jurisdiction in this field (i.e. Germany¹² and France¹³). In addition, the depth of the review carried out by each court *vis a vis* the findings of the NCA varies in every country, and it may change in the different areas of competition law.¹⁴ Finally, while some courts can only “annul” the NCA’s decision by requiring the NCA to re-assess the case, other tribunals can “reform” the NCA’s decision by providing their own ruling on substantive issues.¹⁵ In view of these differences, Schweitzer has concluded that “...at the national level there is no common approach...” in relation to the standard applied by national courts to review the decisions of the NCAs.¹⁶

The limited literature concerning the standard of judicial review applied by national courts in competition law cases has focused on the “old” EU MS.¹⁷ This paper, on the other hand, investigates the standard of judicial review applied by national courts of the “new” EU Member States. In particular, the paper aims at assessing whether the judicial review applied by the courts of the selected jurisdictions complies with the standard of “full” review introduced by ECtHR in *Menarini*, and whether it is in line with the standard of review applied by GC/ECJ in reviewing the Decisions of the European Commission. The new EU MS have adopted or modified their national competition laws in the context of the EU enlargement process¹⁸ and during the recent years they have increasingly enforced this legislation via the decisions of the NCAs.¹⁹ The role played by the judiciary in these countries in competition law enforcement is thus of increasing relevance.

on a regional basis; the administrative tribunal of Lazio has jurisdictions over the appeal cases against the Italian NCA’s Decisions, since the latter is established in Rome.

<http://www.giustizia-amministrativa.it/WEBY2K/intermediate.asp?Reg=Lazio&Tar=Roma>.

¹¹ *Ibid*.

¹² In Germany, Düsseldorf *Oberlandesgericht* (Court of Appeal) has exclusive jurisdiction to hear appeals cases *vis a vis* the Decisions of the *Bundeskartellamt*. (German NCA). Düsseldorf Court of Appeal has jurisdiction to hear private and criminal law cases, besides competition law.

<http://www.olg-duesseldorf.nrw.de/aufgaben/index.php>.

¹³ In France, appeal cases against the Decisions of the *Autorité de la Concurrence* (French NCA) are heard by the *Cour d’appel de Paris* (Paris Court of Appeal) if the case concerns an antitrust violation. On the other hand, merger cases are heard by the *Conseil d’Etat* (French Supreme Administrative Court).

<http://www.ca-paris.justice.fr/>.

<http://www.conseil-etat.fr/en>.

¹⁴ See the case of France, *ibid*.

¹⁵ UK CAT, for instance, has the power to conduct a full judicial review, and it can either reform or annul the OFT’s Decision in antitrust cases. On the other hand, in the field of merger control CAT can only annul the Decision and it limits its review to verify a possible error of law or procedure, or the “irrationality” of the Decision. A merger Decision is considered “irrational” when it is “an act or Decision which no person or tribunal properly instructed and taking into account of all but only relevant considerations could do or make.”

K. Bacon, “Standard of Proof, Standards of Review and Evaluation of Evidence in UK Antitrust and Merger Cases.” Pages 671-682. In D. Ehlermann, M. Marquis (eds.) (2011), *supra*.

¹⁶ H. Schweitzer, “Introduction to the workshop”. Page 7. In C. D. Ehlermann, M. Marquis (eds.) (2011), *supra*.

¹⁷ See, in particular: *supra*, C. D. Ehlermann, M. Marquis (eds.) (2011). O. Essens and others (eds.) (2009), *National Courts and the Standard of Review in Competition Law and Economic Regulation*. Europa Law Publishing, Groningen.

¹⁸ J. Fingleton, M. Fritsch, et al. (eds.), (1997), *Rules of Competition and East-West Integration*. The Hague, Kluwer Law International.

¹⁹ A. Svetlicinii and M. Botta (2012), “Article 102 TFEU as a Tool for Market Regulation: ‘Excessive Enforcement’ Against ‘Excessive Prices’ in the New EU Member States and Candidate Countries”. *European Competition Journal* 8(3), 489-491.

The paper analyses this issue taking Bulgaria, Romania and Croatia as cases study. These countries are the last ones to have joined the EU in 2007 and 2013 respectively. Similarly to the other “new” EU MS that have joined the EU during the 2004 enlargement wave, these countries have empowered the administrative courts to review the NCA’s decisions; similar to many other EU MS, these countries do not provide for criminal sanctions for competition law violations. The paper is based on the analysis of the selected judgments of the national courts of the specified EU MS where the courts have reviewed the decisions of the NCAs applying domestic and/or EU competition rules. The paper analyses the dataset from a cross-country perspective, rather than following a country-by-country case study approach. In line with the standard of review applied by GC/ECJ, the selected judgments have been divided into three categories: review of the factual assessment by the NCA; review of the amount of the fine imposed by the NCA; standard of review applied in cases which imply a complex economic assessment..

2. Standard of judicial review in competition law: ECtHR v. ECJ

2.1. ECtHR’s Ruling in *Menarini*

As mentioned in the introduction, the entry into force of the Lisbon Treaty and the “criminalization” of competition law (i.e. due to the increasing level of the fines imposed)²⁰ has generated an academic debate concerning the compatibility of the model of EU competition law enforcement, where the EU Commission acts both as prosecutor and as quasi-judicial body, with the principle of fair trial.²¹ Until *Menarini*, it was unclear whether the “integrated agency model” followed by the EU Commission, and replicated by the NCAs of most of the EU MS, was in compliance with Article 6 ECHR.

Menarini Diagnostic was an Italian pharmaceutical company sanctioned by the Italian NCA due to its involvement in a cartel of pharmaceutical companies.²² “After having exhausted the domestic remedies” in the Italian courts (i.e. *Tribunale Amministrativo Regionale del Lazio* - TAR, and *Consiglio di Stato* – CdS), *Menarini* appealed to the ECtHR. Before the court of Strasbourg, *Menarini* argued that in the absence of a separation between investigative and adjudicative functions within the Italian NCA, and due to the fact that both TAR and CdS had exercised a limited judicial review *vis a vis* the NCA’s decision, the Italian administrative system of competition law enforcement breached the principle of fair trial.²³ In its judgment, the ECtHR ruled that a competition law fine had the features of a criminal sanction, due to its punitive and

²⁰ Statistics concerning the number and amount of fines imposed by the European Commission due to competition law infringements is available at:

<http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>.

²¹ See, for instance: I. Forrester (2009), “Due Process in EC Competition Cases; a Distinguished Institution with Flawed Procedures”. *E.L. Rev.* 34(6): 817-843. W. Wils (2011), “EU Antitrust Enforcement Powers and Procedural Guarantees: the Interplay between EU Law, National Law, the Charter of Fundamental Rights of the EU and the European Convention on Human Rights”. *World Competition* 34 (2): 189-213.

²² M. Bronckers, A. Vallery, “Business as usual after *Menarini*?” *MLex Magazine*, January-March 2012: 44-47.

²³ *Ibid.*

deterrent character.²⁴ However, such fine was a “minor” criminal sanction, which could be imposed by an administrative authority like the Italian NCA.²⁵ However, in order to comply with the principle of fair trial, the NCA’s decision should be subject to a “full” judicial review on appeal by an independent court.²⁶ In the present case, the ECtHR recognized that both TAR and the CdS satisfied the independence criterion.²⁷ In addition, the two administrative courts carried out a full judicial review:²⁸ they controlled the proportionality and the reliability of the evidence put forward by the Italian NCA to justify the fine imposed. In view of these considerations, the ECtHR rejected Menarini’s claim concerning the infringement of Article 6 ECHR.²⁹

Menarini represents a land-mark ruling, since for the first time the ECtHR recognized the compatibility of the “integrated agency model” of competition law enforcement with the principle of fair trial, subject to “full” judicial review on appeal. In its ruling, however, the ECtHR did not clarify the meaning of this formula: on the one hand, the ECtHR seems to have introduced a high threshold of judicial review to justify the integrated agency model; on the other hand, the Court of Strasburg upheld the previous judgments of TAR and CdS without analyzing in details the type of review carried out by the two Italian administrative courts.³⁰ The ECtHR opted for a case-by-case analysis to assess the extent of the review exercised by national courts, rather than introducing a formula to define the meaning of “full” judicial review. In particular, it remains unclear whether the simple “annulment” of the NCA’s decision by the national court rather than a direct “reform” of the decision would be in line with the scope of “full” judicial review. In relation to the ambiguous meaning of the expression “full” judicial review, it is worth noticing the dissenting opinion the ECtHR judge Pinto de Albuquerque.³¹ The latter agreed with the other members of the court on the criterion of “full” judicial review. However, he concluded that TAR and CdS had not carried a careful technical assessment of the Italian NCA’s decision in *Menarini*; their judicial review had not been “full”, and thus not in compliance with Article 6 ECHR.

The relevance of *Menarini* goes beyond the compatibility of the Italian system of competition law enforcement with Article 6 ECHR. In fact, the Italian “integrated agency model” closely resembles the structure of the EU Commission, as well as that one of most of the NCAs in EU MS. Secondly, similarly to other national courts, the standard of review developed by TAR and CdS was quite close to the one

²⁴ ECtHR *Menarini*, para. 41-42.

²⁵ ECtHR *Menarini*, para. 59.

²⁶ ECtHR *Menarini*, para. 58.

²⁷ ECtHR *Menarini*, para. 60.

²⁸ ECtHR *Menarini*, para. 64-66.

²⁹ ECtHR *Menarini*, para. 67.

³⁰ In the *Menarini* judgment, in fact, the ECtHR dedicated only few paragraphs (i.e. 64-66) to discuss this important issue. Among the commentators, Bronckers and Vallery have expressed dissatisfaction with the manner whereby the ECtHR checked the compliance with the principle of full judicial review by TAR and the Council of State in *Menarini*.

Supra, M. Bronckers, A. Vallery, (2012).

³¹ Dissenting opinion of the judge Pinto de Albuquerque attached to ECtHR judgment, *Menarini Diagnostics S.R.L. v. Italy*. Judgment issued on 27.9.2011. Application n. 43509/08.

exercised by the GC and the ECJ in relation to the Decisions of the EU Commission in the field of EU competition law.

2.2. The Standard of Review Applied by GC/ECJ: Compatible with *Menarini*?

The standard of judicial review applied by GC/ECJ varies in the different areas of competition law. Under Article 261 TFEU and Article 31 Regulation 1/2003,³² GC/ECJ exercises an “unlimited jurisdiction” *vis a vis* the amount of the fine imposed by the EU Commission for violations of Articles 101 and 102 TFEU. As confirmed by the ECJ in *Danone*, the GC/ECJ are empowered to cancel, reduce or increase any fine or periodic penalty payment.³³ While Article 261 TFEU and Article 31 Regulation 1/2003 provide a solid legal basis to conclude that GC/ECJ exercise a “full” judicial review in relation to the amount of the fine imposed, Article 263 TFEU does not clarify the standard of review that the Courts of Luxembourg should follow in an action for annulment of the Decisions adopted by the EU Commission in competition law. Article 263 TFEU states that the GC/ECJ can only annul (i.e. fully or partially) the EU Commission’s Decision, rather than reforming its content. The standard of review followed by GC/ECJ under Article 263 TFEU has thus developed over the decades on the basis of GC/ECJ case law.

The review by GC/ECJ of the correctness of the “facts” on which the EU Commission relies in its findings of competition infringements has traditionally been regarded as intense. According to Advocate General Tizzano, “with regard to the findings of facts”, the GC/ECJ should “...verify objectively and materially the accuracy of certain facts and the correctness of the conclusions drawn (by the EU Commission) in order to establish whether certain known facts make it possible to prove the existence of other facts to be ascertained.”³⁴ An illustrative example of this standard of review can be found in GC’s judgment *Schneider/Legrand*, concerning a merger prohibited by the EU Commission between two manufacturers of electrical equipment active in different EU MS.³⁵ Due to the differences in the regulatory framework in the EU MS, which required the equipment produced by the merging parties to satisfy certain technical standards defined at the national level, the EU Commission concluded that the relevant geographic markets had a national dimension.³⁶ However, when assessing the dominance of the merging parties, the “EU Commission based its assessment of the impact of the concentration on transnational, global considerations, extrapolated from a single market without demonstrating its relevance at the national

³² 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. Art. 31.

³³ Case C-3/06P *Groupe Danone v Commission* [2007] ECR I-1331, para 62.

³⁴ Opinion of AG Tizzano in Cases C-12/03 P and C-13/03 P *Commission v Tetra Laval*, at 86.

³⁵ Case COMP/M.2283 *Schneider/Legrand* [2001].

³⁶ *Id.*, para 193-220.

level.”³⁷ In its ruling, the GC noted that EU Commission’s assessment of the facts was “vitiating by errors and omissions which deprived it of probative value”, and thus it annulled the Decision.³⁸

While the GC/ECJ have traditionally carried out a “full” review of the correctness and accuracy of the “facts” put forward by the EU Commission as evidence in its Decision, the Courts of Luxembourg have restricted their degree of review in relation to matters which require a “complex economic assessment”. In *Aalborg Portland*, the ECJ ruled that “examination by the Community judicature of the complex economic assessments made by the EU Commission must necessarily be confined to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of powers.”³⁹ The Courts of Luxembourg, therefore, have traditionally declined to assess the validity of the economic theories relied by the EU Commission in its Decision. According to Wahl, the limited review exercised by GC/ECJ in relation to issues implying a “complex economic assessment” is due to the “institutional balance” between the EU Commission and the GC/ECJ.⁴⁰ In selecting which economic theories to rely in its Decision, the EU Commission exercises its task to develop the EU competition policy. The Courts of Luxembourg do not review the correctness of this policy choice; they limit themselves to the review of legal issues.

Although the EU Commission’s discretion in economic assessment has been confirmed in a number of GC/ECJ’s judgments,⁴¹ the standard of review exercised by the Courts of Luxembourg became arguably “more intense” following the ECJ’s land-mark ruling *Tetra Laval*.⁴² In the judgment, the Court confirmed the “margin of discretion with regard to economic matters” enjoyed by the EU Commission.⁴³ Nevertheless, the ECJ broadly interpreted the concept of “manifest error of assessment”, by pointing out that that the GC should check whether the evidence relied by the EU Commission was “factually accurate, reliable and consistent...and contains all the information which must be taken into account in order to assess a complex situation...”⁴⁴ In view of this “more intense” standard of review, the ECJ upheld the previous GC’s judgment which had annulled the EU Commission’s Decision prohibiting the merger.⁴⁵

The *Tetra Laval* formula has *de facto* strengthened the standard of review applied by the EU Courts *vis a vis* issues related to the “complex economic assessment” carried out by the EU Commission. Commentators, however, have criticized the alleged inconsistency allowed by the Courts of Luxembourg in

³⁷ Case T-351/03 *Schneider Electric SA v Commission* [2007] ECR II-2237, para 227.

³⁸ *Ibid.*

³⁹ Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P, and C-219/00 P, *Aalborg Portland and Others v Commission*, para 279.

⁴⁰ N. Wahl, “Standard of Review – Comprehensive or Limited?” Pag. 289. In C. D. Ehlermann, M. Marquis (eds.) (2011), *supra*.

⁴¹ See, for instance : Case T-102/96 *Gencor v Commission* [1997] ECR II-0879, para 164-165. Joined Cases C-68/94 and C-30/95 *France v Commission* [1998] ECR I-1375, para 223-224. Case T-342/99 *Airtours v Commission* [2002] ECR II-02585, para 64. Case T-342/00 *Petrolessence v Commission* [2003] ECR II-01161, para 101.

⁴² Case C-12/03 P, *Commission v. Tetra Laval* (2005) ECR I-00987.

⁴³ *Ibid*, para. 39.

⁴⁴ *Ibid*, para. 39.

⁴⁵ *Ibid*, para. 148.

deciding when applying this test, rather than the full factual analysis of the case.⁴⁶ Although *Tetra Laval* concerned a merger case (i.e. the area of competition law which is most influenced by economics), the same formula has been applied by GC/ECJ in reviewing Decisions concerning anti-competitive agreements and abuses of dominance. For instance, in *Microsoft* the GC applied the “manifest error of assessment” test, since the case implied a “complex technical assessment”.⁴⁷ As noted by Forrester, the increasing reliance by the EU Commission on economics in view of the “more economic approach” in competition law may lead the Courts of Luxembourg to increasingly rely on the manifest error of assessment test, rather than the full factual review.⁴⁸

The issue of the compatibility of the GC/ECJ “manifest error of assessment” with the principle of fair trial has clearly emerged after *Menarini* ruling. In *Chalkor*,⁴⁹ *KME*⁵⁰ and *Otis*,⁵¹ the ECJ has recently concluded that the combination of the *Tetra Laval* formula and the unlimited jurisdiction over fines satisfied “the requirements of the principle of effective judicial protection in Article 47 of the EU Charter.”⁵² Notably, the ECJ referred only to Article 47 EU Charter, rather than to Article 6 ECHR.⁵³ Secondly, the ECJ omitted any reference to *Menarini*, even though *Chalkor* and *KME* were decided few months after the ECtHR ruling.⁵⁴ According to Sibony, ECJ voluntarily omitted any reference to the ECtHR case law, avoiding to openly assessing whether the standard of review applied by the EU Courts was in compliance with the standard of “full” judicial review elaborated by the ECtHR in *Menarini*.⁵⁵

In *Chalkor*, *KME* and *Otis* the CJEU positively “self-assessed” the compatibility of its standard of judicial review with Article 47 of the EU Charter.⁵⁶ However, at the moment it is unclear whether the ECtHR would reach the same conclusion in relation to Article 6 ECHR. *Menarini*, in fact, referred to the compatibility of the enforcement regime of the Italian competition law with Article 6 ECHR. Only when the EU will accede to the ECHR, the ECtHR will be able to “verify” the correctness of the “self-assessment” made by the ECJ.⁵⁷ When the EU will join the ECHR, in fact, a company fined by the EU Commission will be able to appeal to the ECtHR “after having exhausted the domestic remedies” (i.e. after having appealed

⁴⁶ See, for instance: H. Schweitzer, “Introduction to the workshop”. Page 5. In C. D. Ehlermann, M. Marquis (eds.) (2011), *supra*.

⁴⁷ Case T-201/04, *Microsoft Corp. v Commission* (2007) ECR II-03601. Para. 87-89.

⁴⁸ I. Forrester, “A Bus in Need of Pruning: the Luxuriant Growth of ‘Light Judicial Review.’” Page 425. In C. D. Ehlermann, M. Marquis (eds.) (2011), *supra*.

⁴⁹ Case C-386/10, *Chalkor AE Epexergasias Metallon v Commission* (2011), n.y.p. ECR.

⁵⁰ Case C-272/09, *KME Germany AG, KME France SAS and KME Italy SpA v Commission* (2011), n.y.r. ECR.

⁵¹ Case C-199/11, *Commission v. Otis NV and others* (2012), n.y.r. in ECR.

⁵² *Ibid*, para. 63.

⁵³ The ECJ justified this choice by stating that “Article 47 of the EU Charter implements in EU law the protection afforded by Art. 6(1) of the ECHR. It is necessary, therefore, to refer only to Art. 47.”

Ibid, para. 47.

⁵⁴ *Chalkor* and *KME* were ruled by the ECJ on 8.12.2011. The ECtHR, on the other hand, ruled *Menarini* 27.9.2011.

⁵⁵ A. L. Sibony (2012), “Case C-272/09 P, *KME Germany and others v. Commission*.” 49(6) *CML Rev.* 1990.

⁵⁶ M. Botta (2013), “Commission Acting as Plaintiff in Cases of Private Enforcement of EU Competition Law: *Otis*” 50(4) *CML Rev.* 1105-1118.

⁵⁷ *Ibid*.

the EU Commission's Decision to the GC, and later to ECJ).⁵⁸ Taking in consideration the recent conclusion of the Accession Agreement of the EU to the ECHR in April 2013, we might get an answer to this pending question in the coming years.⁵⁹

3. Judicial review of the NCA's decisions in the new EU Member States

3.1. Procedural frameworks for judicial review

The review of the NCA's decisions in Bulgaria is carried out pursuant to the provisions of the Code of Administrative Procedure.⁶⁰ The general grounds for the appeal against an NCA decision are: lack of competence; non-compliance with the required form; material breach of the rules of administrative procedure; contravention of the provisions of substantive law; and non-conformity with the objectives of the law.⁶¹ According to the provisions of the Law on Protection of Competition,⁶² the Supreme Administrative Court (SAC)⁶³ is the single first and second instance court competent to carry out the judicial review of the decisions issued by the Commission for Protection of Competition (CPC)⁶⁴. The initial appeals are heard in a three-member panel⁶⁵ while the cassation appeals on the decisions of the SAC three-member panel are heard in a five-member format.⁶⁶ The grounds for cassation appeal are: nullity, inadmissibility; and illegality (due to violation of substantive law or material violation of procedural rules, lack of sufficient reasoning of the decision).⁶⁷ The SAC, sitting in a three-member panel may: declare the CPC's decision null and void (in case of lack of competence); annul the CPC's decision in whole or in part; amend the CPC's decision; or uphold the CPC's decision and reject the appeal.⁶⁸ The declaration of nullity refers only to the cases where the CPC did not have competence to act, while the annulment of the CPC's decision by the SAC means the CPC has made errors in its fact-finding, admitted procedural irregularities or incorrectly interpreted the law. The five-member panel of the SAC upon hearing the cassation appeal may: declare the decision of the three-

⁵⁸ M. Botta, A. Svetlicinii., "The standard of judicial review in EU competition law enforcement and its compatibility with the right to a fair trial under the EU Charter of Fundamental Rights." Pages 107-128..In T. Kerikmäe (ed.), *Protecting Human Rights in EU: Controversies and Challenges of the Charter of Fundamental Rights*. (Springer, 2013).

⁵⁹ On 5.4.2013, the negotiators of the Council of Europe and of the EU finalized the Accession Agreement to allow the EU to join the Council of Europe as 48th High Contracting Party. In July 2013, the EU Commission requested an Opinion to the ECJ concerning the compatibility of the Accession Agreement with the EU *acquis*. Subject to the ECJ's Opinion, the Accession Agreement will have to be ratified by the High Contracting Parties of the Council of Europe, as well as by the EU via the vote of the Council and the European Parliament.

<http://hub.coe.int/what-we-do/human-rights/eu-accession-to-the-convention>.

For an analysis of the recent Accession Agreement, see: P. Gragl (2014), "A Giant Leap for European Human Rights? The Final Agreement on the European Union's Accession to the European Convention on Human Rights" 51(1) CML Rev. 13-58.

⁶⁰ Code of Administrative Procedure (*Административнопроцесуален кодекс*), State Gazette No. 30 of 11.04.2006.

⁶¹ See P. Petrov, Bulgaria Chapter – Enforcement of Competition Law 2009, <http://www.iclg.co.uk/practice-areas/enforcement-of-competition-law/enforcement-2009/bulgaria>.

⁶² Law on Protection of Competition (*Закон за защита на конкуренцията*), Official Gazette No. 102 of 28.11.2008, Article 99.

⁶³ *Върховен административен съд*, <http://www.sac.government.bg/>.

⁶⁴ *Комисия за защита на конкуренцията*, <http://www.cpc.bg/>.

⁶⁵ Code of Administrative Procedure, Article 165.

⁶⁶ Code of Administrative Procedure, Article 217.

⁶⁷ Code of Administrative Procedure, Article 209.

⁶⁸ Code of Administrative Procedure, Article 172.

member panel invalid; declare the decision of the three-member panel inadmissible; annul the decision of the three-member panel in whole or in part; uphold the decision and reject the appeal.⁶⁹

In Romania the judicial review of the infringement decisions issued by the NCA – the Competition Council (CC)⁷⁰ is carried out by the Bucharest Court of Appeals (CAB)⁷¹ pursuant to the rules of the administrative procedure.⁷² The Romanian Competition Act⁷³ provides for the possibility to contest the judgments of the CAB under the rules of cassation appeal before the High Court of Cassation and Justice (ICCJ).⁷⁴ As a result, the CAB exercises the control of legality over the CC's decisions, which empowers to the court: (1) to annul in whole or in part the contested decision; (2) to order the administrative authority to issue an administrative act or other document or to conduct certain administrative actions.⁷⁵

In Croatia, the Law on Protection of Market Competition⁷⁶ provided that infringement decisions issued by the Agency for Protection of Market Competition (AZTN)⁷⁷ can be contested within thirty days from the date of communication before the three-member panel of the High Administrative Court (VUS).⁷⁸ The appeals are allowed on the following grounds: (1) infringement of substantive competition rules; (2) serious infringements of procedural rules; (3) erroneous or incomplete facts; (4) erroneous application of sanctions or other measures that AZTN can order under the law.⁷⁹ The VUS exercises the judicial review pursuant to the rules of administrative procedure.⁸⁰

3.2. Standard of judicial review of the factual assessment by the NCAs

The jurisprudence of the Bulgarian SAC in antitrust cases demonstrates its receptiveness to all sorts of evidence that the CPC can adduce in support of its findings. A recent case involving an alleged bid rigging by the travel agencies illustrates this point. In 2012, the CPC found that three travel agencies have submitted identical prices for the air tickets in the context of their bids submitted to a public procurement competition organized by a State agency.⁸¹ The first instance court held that the mere overlap in the amount of prices is not sufficient for proving bid rigging, in the absence of any other evidence of actual anticompetitive behaviour.⁸² The five-member panel of the SAC, on the other hand, clarified the standard of proof stating that the NCA should not be required to produce direct evidence in all cases; indirect evidence

⁶⁹ Code of Administrative Procedure, Article 221.

⁷⁰ *Consiliul Concurenței*, <http://www.consiliulconcurenței.ro/>.

⁷¹ *Curtea de Apel București*, <http://www.cab1864.eu/>.

⁷² Law No. 554/2004 on administrative procedure (*Legea contenciosului administrativ*) adopted on 02.12.2004.

⁷³ Law No. 21/1996 on competition (*Legea concurenței*) adopted on 10.04.1996 re-published in the Official Gazette No. 240 on 03.04.2014.

⁷⁴ *Înalta Curte de Casație și Justiție*, <http://www.scj.ro/>.

⁷⁵ Law on administrative procedure, Article 18.

⁷⁶ *Zakon za zaštitu tržišnog natjecanja*, adopted on 24.06.2009.

⁷⁷ *Agencija za zaštitu tržišnog natjecanja*, <http://www.aztn.hr/>.

⁷⁸ *Visoki upravni sud Republike Hrvatske*, <http://www.upravnisudrh.hr/>.

⁷⁹ Law on Protection of Market Competition, Article 67(1).

⁸⁰ Law on Administrative Procedure (*Zakon o upravnim sporovima*) published in the Official Gazette No. 20/10 and 143/12.

⁸¹ Decision No. 220 dated 01.03.2012.

⁸² Judgment No. 15333 dated 04.12.2012.

and certain coincidences should be sufficient for the finding of anti-competitive coordination when there was no other meaningful explanation of the undertakings' conduct.⁸³

Even by accepting various types of evidence, including indirect evidence, SAC has exercised full judicial review over the correctness and completeness of the facts established by the CPC. In 2011, the CPC closed its investigation into the alleged abuse of dominant position against the national gas company *Bulgargaz*.⁸⁴ The three-member panel of the SAC has upheld the CPC's findings and rejected the appeal launched by customers alleging the refusal to deal.⁸⁵ The five-member panel of the SAC has reviewed the factual evidence collected by the CPC, and found that the NCA had failed to collect the data concerning the exact quantities of gas requested by the customers under the existing supply agreements with *Bulgargaz*. The court held that by failing to collect this relevant evidence the CPC could not make any conclusions as to the absence of anti-competitive effect or economic justification of the alleged refusal to deal.⁸⁶

In cases where the CPC demonstrated that it has taken into account all relevant evidence that could explain the reasons for the undertaking's conduct, the Bulgarian judges have confirmed the legality of the CPC's findings. This has been the case in 2011 when the SAC has reviewed the no-infringement decision rendered by the CPC in a case concerning an alleged anti-competitive agreement reached by the commercial banks at the meetings of the Bulgarian Banking Association.⁸⁷ The CPC has examined all documents recording the contents of the meetings and concluded that there was no exchange of commercial information as to coordinated conduct on the market. While third parties attempted to challenge the CPC's findings before the SAC, the Court held that the CPC has reached its conclusion on the basis of all the available evidence while the parties could not produce any evidence that would dispute that finding.⁸⁸

The full review of the factual evidence and its interpretation by the Romanian competition authority has been also scrutinized by the Romanian courts. The CAB has demonstrated its receptiveness to various types of evidence including indirect evidence that could serve as a proof of existence of the clandestine anti-competitive agreements and concerted practices. At the same time, the court has reviewed the CC's interpretation of various types of indirect evidence including the alternative justification of certain commercial practices. In 2009, the CC established that following a meeting of the bakeries association in Vrancea county the participating undertakings raised the price of white bread to the identical levels. Based on this indirect evidence corroborated by the testimonies of the parties given during the course of the

⁸³ Judgment No. 11522 dated 16.09.2013. See D. Fessenko, "The Bulgarian Supreme Court dismisses mere price parallelism as a form of concerted practice in the absence of compelling evidence of such (Travel Agencies)", 16 September 2013, *e-Competitions Bulletin* September 2013, Art. N° 61110.

⁸⁴ Decision No. 546 dated 28.04.2011.

⁸⁵ Judgment No. 15234 dated 21.11.2011.

⁸⁶ Judgment No. 6071 dated 27.04.2012.

⁸⁷ Decision No. 622 dated 03.06.2010. See A. Svetlicinii, "The Bulgarian Competition Authority finds no cartel on the market for banking services (Association of Banks in Bulgaria)", 3 June 2010, *e-Competitions Bulletin* June 2010, Art. N° 31625.

⁸⁸ Judgment No. 11077 dated 09.08.2011; Judgment No. 16668 dated 16.12.2011.

investigation, the CC established the existence of a concerted price-fixing.⁸⁹ The CAB examined the indirect evidence presented by the competition authority; in the absence of an alternative economic justification for the identical price increase the court confirmed the existence of anti-competitive price-fixing.⁹⁰ When the case was appealed before the ICCJ the Court noted that various documentary evidence collected by the CC in order to demonstrate participation of individual bakeries in the anti-competitive practices has been dismissed by the lower courts. Based on these factual findings the ICCJ has quashed the CC's decision in parts related to certain undertakings that disputed their participation in the alleged cartel.⁹¹

The Romanian judges have also scrutinized the explanations submitted by the CC in relation to both direct and indirect evidence. In 2010, the CAB annulled the infringement decision of the CC in part related to the applicant undertaking due to the absence of incriminating evidence that would suggest the undertaking's participation in the price-fixing cartel.⁹² In that case, the court referred to the *United Brands* precedent,⁹³ stating that any doubt in relation to the undertaking's participation in the infringement should be interpreted in its favor placing the burden of proof on the competition authority.

The Romanian courts have also made use of presumptions that shift the burden of proof between the NCA and the undertakings concerned. Thus, in a 2010 price-fixing cartel case the CAB held that once the participation of an undertaking at the anti-competitive negotiations/discussions is established, the burden of proof shifts to the undertaking concerned that has to demonstrate the fact that it has publicly distanced itself from the anti-competitive agreement and informed other participating undertakings about its different intentions vis-a-vis those negotiations/discussions.⁹⁴ The EU case law has also been used by the Romanian judiciary as a point of reference when determining the standard of proof in relation to concerted practices cases where no formal anti-competitive agreement was reached by the cartelists.⁹⁵ The court referred to *T-Mobile* case where the ECJ held that it must be presumed that "the undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their competitors in determining their conduct on that market."⁹⁶ The ICCJ also made use of burden of proof presumptions in its antitrust jurisprudence. In a 2012 decision the high court referred to the EU jurisprudence⁹⁷ stating that for the purpose of adducing *prima facie* evidence of undertaking's participation in the anti-competitive

⁸⁹ Decision No. 62 dated 07.12.2009. See also A. Svetlicinii, The Romanian Competition Authority opens public consultation on the preliminary report of the sector inquiry on the market for cereals used in the bakery industry (Raport privind investigația utilă pentru cunoașterea pieței cerealelor de panificație), 11 March 2009, *e-Competitions Bulletin* March 2009, Art. N° 25778.

⁹⁰ Judgment No. 2650 dated 01.06.2010 (case 204/2/2010).

⁹¹ Judgment No. 5185 dated 25.04.2013 (case 360/2/2010).

⁹² Judgment No. 1227 dated 09.03.2010 (case 6156/2/2009).

⁹³ Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission* [1978] ECR 207.

⁹⁴ Judgment No. 2369 dated 18.05.2010 (case 7120/2/2009). The court referred to Case T-38/02 *Groupe Danone v Commission* [2005] ECR II-4407.

⁹⁵ Judgment No. 1881 dated 23.04.2010 (case 6993/2/2009).

⁹⁶ Case C-8/08 *T-Mobile Netherlands BV and Others v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529 para 51.

⁹⁷ Case T-303/02 *Westfalen Gassen Nederland v Commission* [2006] ECR II-4567.

agreement it was sufficient for the NCA to demonstrate the attendance of the undertaking at the meeting when the said agreement was discussed.⁹⁸

Despite the general acceptance of presumptions that allow shifting the burden of proof between the CC and the undertakings concerned, the Romanian judges have also demonstrated their determination to monitor the compliance of the CC with the requisite standard of proof. For example, in an early case the CC has sanctioned three cement companies for an alleged concerted practice that led to price increases.⁹⁹ The ICCJ relied on ECJ's judgement in *Ahlström*, which required the absence of any plausible explanations as to the undertaking's conduct in order to prove the existence of concerted practice.¹⁰⁰ The ICCJ held that showing of parallel behaviour was insufficient in this respect; the CC should have produced evidence that there could be no explanation for the increase of prices other than the existence of concerted practices.¹⁰¹

The Romanian courts have routinely considered the ECJ jurisprudence when reviewing even purely domestic cases where application of the EU law was not at issue. For example, in a 2010 case concerning a price cartel of drivers schools in Bucharest,¹⁰² the CAB referred to the GC's findings in *Danone*;¹⁰³ the latter ruling placed the burden of proof on the undertaking that wished to disassociate itself from the cartel agreement by public announcement, although it had attended the meetings where the anti-competitive agreement had been discussed and agreed upon. In the same case, the Romanian court considered the notion of an anti-competitive agreement and the effect of undertaking's participation at the meetings where anti-competitive agreements were negotiated. The court adopted the notion of an anti-competitive agreement from the *ACF Chemiefarma* judgment, where the ECJ held that the existence of the agreement was proved by the fact that the undertakings had expressed their common intention to adopt certain behavior on the relevant market.¹⁰⁴ Referring also to the *Mayr-Melnhof* ruling, the Romanian court distinguished between the object and effect of an anti-competitive agreement; the CAB held that it was sufficient for the undertaking to take part in the negotiations of the cartel agreement regardless of the fact that the agreement has not been put in practice.¹⁰⁵

On another occasion, the CAB referred to the ECJ *Aalborg Portland* case mentioned above,¹⁰⁶ where the Court in Luxembourg held that an undertaking cannot be exempted from liability for participation in an

⁹⁸ Judgment No. 3384 dated 05.07.2012 (case 198/2/2010).

⁹⁹ Decision No. 94 dated 26.05.2005.

¹⁰⁰ Joined Cases 89/85, 104/85, 114/85, 116/85, 117/85, 125/85, 126/85, 127/85, 128/85 and 129/85 *Ahlström Osakeyhtiö, United Paper Mill, Kaukas Oy a. o. v. Commission* [1993] ECR I-1307.

¹⁰¹ Judgment No. 1358 dated 05.03.2007 (case 21533/2/2005). See E. Udriou, B. Leroy, The Romanian High Court quashes a NCA's decision having imposed a 27 M euro fine for price fixing practices for insufficient proof on the basis, inter alia, of ECJ case law, 5 March 2007, *e-Competitions Bulletin* March 2007, Art. N° 14009; V. Olteanu, The Romanian Supreme Court overturns the NCA's decision having fined one participant to a cartel for lack of sufficient proofs (Cement Cartel), 5 March 2007, *e-Competitions Bulletin* March 2007, Art. N° 13312.

¹⁰² Judgment No. 2369 dated 18.05.2010 (case 7120/2/2009).

¹⁰³ Case T-38/02 *Groupe Danone v Commission* [2005] ECR II-4407.

¹⁰⁴ Case 41/69 *ACF Chemiefarma v Commission* [1970] ECR 661.

¹⁰⁵ Case T-347/94 *Mayr-Melnhof Kartongesellschaft v Commission* [1998] ECR II-1751.

¹⁰⁶ Joined Cases C-402, C-205, C-211, C-213, C-217, C-219/00 *Aalborg Portland and Others v Commission* [2004] ECR I-123.

anti-competitive agreement for the mere fact that it has not participated in all anti-competitive actions or its participation had a minor impact on the success of the anti-competitive mechanism.¹⁰⁷ Reference to the EU jurisprudence in *European Night Services* case¹⁰⁸ aided the Romanian judges in establishing the distinction between the object and effect of an anti-competitive agreement, which allowed catching the situations where an agreement was negotiated by the parties, but it had never been put in practice.¹⁰⁹ In another price cartel case, the BCA was seized on the notion of representation of undertakings in anti-competitive agreements. The applicant challenging the CC's infringement decision argued that it was not properly represented at the meetings when the cartel participants agreed on simultaneous price increase. The court referred to the ECJ's *Sumitomo Metal Industries* case,¹¹⁰ and it concluded that due to the informal character of the cartel meetings the Romanian NCA was not required to prove that the employee attending the cartel meetings had the legal authority to represent the undertaking concerned.¹¹¹

The ICCJ has also referred to the EU case law when reviewing the CC's decisions. For example, in a 2009 case the ICCJ upheld the CC's decision sanctioning the National Dental Association in the light of the *Höfner* ruling,¹¹² which defined the concept of undertaking without regard to the legal status of the entity or the way it was financed.¹¹³ In the above mentioned cement cartel case the ICCJ referred to ECJ case when deciding whether the parallel conduct can amount to the conclusive evidence of anti-competitive concertation.¹¹⁴

In Croatia, the VUS has acquired substantial practice in reviewing the infringement decisions of the AZTN in cartel cases. The parties have challenged the AZTN's findings on various grounds starting from the incorrect determination of the relevant market to the far-fledged arguments concerning the compatibility of competition law enforcement with the constitutional freedom to conduct business activity.¹¹⁵ The following example demonstrates the judicial scrutiny of the indirect evidence of an anti-competitive agreement reached by the newspaper publishers and that involved concerted price increase. The key evidence submitted by the AZTN in that case was the remarks by the president of the Croatian Association of Newspaper Publishers who stated that there were heated debates among the newspaper publishers

¹⁰⁷ Judgment No. 3352 dated 14.09.2010 (case 7181/2/2009).

¹⁰⁸ Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services Ltd and Others v Commission* [1998] ECR II-3141.

¹⁰⁹ Judgment No. 2370 dated 18.05.2010 (case 7121/2/2009), Judgment No. 3352 dated 14.09.2010 (case 7181/2/2009), Judgment No. 4670 dated 23.11.2010 (case 7187/2/2009).

¹¹⁰ Joined Cases C-403/04P, C-403/04P, C-405/04P *Sumitomo Metal Industries Ltd and Others v Commission* [2007] ECR I-729

¹¹¹ Judgment No. 2370 dated 18.05.2010 (case 7121/2/2009).

¹¹² Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH* [1991] ECR I-1979.

¹¹³ Judgment No. 5.236 dated 19.11.2009 (case 2616/2/2008). See N. Cornoiu-Jitărășu, The Romania's High Court of Justice upholds a NCA's decision having imposed a fine for price fixing to a non-profit organization (National Association of Dental Technicians), 19 November 2009, *e-Competitions Bulletin* November 2009, Art. N° 30030.

¹¹⁴ Judgment No. 1358 dated 05.03.2007. The Court referred to Joined Cases 89/85 89/85, 104/85, 114/85, 116/85, 117/85, 125/85, 126/85, 127/85, 128/85 and 129/85 *Ahlström Osakeyhtiö, United Paper Mill, Kaukas Oy a. o. v. Commission* [1993] ECR I-1307.

¹¹⁵ See e.g. J. Pecotic Kaufman, The Croatian High Administrative Court confirms the decision of Competition Agency on illegal price fixing agreement in the residential management services market (Stano-uprava), 13 December 2012, *e-Competitions Bulletin* December 2012, Art. N° 57715.

concerning the need for price increases, due to substantial increases in costs and due to the fact that last price increase occurred in 2001. Following these remarks, one of the leading national newspapers raised its price by 1 HRK on 1 July 2008. All other publishers adopted similar decisions by the end of July 2008 with price increases taking effect on 1 and 2 August 2008. The AZTN has interpreted these facts as indirect evidence of an anti-competitive agreement.¹¹⁶ The newspaper companies have challenged the AZTN's decision arguing that the observed actions amounted to price parallelism, where the newspapers have followed market leader. The VUS noted that the differences in cost structure and cost effectiveness of individual newspaper publishers spoke against the economic logic of identical and simultaneous price increase. Since price fixing was considered as a restriction by object, the court saw no need for a more detailed economic assessment of the relevant market and upheld the legality of the AZTN's findings.¹¹⁷

In more straight-forward cases, where the evidence of the existence of anti-competitive agreements was presented by the AZTN in a written form bearing the signatures of the parties concerned, the VUS has limited its review to the confirmation of the existing facts. For example, in a 2012 case concerning the resale price maintenance imposed by an electronics wholesaler on its retailers, the wholesaler attempted to argue that the resale price were not „imposed“ but merely „recommended“, while the retailers were free to decide to the final resale price. The court held that the direct restriction on the buyer to freely determine its resale price under the documented threat of terminating the supply was sufficient to establish the existence of a hard core vertical restraint.¹¹⁸

The Croatian VUS routinely referred to EU case law in its judgments reviewing the AZTN's decisions. In 2012, the court rejected the argument put forward by the association of office supplies retailers concerning the need to conclude market shares arrangements due to the low market shares of its members, which had to compete against larger retailers. Referring to ECJ case law,¹¹⁹ the court ruled that although industry associations had a legitimate right to promote the interests of its members, they could use the freedom of association as a justification for infringement of competition rules.¹²⁰ In addition, economic crisis could not justify anti-competitive agreements and practices.

Generally it should be noted that the administrative courts of the 'new' EU MS have been traditionally acquainted with the full review of facts when exercising judicial review over individual acts of

¹¹⁶ Decision No. UP/I 030-02/2008-01/72 dated 25.03.2010.

¹¹⁷ Judgment No. Us-4995/2010-6 dated 21.12.2011. See A. Svetlicinii, The Croatian Administrative Court upholds the infringement NCA's decision establishing the existence of concerted practices among newspaper publishers that led to uniform price increases (Slobodna Dalmacija, Europapress holding, RTD, Glas Slavonije...), 21 December 2011, *e-Competitions Bulletin* December 2011, Art. N° 49030.

¹¹⁸ Judgment No. Us-12531/2010-7 dated 16.05.2012. See A. Svetlicinii, The Croatian High Administrative Court upholds the NCA's interpretation of the block exemption regulation on vertical agreements in a resale price maintenance case (M San Grupa), 7 March 2012, *e-Competitions Bulletin* March 2012, Art. N° 49028.

¹¹⁹ ECJ, November 20th, 2008, *Beef Industry Development and Barry Brothers*, Case C-209/07; CFI, December 13th, 2006, *FNCBV v. Commission*, Joined Cases T-217/03 and T-245/03.

¹²⁰ Judgment No. Us-9383/2011-4 dated 19.12.2012. See A. Svetlicinii, "The Croatian High Administrative Court upholds the decision of the NCA concerning anti-competitive practices in the market for office supplies (Association of office supplies retailers)", 19 December 2012, *e-Competitions Bulletin* December 2012, Art. N° 54816.

the administrative authorities. This experience has been reflected in the antitrust jurisprudence where the NCAs faced the burden of proving their factual findings with the sufficient and pertinent evidence. At the same time, the competition cases have brought with them various types of indirect and economic evidence that would point to the existence of clandestine anti-competitive agreements or concerted practices. The selective review of the case law in the selected jurisdictions demonstrates that although accepting such indirect evidence in principles, the courts have been cautious in accepting the conclusions drawn by the NCAs from such indirect evidence. As was shown above, plausible alternative interpretations suggested by the parties have led to the annulment of the NCA's findings.

3.3. Judicial review of the fines imposed by the NCAs

In Bulgaria, the SAC on several has reviewed the fines imposed by the CPC for competition law infringements. In a 2010 judgment the three-member panel of the SAC found that the fines imposed by the CPC on the members of the Bulgarian Poultry Breeders Union ranging between BGN 5,000 and 30,000 (approx. EUR 2,550 to 15,340) were in line with the current CPC Fining Guidelines¹²¹ and in the absence of the infringement of the basic principles (such as proportionality, individualization, deterrent effect, etc.) the SAC has refused the reduction.¹²² The SAC has demonstrated its power to modify the amount of the fine imposed by the CPC in a 2009 case when upholding the CPC's decision sanctioning the power plant undertaking in the municipality of Ruse for exploitative abuse of dominant position in the form of imposing unfavourable trading conditions (property liens) on the consumers – the residents of the newly constructed apartment buildings that had to be connected to the heating network. In that case the CPC has sanctioned the undertaking concerned with a fine of BGN 300,000 (approx. EUR 150,000) considering serious damage to the public interest caused by the abusive practices of the dominant undertaking.¹²³ The SAC has noted the small number of consumers affected by the abuse of dominance: only 44 out of 144 households have concluded the contracts with abusive conditions. On the basis of this factor the SAC ordered the reduction of fine to BGN 50,000 (approx. EUR 25,000).¹²⁴ In the same case the Court has rejected *ne bis in idem* argument of the plaintiff finding that even though the company has been already sanctioned by the State Energy and Water Regulatory Commission¹²⁵ for the violation of the terms of the license, the sanction

¹²¹ The Methodology for setting the amount of penalties and fines under the Law on Protection of Competition (*Методика за определяне размера на имуществените санкции и глоби по Закона за защита на конкуренцията*) adopted by CPC Decision No. 175 dated 27.04.2001. Currently – CPC Decision No. 71 dated 03.02.2009.

¹²² Judgment No. 10568 dated 15.09.2010. See A. Svetlicinii, The Bulgarian Supreme Administrative Court upholds the decision of the competition authority establishing the existence of a cartel on the market for poultry meat and eggs (Bulgarian Poultry Breeders Union), 15 September 2010, *e-Competitions Bulletin* September 2010, Art. N° 32777.

¹²³ Decision No. 1146 dated 11.12.2008.

¹²⁴ Judgment No. 8140 dated 18.06.2009. See A. Svetlicinii, The Bulgarian Supreme Administrative Court confirms an NCA's decision fining a heating plant company for exploitative abuse of dominance (Heating Plant Ruse), 18 June 2009, *e-Competitions Bulletin* June 2009, Art. N° 29126.

¹²⁵ *Държавна комисия за енергийно и водно регулиране*, <http://www.dker.bg/>.

imposed by the CPC concerned the infringement of competition law and therefore did not violate the specified *ne bis in idem* principle.

On the subject of the review of the fines imposed by the Romanian NCA for infringement of competition rules, the Romanian jurisprudence has displayed a consistent approach; the judiciary has scrutinized the CC's consideration of various factual elements when establishing the amount of fine in accordance with CC's Fining Guidelines.¹²⁶ For instance, in 2009 an undertaking that penalized by the CC for the failure to notify an economic concentration submitted a complaint to the CAB; the undertaking argued that the CC had failed to consider various attenuating circumstances that would reduce the final amount of the fine imposed in that case.¹²⁷ The court held that the Fining Guidelines do not restrict the number of attenuating circumstances that should be considered by the CC. However, based on the evidence of the case, the court found no additional circumstances that could affect the amount of the fine. Since the principle of proportionality was not infringed,¹²⁸ the court has concluded that the CC has established the final amount of the fine in accordance with the applicable law.

In a similar case concerning the fine of 6% of the annual turnover imposed on the participants in a horizontal price-fixing cartel, the applicant challenged the CC's calculation of the fine, by stating that it should be only applied towards the turnover realized from the commercial activity covered by the cartel agreement. The CAB held that according to the Fining Guidelines the hard core cartels could be sanctioned with a fine of 4-8%, while the final amount was calculated by the CC based on the duration of the infringement and other relevant circumstances.¹²⁹ The court dismissed the appeal stating that competition law did not specify that the fines should be calculated based on the turnover realized from particular commercial activity, and therefore the CC was correct in taking the total annual turnover as a basis for calculating the fine. The ICCJ has demonstrated similar adherence to the criteria for individualization of the fines laid down in the Competition Act and the Fining Guidelines. In a 2011 judgment the high court has dismissed the plaintiff's request to revise the amount of the fine imposed by the CC because the criteria suggested by the plaintiff were not reflected in the law.¹³⁰

In Croatia, the judiciary has not yet sufficiently developed the practice of reviewing the fines imposed by the AZTN for competition law infringements.¹³¹ This is partly due to the fact that the AZTN has obtained its direct sanctioning powers relatively recently – the new Competition Act has entered into force

¹²⁶ Decree No. 419 dated 02.09.2010 Instructions concerning individualization of sanctions for infringements provided for by Articles 50 and 51 of the Competition Act No. 21/1996.

¹²⁷ Judgment No. 962 dated 23.02.2010 (case 4979/2/2009).

¹²⁸ The court held that a fine of 0,16% of annual turnover was proportionate to the infringement (failure to notify a concentration) and was not capable of deteriorating the financial situation of the undertaking forcing it to exit the relevant market.

¹²⁹ Judgment No. 3352 dated 14.09.2010 (case 7181/2/2009).

¹³⁰ Judgment No. 3103 dated 27.05.2011 (case 6732/2/2009).

¹³¹ According to the official statistics during 2009-2013 there has been only one case in which the administrative court has annulled the fine imposed by the AZTN (Judgment No. Us-5363/2007-10 dated 03.11.2010). The case concerned application of state aid rules. The list of judgments concerning the review of the AZTN's decisions is available at <http://www.aztn.hr/pocetna/114/odluke-sudova/>.

on 1 October 2010.¹³² While the AZTN has already used its sanctioning powers by imposing fines on undertakings found in violation of competition rules,¹³³ the judicial cases concerning those decisions are still pending. Under the previous competition law, the fines were imposed by the competent local courts upon the application by the AZTN. Under the current competition law the Government has already adopted the Fining Guidelines¹³⁴ that should instruct the AZTN and the courts in the determination and review of the fines imposed for competition law infringements. It should be expected that strict adherence to the Fining Guidelines by the AZTN should ensure the judicial support in the matters related to the determination of fines.

While the judicial practice in reviewing the amount of fines imposed by the NCAs of the 'new' EU MS is relatively scarce, some preliminary tendencies can be identified. The courts of all three selected jurisdictions are empowered to revise the amount of fine imposed by the NCAs. In all of the three countries the executive or the NCA have adopted fining guidelines following the EU model of two-step determination of the amount of the fine calculated as a percentage of the annual turnover of the undertaking(s) concerned. These guidelines have restrained and streamlined the discretion of the NCAs in determining the final amount of the fine by providing a set of criteria that can be taken into account in each particular case. The courts in Bulgaria, Romania and Croatia have demonstrated their general receptiveness to the methodology for setting the fines under the specified guidelines and should be expected that strict adherence of the NCAs to the methodology provided in the guidelines should ensure that the instances where the court modifies the amount of fine imposed by the NCA will be rare.

3.4. Standard of review in cases which require a complex economic assessment

Depending on the economic context of a particular case, the Bulgarian courts have engaged in the review of the economic assessment carried out by the CPC. Treating economic evidence as a type of evidence that can be used in the administrative proceedings, the SAC reviewed the CPC's interpretation of the economic facts. In 2013, SAC reviewed a non-infringement decision where the CPC has closed its investigation concerning potential abuse of dominance by a mobile telecom operator due to the absence of dominant position.¹³⁵ The CPC found that there three mobile operators in the market and the undertaking in

¹³² See A. Svetlicinii, The Croatian Parliament adopts new competition law, 24 June 2009, *e-Competitions Bulletin* June 2009, Art. N° 26738.

¹³³ See J. Pecotic Kaufman, The Croatian Competition Agency imposes the highest ever fine for a cartel in a case involving bus operators (Presečki grupa), 27 December 2012, *e-Competitions Bulletin* December 2012, Art. N° 51644; A. Svetlicinii, The Croatian Competition Authority imposes nominal fines on the participants of a price-fixing agreement on the bread market (Craftsmen Association of Osijek), 26 July 2012, *e-Competitions Bulletin* July 2012, Art. N° 49152.

¹³⁴ Regulation on criteria for determination of administrative penalty measures (*Uredba o kriterijima za izricanje upravno-kaznene mjere*) adopted on 11.11.2010 published in the Official Gazette No. 129/2010. See A. Svetlicinii, The Croatian Government adopts the fining guidelines under the new law on protection of competition, 11 November 2010, *e-Competitions Bulletin* November 2010, Art. N° 33580.

¹³⁵ Decision No. 659 dated 14.06.2012.

question did not have a dominant position. The plaintiff disputed the CPC's findings, and it requested the SAC to make a request for preliminary ruling to the ECJ asking whether oligopolistic structure of the market precluded the finding of dominance under Article 102 TFEU and its national equivalent. The SAC refused such request, by ruling that the existence of an oligopoly market structure did not *a priori* exclude the finding of single dominance, as alleged by the applicant. The CPC's decision was thus upheld by the court.¹³⁶ In an earlier abuse of dominance case in the telecom industry the SAC was charged with the review of the CPC's definition of the relevant market and margin squeeze theory alleging that the incumbent public operator has abused its dominance on the market for access to the fixed network.¹³⁷ While the SAC has on both instances upheld the CPC's findings on those matters, the SAC's rulings were criticized due to the lack of substantive review of the CPC's findings against the facts of the case even though the plaintiff has made claims in that regard.¹³⁸

In Romania the courts have demonstrated their willingness and ability to review the interpretation of economic evidence adduced by the CC in antitrust cases. In 2007 the ICCJ has quashed the CC's infringement decision in the cement cartel case in relation to the fine imposed on one of the alleged cartelists for the failure to prove its participation in the anti-competitive agreement.¹³⁹ The Court noted that the NCA has failed to verify the plaintiff's argument that parallel price increases were motivated by objective economic factors rather than participation in the cartel. The Court also noted that the fact that market shares of the competitors remained stable or that the company newly acquired by the plaintiff has also increased its prices could not be viewed as proof of anti-competitive behavior in the absence of the plaintiff's adherence to an express or tacit agreement.¹⁴⁰ Even though the ICCJ's decision does not contain the Court's own appreciation of the economic evidence adduced by the CC, it is noteworthy for the Court's assessment of the credibility of the CC's finding based on the interpretation of that economic evidence.

In another case the ICCJ has engaged in a detailed assessment of complex economic evidence establishing the dominant position of an undertaking on the relevant market and verifying the "excessiveness" of the prices applied by that undertaking under the allegations of abuse of dominant position.¹⁴¹ In that case the producer of the chipboard products used in the manufacture of furniture has

¹³⁶ Judgment No. 6217 dated 08.05.2013.

¹³⁷ Decision No. 210 dated 28.09.2006.

¹³⁸ Judgment No. 6565 dated 26.06.2007 and Judgment No. 254 dated 09.01.2008. See D. Fessenko, The Bulgarian Supreme Administrative Court upholds an NCA decision sanctioning the telecom incumbent for exerting margin squeeze on its competitors in the markets for fixed telephone services (BTC/CPC), 9 January 2008, *e-Competitions Bulletin* January 2008, Art. N° 15516.

¹³⁹ Judgment No. 1358 dated 05.03.2007. See V. Olteanu, The Romanian Supreme Court overturns the NCA's decision having fined one participant to a cartel for lack of sufficient proofs (Cement Cartel), 5 March 2007, *e-Competitions Bulletin* March 2007, Art. N° 13312.

¹⁴⁰ See E. Udrioiu, B. Leroy, The Romanian High Court quashes a NCA's decision having imposed a 27 M euro fine for price fixing practices for insufficient proof on the basis, inter alia, of ECJ case law, 5 March 2007, *e-Competitions Bulletin* March 2007, Art. N° 14009.

¹⁴¹ Judgment No. 3055 dated 09.06.2010 (case 3147/2/2005).

increased its prices up to 50% following an acquisition of a competitor that has led to the consolidation of the dominant position on the relevant market. The CC has sanctioned the undertaking for the abuse of dominant position in the form of applying “excessive prices” and imposed the fine in the amount of 3% of the undertaking’s annual turnover.¹⁴² The infringement decision was later quashed by the CAB.¹⁴³ The court has found that the CC failed to consider the economic data showing that the prices were not “excessive” and the competition authority has not produced any evidence of discrimination or foreclosure effects that should be demonstrated in abuse of dominance cases. The ICCJ has quashed the CAB’s decision and upheld the findings of the CC. In its judgments the high court engaged in detailed analysis of the relevant market where the dominant position was alleged. The Court also examined the cost structure of the undertaking in order to verify the excessiveness of the price. Notably, the ICCJ has rejected the findings of a competition law expert engaged by the plaintiff and held that abuse of dominance in the form of imposing excessive prices did not require the showing of an anti-competitive effect or price discrimination.

In Croatia, the VUS has examined a number of cases which required a certain degree of economic assessment, beyond the analysis of factual evidence that would prove the undertaking’s participation in the competition infringement. Thus, in 2012 the VUS has examined an appeal by a mobile telecom operator against the AZTN’s decision sanctioning the undertaking for imposing maximum rebates and other unrelated technical obligations on its retailers; the arrangements aimed at preventing the retailers from distributing the competing products. While the applicant alleged the absence of anti-competitive effects in case of maximum rebates as well as attempted to justify the technical conditions of its qualitative distribution network, the court did not address those arguments in detail. In its judgment, the VUS held that maximum rebates amounted to resale price maintenance and the technical criteria were “supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”¹⁴⁴

In another case, the VUS examined the appeal of the Croatian Composers Society, a copyright collecting society, challenging the AZTN’s abuse of dominance decision based on price discrimination of various recording associations.¹⁴⁵ The exclusionary effect of the alleged abuse of dominance has played an important role in the AZTN’s findings. The Croatian competition authority established that in the recording products the royalties accounted for up to 25% of the product’s costs; the substantial discounts approved by the collecting society to certain recording associations placed the undertakings members of the latter associations at a competitive disadvantage comparison to competitors. The VUS did not enter into the

¹⁴² Decision No. 329 dated 22.12.2004.

¹⁴³ Judgment No. 1880 dated 05.05.2009.

¹⁴⁴ Judgment No. Us-4116/2009-4 dated 24.12.2012. See A. Svetlicinii, The Croatian High Administrative Court upholds the decision of the Croatian Competition Authority concerning a rebate scheme applied by a mobile phone operator and its distributors (VIPnet), 24 December 2012, *e-Competitions Bulletin* December 2012, Art. N° 54817.

¹⁴⁵ Decision No. UP/I 030-02/2008-01/41 dated 03.11.2009.

economic assessment of discounts; it merely confirmed the existence of dominance of the collecting society on the relevant market, and prohibition of price discrimination under the national equivalent of Article 102 TFEU.¹⁴⁶ By shifting away from the review of complex economic assessment, the court has simplified the substantive tests that have to be used by the AZTN in order to establish the existence of an infringement.

The following example illustrates such simplification. In 2011, the AZTN prosecuted the national petroleum company *INA* for the abuse of dominant position in the form of price discrimination on the market for jet-fuel in Croatian airports.¹⁴⁷ The AZTN found that *INA* applied non-transparent pricing formulas to domestic airlines that used Croatian airports for refuelling. As a result, certain airlines were put at competitive disadvantage *vis-a-vis* the national flag carrier *Croatia Airlines*. *INA* challenged the AZTN's findings before the VUS. According to the appellant, the abuse of dominant position for price discrimination can only be established on the basis of reliable evidence, which shows that the discriminated undertakings are competitors and that the alleged price discrimination puts some of them at a competitive disadvantage. Referring to the wording of the Competition Act, which prohibited "application of unequal conditions to the equivalent transactions with other undertakings, which places them at a disadvantage in relation to competition", *INA* argued that the AZTN had failed to demonstrate the causal link between the different pricing formulas and competitive disadvantage of the domestic airlines. The VUS found that the AZTN had correctly established that sales of jet fuel to the foreign and domestic airlines were equivalent transactions to which *INA* was applying unequal trading conditions in the form of different price formulas.¹⁴⁸ The court's ruling suggests that showing of competitive disadvantage was unnecessary once it is established that equivalent transactions were treated differently.

It becomes obvious from the selective review of the antitrust cases heard by the national judiciary of the 'new' EU MS that the administrative courts, that have used to deal primarily with documentary evidence demonstrating the occurrence of certain acts or facts in the past, have encountered substantial difficulties in examining the NCAs' findings in cases that require complex economic assessment and often attempt to estimate future developments on the relevant markets. One can observe that the national courts have approached these complex economic cases with their traditional procedural tools: review of the facts and their relevance to the arguments made by the parties, consideration of the conflicting facts and theories in verifying the credibility of the theories advanced by the NCAs, increased usage of simplified legal tests and

¹⁴⁶ Judgment No. Us-14370/2009-13 dated 20.04.2012. See A. Svetlicinii, The Croatian High Administrative Court upholds the NCA's decision concerning the abuse of dominance in collection of royalties by the Croatian Composers' Society (Croatian Composers' Society), 20 April 2012, *e-Competitions Bulletin* April 2012, Art. N° 49029.

¹⁴⁷ Decision No. UP/I 030-02/2009-01/035 of 19.05.2011. See A. Svetlicinii, The Croatian Competition Authority finds discriminatory pricing practices on the market for jet fuel supplied in Croatian airports (*INA – Industrija nafte, Dubrovnik Airline*), 19 May 2011, *e-Competitions Bulletin* May 2011, Art. N° 37377

¹⁴⁸ Judgment No. 7153/2011-8 dated 29.02.2012. See A. Svetlicinii, The Croatian High Administrative Court upholds the infringement decision of the Competition Authority finding discriminatory pricing on the market for jet fuel supplied in Croatian airports (*INA*), 29 February 2012, *e-Competitions Bulletin* February 2012, Art. N° 48221.

legal presumptions. Thus, even though the courts do not expressly admit the NCA's margin of appreciation in complex economic matters, the practical outcome of such cases where the opposing parties do not present strong evidence to the contrary would result in the approval of the NCA's assessment.

4. Conclusions: departing points for further research

The paper has analyzed the standard of judicial review applied by the courts of Bulgaria, Romania and Croatia in reviewing the decisions of the NCAs. These three jurisdictions have been selected as a comparative case study. Similarly to the other countries of Central and Eastern Europe that have joined the EU during the last decade, these 'new' EU Member States have reformed their competition laws, which has been increasingly enforced by the NCAs. The role of the judiciary in reviewing the NCA's decisions is thus of increasing relevance. The influence of the GC/ECJ jurisprudence in the selected jurisdictions has been affected by the number of decisions adopted by the NCAs of the selected jurisdictions and the following appeal judgments. For instance, while joining the EU only in 2007, Romanian NCA has adopted more decisions under Article 101/102 TFEU than any 'new' EU MS (with exception of Hungary) that have joined the EU in 2004.¹⁴⁹ In comparison with Bulgaria that also acceded to the EU in 2007, Romanian NCA notified to the EU Commission twice as many investigations and four times more envisaged infringement decisions than the Bulgarian NCA.¹⁵⁰ It is worth noticing that the influence of GC/ECJ case law on the courts of the selected jurisdictions can be traced in judgements ruled prior to the moment of EU accession. The Stabilization and Association Agreements concluded by these countries before joining the EU, in fact, provided that EU competition law should be transposed into the domestic law, and later enforced in the light of relevant EU Commission decisions and GC/ECJ case law.¹⁵¹

As discussed in section 2, it is currently unclear whether the standard of judicial review exercised by the GC/ECJ in competition law, in particular in matters involving complex economic assessment, complies with the standard of "full" judicial review introduced by Strasburg Court in *Menarini*. As Contracting Parties of the Council of Europe, the selected jurisdictions are also bound to comply with the ECtHR case law, and thus national courts are bound to apply *Menarini* standard of "full" judicial review *vis a vis* the NCA's decisions. Nevertheless, in reviewing the decisions of the NCAs, courts of the selected jurisdictions have only referred to the domestic principles of administrative law elaborated at the national level, and they never referred to *Menarini* case law. Therefore, the compatibility of the standard of judicial review in competition law cases with *Menarini* case law remains an open issue not only for the ECJ/GC, but for the courts of the selected jurisdictions as well.

¹⁴⁹ During the reference period 2004-2013 Romania has notified 46 case investigations and 26 envisaged infringement decisions. See more detailed figures on antitrust cases at <http://ec.europa.eu/competition/ecn/statistics.html>.

¹⁵⁰ Bulgaria's contribution is 19 and 6 respectively. See <http://ec.europa.eu/competition/ecn/statistics.html>.

¹⁵¹ See, for instance: Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Croatia, of the other part, signed on 29.10.2001, entry into force 01.02.2005, L 26, 28/01/2005, p. 3, Articles 69, 70.

The courts of the surveyed jurisdictions have made numerous references to the EU jurisprudence even in purely “domestic cases”, which concerned the application of national rather than EU competition law. The EU case law has thus served as a useful interpretative tool in situations where the national courts have not yet developed their own practice on various matters. On the other hand, the courts of the selected jurisdictions have applied a rather different standard of judicial review in competition law cases in comparison to the GC/ECJ. In spite of the procedural differences specific to each of the surveyed jurisdictions, common trends have been identified to this regard.

In cases that do not involve the assessment of complex economic evidence, such as cartels or other *per se* violations of competition law, the courts of the ‘new’ EU MS have exercised full review of the factual evidence put forward by the NCAs. In Bulgaria and Romania, the courts have quashed the NCA’s decisions in a number of cases for failure to adduce pertinent evidence or incorrect interpretation of the existing evidence (i.e. in cases where alternative explanation was possible). In Croatia, on the other hand, there have been no annulments of the NCA’s decisions due to the evidentiary reasons. This situation could be indicative of the generally lenient attitude that the VUS has displayed in the examination of the AZTN’s findings. On the other hand, unlike the GC/ECJ, the courts of the selected jurisdictions have been more open to accept “indirect” evidence as adequate proof of the existence of anti-competitive practices investigated by the NCAs. In a certain way, the courts of the selected jurisdictions have thus recognized the “limits” of the NCAs (i.e. in terms of human resources and expertise) in collecting evidence to prove competition law violations.

Similarly to GC/ECJ under Article 261 TFEU, the courts of the selected jurisdictions generally enjoy “unlimited jurisdiction” under national procedural rules in reviewing the amount of the fine imposed by the NCA. However, only the Romanian courts have exercised on few occasions this power, by modifying the amount of the fine previously imposed by the NCA. The courts of the surveyed jurisdictions have confirmed the legality of the fine calculated by the NCA on the basis of NCA’s fining guidelines. Furthermore, the courts of the selected jurisdictions have generally rejected the attenuating circumstances put forward by the appellants, by thus not questioning the calculation of the fine conducted by the NCA.

In relation to cases that involve the assessment of complex economic evidence, the courts of the ‘new’ EU MS have displayed the following tendencies. In Bulgaria and Romania, the courts have reviewed the interpretations of the economic data put forward by the NCAs, and responded to the “economic” arguments of the parties. In Croatia, the judiciary has tended to simplify the requisite substantive tests or to downplay the significance of the economic assessment in relation to the legality of the NCA’s decision. As a result, the review of economic evidence by the Croatian courts is much less visible than in Bulgaria and Romania. Nevertheless, unlike the GC/ECJ, the courts of the selected jurisdictions have not developed a separate standard of review in relation to matters that imply a “complex economic assessment.” The courts of the

selected jurisdictions have reviewed all the evidence put forward by the NCA in the same manner, without formally differentiating the standard of review applied in relation to the type of evidence analyzed.

Although every EU MS enforces EU substantive competition rules under the national procedural rules in accordance with the principle of “procedural autonomy”, the EU MS are also required to ensure the “full effectiveness” of EU competition law. During the last years, the ECJ has increasingly relied on that principle “to align” national procedural rules which are relevant in competition law enforcement.¹⁵² Therefore, it cannot be excluded that the ECJ will in the future rely on this principle in order to achieve a stronger consistency in relation to the standard of judicial review applied by national courts in EU competition law proceedings. The standard of judicial review applied by GC/ECJ in reviewing the EU Commission’s decisions, though not binding for national courts, thus represents an important reference point for national judiciary.

The present paper represents the first attempt to analyze the standard of judicial review applied by the judiciary of the ‘new’ EU MS in reviewing the decisions of the NCAs; further empirical studies should be undertaken to verify whether the courts of the other ‘new’ EU MS are characterized by the same trends in reviewing their NCA’s decisions. Therefore, rather than a conclusion, this paper represents a starting point for further comparative research in this currently under-explored field.

¹⁵² See, in particular: Case C-439/08, *Vlaamse federatie van verenigingen van Brood- en Banketbakkers, Ijsbereiders en Chocoladebewerkeren (VEBIC) VZW* (2010) ECR I-12471.