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9<sup>th</sup> ASCOLA Conference Warsaw 2014 on  
PROCEDURAL FAIRNESS IN COMPETITION PROCEEDINGS

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CENTRE FOR ANTITRUST AND REGULATORY STUDIES, UNIVERSITY OF WARSAW  
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# **The Compatibility of Deferential Standard of Judicial Review in the EU Competition Proceedings with Article 6 of the European Convention on Human Rights**

by

Maciej Bernatt\*

## ***Abstract***

*The EU courts have been criticized by competition law scholars for exercising insufficient review when it comes to the EU Commission's determinations in factual and economic matters. It has also been claimed that the General Court leaves the Commission too broad deference when it comes to the assessment of fine for violation of Article 101-102 of the TFEU. Against this background the EU courts judicial review is analyzed from the perspective of Article 6 of the European Convention on Human Rights (ECHR) in order to answer the question whether deferential standard of review is permissible under the full jurisdiction principle prescribed in Article 6(1) of the ECHR. The analysis of the European Court of Human Rights jurisprudence leads to the conclusion that the way in which the EU Courts currently review the EU Commission's decisions is not very likely to be found in violation of Article 6 of the ECHR after the EU accesses to the ECHR. However, further improvements of fairness of the administrative process before the Commission should be considered.*

## **1. Introduction**

**1.1.** The right to judicial review of administrative agency actions is internationally recognized guarantee of due process and procedural fairness. As Louis L. Jaffe wrote “the availability of judicial review is a necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid”.<sup>1</sup> Right to judicial review is based on the presumption that every individual should have a right to ask an independent and impartial tribunal established by law to review the administrative decision

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<sup>1</sup> Louis L. Jaffe, *Judicial Control of Administrative Action* 320 (1965).

that concerns his interests. Judicial review increases legality of the administrative process (its accordance with lawmaker commends), promotes efficient resource allocation, contributes to the protection of values recognized in the society and protects against arbitrariness and selectivity in administrative decision-making process.<sup>2</sup> Notably, right to judicial review constitutes a crucial element of right to fair trial under the Article 6 of the European Convention on Human Rights (the ECHR).<sup>3</sup>

The right to judicial review similarly to other individual rights and freedoms should not be theoretical or illusory but practical and effective<sup>4</sup>. In this context the question about the required scope of judicial review appears. One can imagine two extremes. One is a court exercising full, *de novo* decision-making. The other is a court fully bound by the determinations of administrative agency. It is pointed that neither of these two situations may be really described as review—“they represent conclusions that the matter at issue is the unique business of the agency or of the courts, rather than a shared concern to be allocated between them”.<sup>5</sup> Thus judicial review is concerned with the question about the weight of administrative agencies’ determinations in the judicial review process or in other words the scope of deference accorded by the court to these determinations.<sup>6</sup>

Several rationales for permissibility of deferential standard of judicial review have been given in literature. The first one is expertise.<sup>7</sup> The argument is that “the courts should be slow to intervene where a decision has been made by a body entrusted by the legislature with the exercise of a function because of the particular skill and knowledge possessed by it”.<sup>8</sup> The second is separation of powers rationale.<sup>9</sup> The courts defer to the decisions made by administrative agencies because of institutional competence of the executive branch to make decisions that involve policy judgments. The third one is democratic legitimacy.

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<sup>2</sup> Cass R. Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 *Duke Law Journal* 522, 522-526 (1989).

<sup>3</sup> The Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 as amended by Protocols Nos. 11 and 14 supplemented by Protocols Nos. 1, 4, 6, 7, 12 and 13.

<sup>4</sup> See the ECtHR judgment of 13 May 1980 in *Artico v. Italy*, no. 6694/74, paragraph 33.

<sup>5</sup> Peter L. Strauss, Todd D. Rakoff, Cynthia R. Farina, Gillian E. Metzger, *Administrative Law*, 926 (2011). It is underlined the one of the goals of judicial review is to promote efficient resource allocation between administrative agencies and the courts, Cass R. Sunstein, *supra* note 2, at 523-524.

<sup>6</sup> It is underlined that “whenever one sees the word “deference,” one must accompany it with the question ‘how much’”, Gary Lawson, Stephen Kam, *Making Law Out of Nothing at All: The Origins of the Chevron Doctrine*, 65 *Admin. L. Rev.* 1 (2013), available at: [http://works.bepress.com/gary\\_lawson/1](http://works.bepress.com/gary_lawson/1)

<sup>7</sup> Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law* 3 *Duke Law Journal* 511, 514 (1989). See more: Ronald J. Krotoszynski, Jr., *Why Deference? Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore*, 54 *ADMIN. L. REV.* 735, 737, 739-739 (2002).

<sup>8</sup> Hilary Biehler, *Curial Deference in the Context of Judicial Review of Administrative Action Post-Meadows*, 49 *Irish Jurist* 27, 31 (2013); William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 *GEO. LJ* 1083,1086 (2008).

<sup>9</sup> Antonin Scalia, *supra* note 7, at 515.

Administrative agencies are seen in this context as bodies that execute the law enacted by the legislature that has—different to courts—a democratic mandate.<sup>10</sup> Other arguments for deferential standard of review regard the administrative agencies greater than courts political accountability for the decision taken.<sup>11</sup> It is also argued that administrative agencies are more likely to respond quickly to changing circumstances<sup>12</sup> as well that they guarantee greater uniformity of the decisions across the nation.<sup>13</sup>

Counterarguments against the deferential standard review (more reflected in the administrative law systems of European civil law countries than common law one such as Canada or U.S.) are instead focused on the constitutional role of courts to control the abuse of powers by the administrative agencies and so protection against arbitrariness and selectivity.<sup>14</sup> The courts are also seen to play the primary role in the interpretation of statutory provisions<sup>15</sup> and have been traditionally perceived to be entrusted in duty to eventually say what the law is.<sup>16</sup> In the European context where courts are perceived as the guardians of proper substantive law interpretation and respect for procedural fairness by the administrative authorities the arguments for deference seem to be stronger in factual (especially these that require expertise) rather than legal matters.<sup>17</sup> Importantly, there is no counterpart of U.S. *Chevron* deference doctrine in the EU law: the EU Courts cannot be expected to defer to administrative authority's reasonable interpretation of statutory provision that was left by legislator ambiguous. It is undisputed that in the light of Article 19(1) of the Treaty on European Union (TEU) the CJEU bears primary responsibility for the interpretation of the EU Treaties.<sup>18</sup>

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<sup>10</sup> William N. Eskridge, Jr. & Lauren E. Baer, *supra* note 8, at 1086-1087.

<sup>11</sup> Evan J. Criddle, *Chevron Consensus*, 88 Boston University Law Review 1271, 1288-1290 (2008).

<sup>12</sup> To put it in Peter H. Schuck's words about administrative agency discretion judicial deference to its decisions may vitalize agencies by "infusing them with energy direction, mobility, and the capacity for change", Peter H. Schuck, *Foundations of Administrative Law*, 175 (2004).

<sup>13</sup> Evan J. Criddle, *supra* note 11, at 1291.

<sup>14</sup> Peter H. Schuck, *supra* note 12, at 175 notices dark side of administrative agency discretion: "(d)iscretion enables and even invites officials to overreach, to discriminate invidiously, to subordinate public interests to private ones, to conceal bureaucratic reasons and purposes, and to tyrannize over the citizenry in countless large and small ways". Cass R. Sunstein, *supra* note 2, at 525 posits that judicial review is considered to play a role in "ensurance of legality, protection against arbitrariness and selectivity, promotion of procedural regularity, and ensurance against the twin evils of factional tyranny and self-interested representation".

<sup>15</sup> Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 551 (1985).

<sup>16</sup> Antonin Scalia, *supra* note 7, at 514. It is pointed that the courts' traditional understanding of judicial role may overwhelm doctrinal initiatives to place some part of this responsibility in other hands, see Barry Sullivan, *On the Borderlands of Chevron's Empire: An Essay on Title VII, Agency Procedures and Priorities, and the Power of Judicial Review*, 62 La. L. Rev. 317, 326-327 (2002).

<sup>17</sup> Susan Rose-Ackerman, Peter L. Lindseth, *Comparative Administrative Law: Outlining a Field of Study*, 28 *Windsor Yearbook of Access to Justice* 435, 445 (2010); Paul Craig, *EU Administrative Law* 436 (2006).

<sup>18</sup> Article 19(1) of the TEU provides that the CJEU "shall ensure that in the interpretation and application of the Treaties the law is observed". Additionally Article 267 of the TFEU provides that the CJEU has a jurisdiction to give preliminary rulings concerning the interpretation of the Treaties as well as the validity and interpretation of acts of the institutions, bodies, offices or agencies of the European Union.

**1.2.** Against this background this paper analyzes judicial review of EU central competition authority—the EU Commission and refers the standards established in the European Court of Human Rights (ECtHR) jurisprudence based on Article 6 of the ECHR to the EU competition proceedings. Article 6 of the ECHR is considered as a source of binding standard for the EU competition proceedings. This is the consequence of the fact that Article 6(3) of the Treaty establishing the European Union provides that the “fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.” Article 6 of the ECHR is also reflected in Article 47 of the EU Charter on Fundamental Rights<sup>19</sup> (the CFR) that regulates at the EU level a right to a fair trial. Article 47 of the CFR must be interpreted by the EU Courts in accordance with Article 6-ECtHR’s jurisprudence.<sup>20</sup> Such interpretation is indispensable for the EU law to provide continuously “equivalent” protection of fundamental rights to that of the ECHR system.<sup>21</sup> For these reasons the standards derived from Article 6 of the ECHR are bounding not only in case of enforcement of competition by the EU Member States (ECHR contracting parties) but also in case of central competition proceeding before the EU Commission and the EU Courts.<sup>22</sup> In the near future the entities unsatisfied with the fairness of EU competition proceedings will have a right to file a complaint against the EU to the ECHR. This will be one of consequences of the EU accession to the ECHR—the enforcement of the EU law by the EU institutions (in this case the Commission and the EU courts) will fall under the direct scrutiny of the ECtHR.<sup>23</sup> It is a right moment to ask whether the future applicants may succeed with complaints about insufficiency of judicial review exercised by the EU Courts.

**1.3.** The analysis provided in the paper is meant to answer the question whether deferential standard of review is permissible under the full jurisdiction principle prescribed in Article

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<sup>19</sup> The Charter of Fundamental Rights of the European Union, OJ C 83 of 30.3.2010, p. 389.

<sup>20</sup> According to Article 52(3) of the CFR the fundamental rights there provided must have the same meaning and scope as the same rights laid down in the ECHR. The CJEU held that Article 47 of the CFR secures in EU law the protection afforded by Article 6(1) of the ECHR (Case C-386/10 P *Chalkor v Commission* [2011] ECR I-0000, paragraph 51). See more Wolfgang Weiss, Human Rights in the EU: Rethinking the Role of the European Convention on Human Rights after Lisbon, 7 *European Constitutional Law Review* 64 (2011).

<sup>21</sup> In this respect see the ECtHR judgement of 30 June 2005 in case *Bosphorus v. Ireland*, no. 45036/98, paragraph 155-156 and 165. On the relation between EU and Council of Europe fundamental rights' system see Jean-Paul Costa, The Relationship between the European Convention on Human Rights and European Union Law – A Jurisprudence Dialogue between the European Court of Human Rights and the European Court of Justice, Lecture at KCL, 7<sup>th</sup> October 2008, [http://www.ECtHR.coe.int/NR/rdonlyres/DA4C4A2E-0CBE-482A-A205-9EA0AA6E31F6/0/2008\\_Londres\\_King\\_s\\_College\\_7\\_10.pdf](http://www.ECtHR.coe.int/NR/rdonlyres/DA4C4A2E-0CBE-482A-A205-9EA0AA6E31F6/0/2008_Londres_King_s_College_7_10.pdf)

<sup>22</sup> Maciej Bernatt, *Convergence of Procedural Standards in the European Competition Proceedings*, 3(8) *Competition Law Review*, 255, 272-273 (2012), available at: <http://ssrn.com/abstract=2240899>

<sup>23</sup> See Council of Europe website: <http://hub.coe.int/what-we-do/human-rights/eu-accession-to-the-convention> For a comment see for example Paul Craig, EU Accession to the ECHR: Competence, Procedure and Substance, 36 *Fordham Int'l L.J.* 1114 (2013).

6(1) of the ECHR. The first part of the paper provides analysis of the EU courts review in competition law field and asks whether this review is deferential. After giving a positive answer the article embarks on a detailed examination of the ECtHR jurisprudence. In the final part it provides the answer whether the EU courts deferential standard of review is permissible in the light of Article 6 of the ECHR and suggest improvements in the fairness of administrative process before the Commission.

## 2. Judicial review in EU competition law

**2.1.** The EU Commission's decisions issued under Article 101 (prohibition of agreements restricting competition) and Article 102 (prohibition of abuse of dominant position) of the Treaty on the Functioning of the European Union<sup>24</sup> ("TFEU") as well as EU Commission's merger decisions<sup>25</sup> are reviewed by the EU Courts (the General Court, "GC" and the Court of Justice of the EU, "CJEU"). Article 263(4) of the TFEU provides that any natural or legal person may institute proceedings against an act addressed to that person or which is of direct and individual concern to them. On this basis the undertaking found by the Commission in violation of EU competition rules or other entity affected by the EU Commission's decision (such as competitor) may bring an action for annulment of the Commission decision to the GC and subsequently to the CJEU (if the action is dismissed by the GC<sup>26</sup>). In such situation on the basis of the Article 263(2) of the TFEU the EU Courts have jurisdiction on grounds of (1) lack of competence of the Commission, (2) infringement of an essential procedural requirement by the Commission, (3) infringement of the EU Treaties (in the competition context especially Article 101 or 102 of TFEU) or of any rule of law relating to its application (such as the regulation on implementation of Article 101-102) by the Commission and (4) misuse of powers by the Commission.

Review provided in Article 263 of the TFEU is described as "review of legality"<sup>27</sup> or "annulment jurisdiction"<sup>28</sup>. Where the EU courts find the decision of the Commission to be illegal (in violation of Article 263(2) of the TFEU) they may only annul it and remand to the Commission. The EU Courts have no power to issue a new decision that would replace the

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<sup>24</sup> Official Journal C 83, 30.3.2010., p. 47.

<sup>25</sup> See Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings, Official Journal L 24, 04.01.2004, pp. 1-25.

<sup>26</sup> See for example case C-414/12 P *Bolloré v Commission*, not yet reported or case C-272/09 P *KME Germany and Others v Commission*, [2011] ECR I-12789.

<sup>27</sup> *KME*, *supra* note 26, at paragraph 93.

<sup>28</sup> Damien Gerard, Breaking the EU Antitrust Enforcement Deadlock: Re-empowering the Courts? 36 *European Law Review* 457, 467 (2011).

one issued by the Commission. In practice the EU Commission decisions are annulled most often on evidentiary basis because of insufficient proof supporting the Commission conclusion that Article 101 or 102 of the TFEU was violated<sup>29</sup> or because of infringement of essential procedural requirement that might have affect the outcome of the decision.<sup>30</sup>

Legality review is supplemented by “a review with unlimited jurisdiction envisaged in regard to the penalties”<sup>31</sup> laid down by Article 31 of the Council Regulation (EC) No 1/2003 of 16 December 2002 on implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty<sup>32</sup> (“Regulation 1/2003”). Under this provision the fine imposed by the Commission may be cancelled, reduced or increased by the court.<sup>33</sup> Thus when it comes to the appropriateness of the amounts of fine imposed the EU Courts exercise (or at least could exercise<sup>34</sup>) *de novo* review: they can re-make the Commission’s decision assessing differently factors taken into account when calculating the amount of fine (the gravity and duration of

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<sup>29</sup> This may be considered either a violation of Article 263(2) of the TFEU third annulment ground or the violation of Article 263(2) of the TFEU second ground. However, it is underlined that the modern trend is to discard the formal grounds of Article 263 TFEU and plead simply that the Commission has not proven the infringement, Nicholas Khan, Kerse & Khan on EU Antitrust Procedure (2012), 575. The GC’s approach is to assess whether the evidence was sufficient to establish infringement, cases T-305/94, etc. *Limburgse Vinyl Maatschaap v Commission* [1999] ECR II-931.

<sup>30</sup> This happened, for example, where the Commission relied on the interpretation of a number of documents upon which parties had no chance to comment on (case T-30/91 *Solvay v Commission*, [1995] ECR II-1775, paragraph 81), where the Commission failed to properly explain charges contained in a statement of objections (case 17/74 *Transocean v. Commission*, [1974] ECR 01063, paragraphs 13-20; case T-191/98 *Atlantic Container Line AB and others v. Commission*, [2003] ECR II-3275, paragraphs 113, 162) and where its decision lacked proper justification (case T-101/03 *Suproco NV v. Commission*, [2005] ECR II-3839, paragraph 20). See also Nicholas Khan, *supra* note 29, at 590-591. Recently the CJEU set aside the GC judgment to the extent that it rejected Ballast Nedam’s plea in law about the infringement of its rights of the defence (ambiguity in the wording of the statement of objections), see C-612/12 P *Ballast Nedam v Commission*, not yet published, judgment of 27 March 2014, paragraphs 22-31.

<sup>31</sup> *KME*, *supra* note 26, at paragraph 93.

<sup>32</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Official Journal L 1, 04.01.2003, pp.1-25. Recently a proposal of new interpretation of Article 31 of Regulation 1/2003 has been put forward. Article 31 of the Regulation 1/2003 provides in the first sentence that “(t)he Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment” what makes Damien Gerard to claim that unlimited jurisdiction should concern not only the amount of fine but the whole decision under which the fine is imposed, see Damien Gerard, *supra* note 28, at 477. However, the EU courts refer unlimited jurisdiction to fines only, see *KME*, *supra* note 26, at paragraph 93 (“In addition to the review of legality, now provided for under Article 263 TFEU, a review with unlimited jurisdiction was envisaged *in regard to the penalties* laid down by regulations”, emphasis added). Such interpretation is rooted in the wording of Article 261 TFEU that provides that EU regulations “may give the Court of Justice of the European Union *unlimited jurisdiction with regard to the penalties* provided for in such regulations” (emphasis added). For a discussion in this respect see also Wouter Wils, *The Compatibility with Fundamental Rights of the EU Antitrust Enforcement System in Which the European Commission Acts Both as Investigator and as First-Instance Decision Maker*, 37 World Competition (2014), available at SSRN: <http://ssrn.com/abstract=2363440>, at 7 and Andreas Scordamaglia-Tousis, *EU Cartel Enforcement: Reconciling Effective Public Enforcement with Fundamental Rights* 133 (2013).

<sup>33</sup> The General Court is not able to impose a different fine but to rule on existing fines set by decisions of the Commission, see Ioannis Lianos, Arianna Andreangeli, *The European Union. The Competition Law System and the Union’s Norm in The Design of Competition Law Institutions. Global Norms, Local Choices*, Eleanor M. Fox, Michael J. Trebilcock (eds), 401 (2013).

<sup>34</sup> For actual practice see below, at point 2.3. of the paper.



infringement<sup>35</sup>).

**2.2.** Other issue than the EU courts jurisdictions is the standard of review of the Commission's decisions, namely the intensity of the scrutiny exercised by the EU Courts over the legality of the Commission's decision subject to review<sup>36</sup>. It is here where the question about the scope of EU courts deference to Commission's decisions arises and where the criticism from the point of view of Article 6 of the ECHR is raised.

As a general rule the EU Courts undertake a comprehensive (exhaustive) review of the examination carried out by the Commission<sup>37</sup>. This review concerns "both the Commission's substantive findings of facts and its legal appraisal of these facts"<sup>38</sup>. Thus the Commission's decision is subject to judicial control from the point of view of the correctness and importance of the facts established by the Commission<sup>39</sup>. The EU courts check whether the Commission produced "sufficiently precise and consistent evidence" to support the firm conviction that the alleged infringement took place.<sup>40</sup> In the same time the EU courts do not exercise *de novo* review: they do not consider possible alternative outcomes of the case as they simply check whether the evidence collected supports the Commission's conclusion.<sup>41</sup> Such shape of judicial review has its grounds in the division of tasks between the Commission and the EU courts (it is for the Commission, not for the EU courts to conduct competition policy<sup>42</sup>) and a presumption that the Commission is better placed to choose between conflicting interests.<sup>43</sup> It

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<sup>35</sup> See Article 23 of the Regulation 1/2003.

<sup>36</sup> Damien Gerard, *supra* note 28, at 467.

<sup>37</sup> Case 42/84 *Remia and Others v Commission* [1985] ECR 2545, paragraph 34; case T-168/01 *GlaxoSmithKline Services v Commission* [2006] ECR II-2969, paragraph 57 (describing judicial review as comprehensive) and Joined Cases T-25/95 etc *Cimenteries CBR and Others v Commission* [2000] ECR II-508, para 719 (describing the judicial review as exhaustive).

<sup>38</sup> See *Cimenteries CBR*, *supra* note 37, at paragraph 719.

<sup>39</sup> Case T-156/94 *Siderugica Aristrain Madrid SL v. Comission*, [1999] ECR II-645, paragraph 115; See also A. Andreangeli, *EU Competition Enforcement and Human Rights*, 152 (2008).

<sup>40</sup> Nicholas Khan, *supra* note 29, at 576. However, in the light of the *KME* it is argued that the thoroughness of the judicial review depends on whether the appellate parties provide a court with an alternative conception that they believe the Commission should have taken into account, Pieter Van Cleynenbreugel, *Constitutionalizing Comprehensive Tailored Judicial Review in EU Competition Law*, 18 *Columbia Journal of European Law* 519, 542 (2011-2012).

<sup>41</sup> D. Gerard, *supra* note 28, at 469 (The EU Courts "do not carry out anew a balance of probabilities between the different interpretations of the evidence as put forward by the Commission on the one hand, and the applicant(s) on the other. Rather, they check the internal consistency of the *ratio decidendi* of the Commission's decision".)

<sup>42</sup> Bo Vesterdorf, *Judicial review in EC competition law: Reflections on the role of the Community courts in the EC system of competition law enforcement*, 1 *Competition Policy International* 3, 10 (2005) ("(t)he system envisages a sort of institutional balance. The Commission and the Courts should focus on their respective primary functions: competition policy and enforcement on the one hand, judicial review on the other").

<sup>43</sup> John Ratliff, *Judicial review in EC Competition cases before the European Courts: Avoiding double renvoi*, 10 (2009), available at [http://www.wilmerhale.com/uploadedFiles/WilmerHale\\_Shared\\_Content/Files/Editorial/Publication/EUI\\_Proceedings\\_Judicial\\_Review\\_Ratliff.pdf](http://www.wilmerhale.com/uploadedFiles/WilmerHale_Shared_Content/Files/Editorial/Publication/EUI_Proceedings_Judicial_Review_Ratliff.pdf); David Bailey, *The Scope of Judicial Review under Article 81 EC*, 41 *CML Rev.* 1327, 1338-1339 (2004); Renato Nazzini, *Administrative Enforcement, Judicial Review and Fundamental*

is argued that “if there is a choice between two approaches on which reasonable people may disagree, then the Courts may be expected to leave the Commission’s assessment alone”.<sup>44</sup> Reflection of such view may be found in jurisprudence where the EU Courts points at the need of preservation of the “inter-institutional balance” within the EU<sup>45</sup> what prohibits them to encroach on the discretion enjoyed by the Commission.<sup>46</sup>

**2.3.** The area where one can observe a judicial deference to Commission’s determinations concern complex economic and technical assessment.<sup>47</sup> The EU Courts recognize that the Commission has a margin of appreciation in complex economic and technical matters and apply manifest error of assessment standard. In case *Aalborg* the CJEU summarized its previous jurisprudence<sup>48</sup> and held that: “(e)xamination by the Community judicature of the complex economic assessments made by the Commission must necessarily be confined to verifying whether the rules on procedure and on the statement of reasons have been complied

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*Rights in EU Competition Law: A Comparative Contextual-Functionalist Perspective*, 49 CMLR 971, 996 (2012).

<sup>44</sup> Renato Nazzini, *supra* note 43, at 996 invoking the opinion of Bo Vesterdorf. For a discussion of institutional balance see also Alexander Fritzsche, *Discretion, Scope of Judicial Review and Institutional Balance in European Law*, 47 CML Rev. 361 390-392 (2010).

<sup>45</sup> Joined cases T-68, 77-78/89, *Societa Italiana Vetro and Others v Commission*, [1992] ECR II-1403, paras 319-320 (“Accordingly, the Court considers that, although a Community court may, as part of the judicial review of the acts of the Community administration, partially annul a Commission decision in the field of competition, that does not mean that it has jurisdiction to remake the contested decision. The assumption of such jurisdiction could disturb the inter-institutional balance established by the Treaty and would risk prejudicing the rights of defence”).

<sup>46</sup> Case C-441/07 P *Commission v Arosa*, [2010] ECR I-05949, paragraph 67. See also opinion of A.G. Tizzano in C-12/03 P *Commission v Tetra Laval*, paragraph 89 (“The rules on the division of powers between the Commission and the Community judicature, which are fundamental to the Community institutional system, do not however allow the judicature to go further, and particularly—as I have just said—to enter into the merits of the Commission’s complex economic assessments or to substitute its own point of view for that of the institution”).

<sup>47</sup> It is argued that ‘complexity’ should not be understood as ‘difficult to understand’ but rather be associated with “situations where the Commission makes economic policy choices”, Marc Jaeger, *The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of the Marginal Review?* 2 Journal of European Competition Law & Practice 295, 309-310 (2011). Originally the EU Courts were using only the complex economic assessment formula. In *Microsoft* the General Court expanded the formula also to complex technical assessment by making a reference to cases concerning “medico-pharmacological sphere”, see case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, paragraphs 88-89.

<sup>48</sup> See case 42/84 *Remia and Others v Commission* [1985] ECR 2545, paragraph 34, and Joined Cases 142/84 and 156/84 *BAT and Reynolds v Commission* [1987] ECR 4487, paragraph 62. However, it is observed that already in seminal *Consten/Grundig* case the deferential approach to Commission’s economic determinations has been taken and played a significant role in shaping the EC competition policy where the ECJ was deferring to the goals of competitions law set by the Commission (such as market integration), see Ian S. Forrester, *A Bush in need of pruning: The luxuriant growth of ‘Light Judicial Review’*, in Ehlermann and Marquis (Eds.), *European Competition Annual 2009: The Evaluation of Evidence and its Judicial Review in Competition Cases* (2011), available at <http://www.eui.eu/Documents/RSCAS/Research/Competition/2009/2009-COMPETITION-Forrester.pdf>, at 19-20. Compare case C-56/64 *Consten and Grundig v Commission* [1966] ECR 429, at page 347 (“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 there from”).

with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of powers”<sup>49</sup>. However, according to newer line of judgments concerning in the same manner cartels, abuse of dominant position and mergers the Commission’s decisions are under more thorough judicial scrutiny. The EU Courts underline that the fact that the Commission has a margin of discretion with regard to economic or technical matters “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”.<sup>50</sup> The mergers cases show<sup>51</sup> that actual review may be intense and the Commission’s decision may be annulled when the Commission commits an error of assessment of factors that are economic in their nature.<sup>52</sup> On the other hand it is often observed that the Commission is left with broad deference when making economic assessment in the criminal in a sense of Article 6 of the ECHR abuse of dominance field.<sup>53</sup>

The GC is precluded from substituting its own assessment of complex economic facts for that of the Commission.<sup>54</sup> *Alrosa* case predating the *KME/Chalkor* seems to provide still a

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<sup>49</sup> Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland A/S and Others v Commission*, [2004] ECR I-123, paragraph 279.

<sup>50</sup> *KME*, *supra* note 26, at paragraph 94 and Case C-386/10 P *Chalkor v Commission*, December 8, 2011, not yet officially published, paragraph 54 (cartels); *Microsoft v Commission*, *supra* note 47, at paragraphs 87-89 (abuse of dominant position) and case C-12/03 P *Commission v Tetra Laval* [2005] ECR I-987, paragraph 39 (mergers). Recently such formula was confirmed in the CJEU judgment (Grand Chamber) of 6 November 2012 in Case C-199/11 *Europese Gemeenschap v Otis and Others*, not yet reported, paragraph 59. According to Paul Craig the General Court in *Tetra Laval* failed to establish a clear test of assessment when the evidence is convincing for the Court and was very close to substituting its judgment for this of the Commission (what he believes is impermissible). He concludes that it is unclear how much real margin of appreciation is accorded to the Commission in relation to complex economic matters, see Paul Craig, *supra* note 17, at 468-470.

<sup>51</sup> Case T-342/99 *Airtours v Commission* [2002] ECR II-2585; case T-310/01, *Schneider Electric v. Commission* [2002] ECR II-4071 and *Tetra Laval*, *supra* note 50. In these three cases the GC overturned the Commission’s decision because the analysis of the effects of a proposed mergers were insufficient.

<sup>52</sup> In *Airtours* (*supra* note 51, at paragraph 294) the Court concluded that the Commission’s decision “far from basing its prospective analysis on cogent evidence, is vitiated by a series of errors of assessment as to factors fundamental to any assessment of whether a collective dominant position might be created. It follows that the Commission prohibited the transaction without having proved to the requisite legal standard that the concentration would give rise to a collective dominant position of the three major tour operators, of such a kind as significantly to impede effective competition in the relevant market”.

<sup>53</sup> Gerard, *supra* note 28, at 465.

<sup>54</sup> Opinion of A.G. Tizzano, *supra* note 46, paragraph 89. See also the same conclusion reached by Damien Gerard, *supra* note 28, at 469. He observes also that in consequence, the GC cannot balance the Commission’s assessment against alternative conclusions or counter-factual propositions.

valid proof for that.<sup>55</sup> In this case the GC when reviewing the Commission decision expressed according to the CJEU its “own differing assessment of the capability of the joint commitments to eliminate the competition problems identified by the Commission, before concluding (...) that alternative solutions that were less onerous for the undertakings than a complete ban on dealings existed in the present case”.<sup>56</sup> The Court concluded that “(b)y so doing, the GC put forward its own assessment of complex economic circumstances and thus substituted its own assessment for that of the Commission, thereby encroaching on the discretion enjoyed by the Commission instead of reviewing the lawfulness of its assessment”.<sup>57</sup> Importance of *Alrosa* ruling was noticed in EFTA Court *Posten Norge* judgment, where the Court after holding that “the submission that the Court may intervene only if it considers a complex economic assessment to be manifestly wrong must be rejected”<sup>58</sup> noted that the competition authority is precluded from substituting its own more preferable view for this of the authority if it finds the authority conclusion to be supported by evidence<sup>59</sup>.

The EU courts jurisprudence shows also that the EU Courts may be deferential also in areas falling out of scope of complex economic and technical assessment. It is observed that in case *Archer Daniels Midland* the EU Courts found the Commission to be better placed to carry out the task of the evaluation of evidence concerning the leader role of *Archer Daniels Midland* in the cartel.<sup>60</sup> Also appraisal of facts (different to establishment of facts itself) may also be review under more deferential “manifest error of appraisal” standard.<sup>61</sup> It is observed that EU courts apply a deferential standard in case of some of evidentiary issues “probably because of the implied belief that the evaluation of evidence is better carried out by the first

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<sup>55</sup> See especially Judgment of 24 October 2013 in Case C-510/11 P *Kone v Commission*, not yet reported, paragraph 27.

<sup>56</sup> *Alrosa*, *supra* note 46, paragraph 66. The CJEU was reviewing the General Court judgment in case T-170/06, *Alrosa v Commission*, [2007] ECR II-2601.

<sup>57</sup> *Alrosa*, *supra* note 46, paragraph 67.

<sup>58</sup> Judgment of 18 April 2012 in Case E-15/10 *Posten Norge v EFTA Surveillance Authority*, paragraphs 100-102.

<sup>59</sup> *Posten Norge*, *supra* note 58, at 98 (“Also as far as past events involving complex economic features are concerned, a situation may arise in which the Court, while still considering ESA's reasoning to be capable of substantiating the conclusions drawn from the economic evidence, may come to a different assessment of a complex economic situation. However, the fact that the Court is restricted to a review of legality precludes it from annulling the contested decision if there can be no legal objection to the assessment of ESA, even if it is not the one which the Court would consider to be preferable (compare *Commission v Alrosa*, cited above, paragraphs 65-67; and the Opinion of Advocate General Kokott in that case, points 81-84)”).

<sup>60</sup> Renato Nazzini, *supra* note 43, at 994. Compare case T-59/02 *Archer Daniels Midland Co v. Commission*, [2006] ECR 11-3627, paras. 220-226.

<sup>61</sup> Renato Nazzini, *supra* note 43, at 994. See for instance Joined Cases C-501, 513, 515 & 519/06 P, *GlaxoSmithKline Services Limited v. Commission*, [2010] ECR 11-2969, paragraphs 85 and 146.

instance decision-maker rather than by a court of review”.<sup>62</sup>

Surprisingly, the Commission is also accorded judicial deference to its fining policy. This happens despite the EU court unlimited jurisdictions in the field of fines.<sup>63</sup> The GC underlines that fines “constitute an instrument of the Commission's competition policy” and so “it must be allowed a margin of discretion when fixing their amount, in order that it may channel the conduct of undertakings towards observance of the competition rules”.<sup>64</sup> The Commission has a margin of appreciation when fixing fines and “a particularly wide discretion as regards the choice of factors to be taken into account for the purposes of determining the amount of fines, such as, *inter alia*, the particular circumstances of the case, its context and the dissuasive effect of fines, without the need to refer to a binding or exhaustive list of the criteria which must be taken into account”.<sup>65</sup> Crucially the Commission is granted deference as to the decision about the level of fines necessary to achieve the objective of the EU Treaties.<sup>66</sup> For this reason judicial review in the areas of fines is concentrated on correctness of the application the Commission’s 2006 Fining Guidelines<sup>67</sup> when determining the amount of fine imposed.<sup>68</sup> The EU Courts on many occasions manifest deference to the EU Commission soft law acts: the Fining Guidelines and the Commission Leniency Notice<sup>69</sup> are examples here. The GC leaves the Commission with the determination what the starting amount for a calculation of fine should be in the given case<sup>70</sup> it is in fact deferring to the Commission interpretation of the term “basic amount of fine” used in the

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<sup>62</sup> Renato Nazzini, *supra* note 43, at 994.

<sup>63</sup> See Editorial Comments, *Towards a More Judicial Approach? EU Antitrust Fines under the Scrutiny of Fundamental Rights*, 48 CML Rev., 1405, 1412 (2011). Renato Nazzini argues that “the fact that this margin of discretion is granted in the area where the jurisdiction of the Union courts is the most intense demonstrates that the issue is not one relating to the abstract standard of review but to judicial restraint in individual cases” (Renato Nazzini, *supra* note 43, at 993).

<sup>64</sup> Case T-150/89 *Martinelli v Commission*, [1995] ECR II-01165, paragraph 59. See also case T-439/07 *Coats Holdings v Commission* [2012] ECR II-000, paragraphs 184-185.

<sup>65</sup> Case C-219/95 P *Ferriere Nord v Commission* [1997] ECR I-4411, paragraph 33; see also case C-3/06 P, *Group Danone v Commission* [2007] ECR I-1331.

<sup>66</sup> Joined Cases C-189/02 P etc *Dansk Rørindustri and Others v Commission*, [2005] ECR I-5425, paragraph 227. See more Ian S. Forrester, *A Challenge for Europe’s Judges: The Review of Fines in Competition Cases 36 European Law Review* 185, 194-196 (2011).

<sup>67</sup> European Commission’s Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ C 210, 01/09/2006, p. 2–5.

<sup>68</sup> Such approach makes the process of the imposition of fines more transparent for firms, see *KME*, *supra* note 26, at paragraph 99.

<sup>69</sup> Commission Notice on Immunity from fines and reduction of fines in cartel cases Official Journal C 298, 08/12/2006, p. 0017 – 0022.

<sup>70</sup> The General Court in *KME* case noted that “in the exercise of its unlimited jurisdiction and in the light of the foregoing considerations (...) there is no cause to call into question the starting amount of the fine imposed on the applicants” (case T-25/05 *KME Germany and others v Commission* [2010] II-00091, paragraph 92. See also case T-439/07 *Coats Holdings v Commission* [2012] ECR II-000, paragraph 190).

Commission Fining Guidelines.<sup>71</sup> Similarly, the GC finds that it is for the Commission to assess under point 12(a) of Leniency Notice whether the leniency applicant deserves full reduction of fine because of the scope of its cooperation.<sup>72</sup> The same observation is valid when it comes to the term “significant added value”<sup>73</sup> of the information provided by the leniency applicant.<sup>74</sup>

**2.4.** To sum up we may conclude that the standard of review of the Commission’s complex economic and technical determination is deferential. However, the GC is under obligation to establish whether the evidence relied on by the Commission substantiate the conclusions drawn from it. The Commission is also accorded deference when fixing amount of fine and particularly when choosing factors that determine the amount of fine even if the EU Courts have a competence to exercise *de novo* review in this respect. In other areas concerning factual determinations the EU Courts exercise the correctness test and check whether the Commission produced sufficiently evidence to support the finding of infringement.<sup>75</sup> In any case in all areas concerning the Commission’s factual determinations the EU courts do not exercise *de novo* review: they are not entitled to substitute its own view for this of the Commission. The jurisprudence of the EU Courts and opinions in the EU law literature persuade that such state of affairs reflects first two rationales of deference discussed above. The EU Courts seem to believe that the Commission deserves a respect as an expert body responsible for the task of conducting competition policy on the EU market.

### **3. Standard of judicial review under Article 6 of the ECHR**

**3.1.** For some time the EU courts have been under heavy criticism on not exercising sufficient review of EU Commission decisions because of the deference left to Commission’s complex

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<sup>71</sup> See the Commission’s 2006 Fining Guidelines, *supra* note 67, at paragraphs 12-26.

<sup>72</sup> Case C-328/05 P *SGL Carbon v Commission* [2007] ECR I-3921, paragraph 88 (“As regards, finally, SGL Carbon’s claim that the cooperation provided by it was undervalued by comparison with that of the other members of the cartel, it should be noted, as the Court of First Instance rightly pointed out at paragraph 371 of the judgment under appeal, that the Commission enjoys a wide discretion in assessing the quality and usefulness of the cooperation provided by an undertaking, in particular by reference to the contributions made by other undertakings.”). See also the same statement in the subsequent case (issued already after *KME* judgment) T-214/06 *Imperial Chemical Industries v Commission* [2012] E.C.R. II-000, paragraph 181.

<sup>73</sup> The Commission Leniency Notice, *supra* note 69, at points 24-25.

<sup>74</sup> Joined Cases T-122-124/07, *Siemens Österreich and Others v. Commission*, [2011] ECR II-00793, paragraph 221 (“Within the limits laid down by the Leniency Notice, the Commission has a broad discretion in assessing whether the evidence provided by an undertaking represents added value within the meaning of point 22 of that notice and, on that basis, whether it is appropriate to grant a reduction to an undertaking under that notice (...). That assessment is the subject of limited review by the Court”).

<sup>75</sup> See however above for appraisal of facts where also a deferential standard of review is applied.

economic and technical assessments.<sup>76</sup> Deferential approach to Commission's fining policy has been also assessed negatively in the literature.<sup>77</sup> The appellate parties have argued that the GC's review of the Commission's decision does not guarantee contrary to standards of Article 47 of the CFR (and so Article 6 of the ECHR) the right to an effective judicial review.<sup>78</sup> The calls for introduction of "full appellate jurisdiction so as to ensure the full and unqualified review of the whole body of Commission antitrust decisions, including so-called complex economic assessments and the methodology applied for setting fines" have been formulated.<sup>79</sup> On the other hand many agree "that the GC has exercised its limited powers of scrutiny in a remarkably effective way since its institution, as its case law in many landmark competition and merger cases demonstrates" and "it is undeniable that the Court has, by means of its review of individual decisions managed to hold the Commission to rather strict standards of proof and sound reasoning".<sup>80</sup> It is observed that "the margin of appreciation doctrine has not prevented the GC from looking into any economic or technical detail of a case that appeared remotely promising as a basis for a successful ground of appeal".<sup>81</sup> The EU Courts themselves strongly defend the compatibility of the current model of judicial review in the EU with the requirements of Article 6 of the ECHR.<sup>82</sup>

Against this background this part analyzes the jurisprudence of the ECtHR in order to

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<sup>76</sup> Damien Gerard, *supra* note 28, at 475; see also: Damien Gerard, *EU Antitrust Enforcement in 2025: "Why Wait? Full Appellate Jurisdiction, Now"*, 1 CPI Antitrust Journal, 4-9 (2010); Ian S. Forrester, *supra* note 66, at 207; Ian S. Forrester, *supra* note 48, at 3. Even those who generally defend current enforcement system of competition law in the EU point that the misleading language of "margin of appreciation" should be abandoned as in fact judicial review provided by the EU Courts is full in a sense of Article 6 of ECHR, Wouter Wils, *supra* note 32, at 13.

<sup>77</sup> See for instance Ian S. Forrester, *supra* note 66.

<sup>78</sup> *KME*, *supra* note 26, paragraphs 83-88.

<sup>79</sup> Damien Gerard, *supra* note 28, at 475. See also Heike Schweitzer, *The European Competition Law Enforcement System and the Evolution of Judicial Review*, 2009 Eur. Competition L. Annual 79, 140 (2009) criticizing margin of appreciation rationale.

<sup>80</sup> Ioannis Lianos, Arianna Andreangeli, *supra* note 33, at 440. For a rather positive assessment of the current scope of judicial review of the Commission's decisions see Wouter Wils, *supra* note 32; Renato Nazzini, *supra* note 43; Fernando Castillo de la Torre, Evidence, Proof and Judicial Review in Cartel Cases, 32 World Competition, 505 (2009).

<sup>81</sup> Editorial Comments, *supra* note 63, at 1411. The studies show also that in cartel cases manifest error of assessment standard has rarely limited the GC in reviewing exhaustively the Commission infringement decisions, see Andreas Scordamaglia-Tousis, *supra* note 32, at 134.

<sup>82</sup> *KME*, *supra* note 26, at paragraph 106 ("The 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 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."); see also *Chalkor*, *supra* note 50, at paragraph 67 and in the preliminary reference proceedings *Otis*, *supra* note 50, at paragraph 63. The EU Courts do not refrain from invoking directly the ECtHR jurisprudence to substantiate defense as to the compatibility of the EU judicial review with Article 6 of the ECHR (see the judgment of 18 July 2013 in Case C-501/11 P *Schindler v Commission*, not yet reported, paragraphs 33-36 relying on *Menarini*).

give an answer whether from the Article 6 of the ECHR point of view this criticism is substantiated. Potential conflict between the EU judicial practice and the ECHR requirements would mean that the changes as to the former are highly required. The constitutional role of Article 6 of the ECHR in the EU law underlies such thesis.<sup>83</sup>

**3.2.** A right to judicial review is in the administrative decision-making context a crucial requirement of a right to fair trial provided in Article 6 of the ECHR. The ECtHR held on many occasions that decisions taken by administrative authorities that themselves do not satisfy the requirements of Article 6(1) of the ECHR must be subject to subsequent control by a “judicial body that has full jurisdiction” over questions of facts and law (full judicial review).<sup>84</sup>

**3.3.** However, full judicial review—as a principle—does not exclude the permissibility of limitation of the scope of judicial review of administrative authorities’ decisions. Right to a fair trial differently to some other rights protected by the ECHR (such as right to life and prohibition of inhuman or degrading treatment) is not absolute and may be limited. The ECtHR is ready to find the limitations of the scope of judicial review to be permissible in these administrative law cases that are classified by the ECtHR under the civil limb of the Article 6(1) of the ECHR: administrative cases that influence applicant’s civil rights or obligations.<sup>85</sup> For example competition merger proceedings are classified as such.<sup>86</sup> This is also a case of EU commitment proceedings.<sup>87</sup>

The ECtHR judgment in *Bryan* (1995) has established the rules governing limited

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<sup>83</sup> See *supra* at point 1.2. of the paper.

<sup>84</sup> See the ECtHR judgment in case *Albert and Le Compte v. Belgium* of 10 February 1983, no. 7299/75, 7496/76, paragraph 29 (“In many member States of the Council of Europe, the duty of adjudicating on disciplinary offences is conferred on jurisdictional organs of professional associations. Even in instances where Article 6 para. 1 is applicable, conferring powers in this manner does not in itself infringe the Convention (...). Nonetheless, in such circumstances the Convention calls at least for one of the two following systems: either the jurisdictional organs themselves comply with the requirements of Article 6 para. 1, or they do not so comply but are subject to *subsequent control by a judicial body that has full jurisdiction* and does provide the guarantees of Article 6 para. 1”, emphasis added) and paragraph 36 (“The public character of the cassation proceedings does not suffice to remedy the defect found to exist at the stage of the disciplinary proceedings. The Court of Cassation does not take cognisance of the merits of the case, which means that many aspects of “contestations” (disputes) concerning “civil rights and obligations”, including review of the facts and assessment of the proportionality between the fault and the sanction, fall outside its jurisdiction”). The standard established in *Albert and Le Compte* is applicable in cases concerning the judicial review of administrative authorities’ decisions; see the ECtHR judgement of 22 November 1995 in case *Bryan v United Kingdom*, no. 19178/91, paragraph 40 and of 23 October 1995 in case *Schmautzer v Austria*, no. 15523/89, paragraph 34.

<sup>85</sup> See more the ECtHR judgement of 27 October 1987 in case *Pudas v. Sweden*, no. 10426/83, paragraph 31 and of 23 October 1985 in case *Bentham v. Holandia*, no. 8848/80, paragraph 32.

<sup>86</sup> Arianna Andreangeli, *supra* note 39, at 186; M. Bernatt, *Prawo do rzetelnego procesu w sprawach konkurencji i regulacji rynku [Right to a Fair Hearing in Competition and Market Regulation Matters]*, 791 Państwo i Prawo 50, 59 (2012).

<sup>87</sup> In the EU commitment proceedings the infringement of Article 101 or 102 of the TFEU is not established and no fines are imposed, see Article 9 of the Regulation 1/2003, see also recital 13 of the Regulation 1/2003 Preamble.



judicial review in administrative cases classified as civil in a sense of Article 6 of ECHR. In this case the ECtHR was confronted with the question whether deferential standard of review limited principally to the questions of law meets the requirements of Article 6 of the ECHR. The applicant John Bryan was ordered by the local council to destroy two buildings on the land he bought. He appealed against the order to the Secretary of State for the Environment who appointed Principal Housing and Planning Inspector (the Inspector) to conduct an inquiry and determine the appeal. The question was whether the buildings in question could be considered to have been designed for the purposes of agriculture. After examining the photographs the Inspector came to conclusion that the local council was right to be concerned that the buildings had the appearance of large detached houses. Thus the Inspector rejected the appeal in all significant parts and held that any reasonable person would have concluded that he or she was looking at the start of a small new detached housing estate. The Inspector while taking the decision exercised his discretion on policy matters involving development in a green belt and conservation area. The applicant appealed against the Inspector's decision to High Court. The Court dismissed the appeal finding that no errors in law was committed. The appeal included also a challenge to the inspector's findings of fact, but this ground was not pursued at the hearing in the High Court. The applicant complained to the ECtHR that the High Court had no power to disturb the findings of fact made by the inspector "unless there was a defect which was so great as to go to jurisdiction".

The ECtHR observed (1) that the appeal to the High Court, being on "points of law", was not capable of embracing all aspects of the inspector's decision concerning the enforcement notice served on Mr Bryan; (2) that there was no rehearing of the original complaints submitted to the inspector; (3) that the High Court could not substitute its own decision on the merits for that of the inspector; (4) and that its jurisdiction over the facts was limited.<sup>88</sup> Despite that the ECtHR was satisfied with the judicial review provided by the High Court. It observed that apart from the classic grounds of unlawfulness under English law (going to such issues as fairness, procedural propriety, independence and impartiality), the inspector's decision could have been quashed by the High Court if it had been made by reference to irrelevant factors or without regard to relevant factors; or if the evidence relied on by the inspector was not capable of supporting a finding of fact; or if the decision was based on an inference from facts which was perverse or irrational in the sense that no inspector properly directing himself would have drawn such an inference.<sup>89</sup> Speaking about the

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<sup>88</sup> *Bryan, supra* note 84, at paragraph 44.

<sup>89</sup> *Id.*

assessment of sufficiency of the review to the ECtHR noted in a more general manner that “it is necessary to have regard to matters such as the subject-matter of the decision appealed against, the manner in which that decision was arrived at, and the content of the dispute, including the desired and actual grounds of appeal.”<sup>90</sup> Also according to ECtHR the respect should be given by the court to decisions taken by administrative authorities on grounds of “expediency”.<sup>91</sup> The required intensity of review depends in the light of *Bryan* standard on the presence of procedural safeguards during administrative phase of the proceedings and institutional guarantees of independence and impartiality of the administrative decisionmaker.<sup>92</sup> It seems that the greater is the level of procedural guarantees and the more quasi-judicial the proceedings are the more limited scope of judicial review may be. In any case procedural shortcomings alleged by the party should be subject to review by the court.<sup>93</sup> The ECtHR does not expect *de novo* review of evidence by the court.<sup>94</sup> It is sufficient if the reviewing court has a power to assess whether “the findings of fact or the inferences based on them were neither perverse nor irrational”.<sup>95</sup> However, it seems that such deferential standard will be applicable only in case of review of factual findings that concern “policy matters”<sup>96</sup> in “the specialized area of law” and where the subject-matter of the contested administrative decision is an example of “exercise of discretionary judgment in the regulation of citizens’ conduct”.<sup>97</sup>

If these elements are lacking and the procedural guarantees during administrative phase are limited the ECtHR requires a more thorough review of administrative factual

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<sup>90</sup> *Id.*, at paragraph 45.

<sup>91</sup> *Id.*, at paragraph 47.

<sup>92</sup> *Id.*, at paragraph 46 (“In this connection the Court would once more refer to the uncontested safeguards attending the procedure before the inspector: the quasi-judicial character of the decision-making process; the duty incumbent on each inspector to exercise independent judgment; the requirement that inspectors must not be subject to any improper influence; the stated mission of the Inspectorate to uphold the principles of openness, fairness and impartiality”).

<sup>93</sup> *Id.*, at paragraph 46.

<sup>94</sup> *Id.*, at paragraph 47 (“while the High Court could not have substituted its own findings of fact for those of the inspector, it would have had the power to satisfy itself that the inspector’s findings of fact or the inferences based on them were neither perverse nor irrational”). However in *Bryan* there was no dispute as to the primary facts before the High Court (*Id.*)

<sup>95</sup> *Id.*, at paragraph 47. See also the ECtHR judgment of 18 January 2001 in case *Jane Smith v UK*, no. 25154/94, paragraph 133.

<sup>96</sup> *Id.*, at paragraph 47 (“These submissions, as the Commission noted, went essentially to questions involving “a panoply of policy matters such as development plans, and the fact that the property was situated in a green belt and a conservation area”).

<sup>97</sup> *Id.*, at paragraph 47 (“Such an approach by an appeal tribunal on questions of fact can reasonably be expected in specialised areas of the law such as the one at issue, particularly where the facts have already been established in the course of a quasi-judicial procedure governed by many of the safeguards required by Article 6 para. 1. It is also frequently a feature in the systems of judicial control of administrative decisions found throughout the Council of Europe member States. Indeed, in the instant case, the subject-matter of the contested decision by the inspector was a typical example of the exercise of discretionary judgment in the regulation of citizens’ conduct in the sphere of town and country planning. ”, emphasis added).

findings. In *Tsfayo* (2006), the case concerning the administration's refusal to pay backdated housing benefits to Ethiopian national living in UK, the ECtHR observed that in *Bryan* "the issues to be determined required a measure of professional knowledge or experience and the exercise of administrative discretion pursuant to wider policy aims". In contrast in *Tsfayo* "no specialist expertise was required to determine pure factual issue at stake" (the question whether there was "good cause" for the applicant's delay in making a claim).<sup>98</sup> Nor unlike in *Bryan* the factual findings could have been said "to be merely incidental to the reaching of broader judgments of policy or expediency which it was for the democratically accountable authority to take".<sup>99</sup> Additionally, the administrative authority that decided the case was not impartial (it was directly connected to one of the parties to the dispute) and the procedural safeguards were not adequate to overcome this.<sup>100</sup> For these reasons the ECtHR found the judicial review that similarly like in *Bryan* was limited to the question whether the evidence supports the factual findings and whether the relevant factors were established not to be sufficient in the instant case.<sup>101</sup> The ECtHR found that there was never the possibility that the central issue would be determined by a tribunal that was independent of one of the parties to the dispute.<sup>102</sup>

The approach taken by the ECtHR in *Bryan* and confirmed in different factual and procedural context in *Tsfayo* established a standard used by the ECtHR when assessing whether the judicial review of administrative law cases classified under civil limb of Article 6 of the ECHR is "sufficient". In 2011 in *Sigma Radio Television*, the case concerning the breach of rules governing broadcasting the materials for children by a television broadcaster, the ECtHR applied the *Bryan/Tsfayo* rationale and concluded that the judicial review provided by the Cyprus Supreme Court was sufficient.<sup>103</sup> The ECtHR used also the instant case to

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<sup>98</sup> The ECtHR judgment of 14 November 2006 in case *Tsfayo v UK*, no. 60860/00, at paragraph 46.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at paragraph 47.

<sup>101</sup> *Id.* at paragraph 48.

<sup>102</sup> *Id.*

<sup>103</sup> The review was found to be sufficient despite the fact that the Supreme Court could not substitute its own decision for that of the national broadcasting authority and its jurisdiction over the facts was limited. The ECtHR was satisfied with the Supreme Court annulment jurisdiction based on a number of grounds, including the situation where the decision had been reached on the basis of a misconception of fact or law, there had been no proper enquiry or a lack of due reasoning, or on procedural grounds. The ECtHR observed that the subject matter of the administrative decision in question was a classic exercise of administrative discretion in the specialised area of law and that a number of procedural guarantees were available to the applicant in the administrative proceedings and that the applicant's allegations as to shortcomings in this proceedings, including those concerning objective partiality and the breach of the principles of natural justice, were subject to review by the Supreme Court. The ECtHR observed also that the Supreme Court analyzed in detail all points raised in the recourse. Differently than in *Tsfayo* the applicant's case did not centre on a fundamental question of fact which the Supreme Court did not have jurisdiction to revisit (the ECtHR judgment of 21 July 2011 in case *Sigma Radio Television v Cyprus*, no. 32181/04 and 35122/05, paragraphs 159-166).

summarize the applicable test by stating that “(i)n assessing the sufficiency of a judicial review available to an applicant, the Court will have regard to the powers of the judicial body in question and to such factors as (a) the subject-matter of the decision appealed against, in particular, whether or not it concerned a specialised issue requiring professional knowledge or experience and whether it involved the exercise of administrative discretion and if, so, to what extent; (b) the manner in which that decision was arrived at, in particular, the procedural guarantees available in the proceedings before the adjudicatory body; and (c) the content of the dispute, including the desired and actual grounds of appeal”.<sup>104</sup> Additionally the court must always be empowered to determine the central issue in dispute<sup>105</sup> and to remand the case to the administrative authority.<sup>106</sup> In *Sigma* the ECtHR confirmed what one could observe earlier when comparing for example the ECtHR conclusion in *Bryan* (no violation of Article 6) and *Tsfayo* (violation of Article 6): whether the review carried out is sufficient for the purposes of Article 6 will very much depend on the circumstances of a given case.<sup>107</sup> Nevertheless, the ECtHR is consistent in applying the *Bryan* rationale in many cases classified as civil in a sense of Article 6 of the ECHR.<sup>108</sup>

**3.4.** The reading of *Bryan*, *Tsfayo* and *Sigma* could suggest that deferential standard of review of the Commission’s determinations in complex economic matters is in accordance with Article 6 of the ECHR. EU competition law is a surely a specialized area of law, the cases involve specialised issues requiring professional, economic knowledge and the competition authorities are acting in public interest.<sup>109</sup> The institution of competition proceedings under Regulation 1/2003 involves the exercise of administrative discretion and the Commission enjoys a policy discretion with regard to its own enforcement priorities in the area of Article

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<sup>104</sup> *Sigma*, *supra* note 103, paragraph 154.

<sup>105</sup> *Id.* See also the judgment of 27 October 2009 in case *Crompton v UK*, no. 42509/05, paragraphs 78-80.

<sup>106</sup> The ECtHR judgment of 7 November 2000 in case *Kingsley v UK*, no. 35605/97, paragraphs 58-59

<sup>107</sup> *Sigma*, *supra* note 103, at paragraph 155.

<sup>108</sup> The ECtHR judgments: in *Jane Smith*, *supra* note 95, paragraphs 130-134; of 4 October 2001 in case *Potocka and others v. Poland*, no. 33776/96, paragraphs 52-59; in *Crompton*, *supra* note 105, paragraphs 74-80; of 9 January 2013 in case *Volkov v Ukraine*, no. 21722/11, paragraphs 123-129; of 16 April 2013 in case *Fazliyski v. Bulgaria*, no. 40908/05, paragraph 58.

<sup>109</sup> In *Sigma*, *supra* note 103, at paragraph 161, the ECtHR found that the administrative authority’s regulation of broadcasting and monitoring of compliance with the relevant legislation is “a classic exercise of administrative discretion in the specialised area of law concerning broadcasting taken in the context of ensuring standard setting and compliance with the relevant legislation and regulations pursuant to public interest aims”. The monitoring of compliance of competition law does not seem to differ significantly when such characterisation is taken into account. Compare also for town planning: *Zumtobel v. Austria*, 21 September 1993, no. 12235/86, paragraphs 31- 32, *Bryan*, *supra* note 84, paragraph 47 and *Jane Smith v UK* [GC], 18 January 2001, no. 25154/94, paragraph 133; environmental protection: *Alatulkkila and Others v. Finland*, 28 July 2005, no. 33538/96, paragraph 52; regulation of gaming: *Kingsley v. the United Kingdom* [GC], 28 May 2002, no. 35605/97, paragraph 32.

101 and 102 TFEU.<sup>110</sup> Thus it could be argued that as long as procedural safeguards required by Article 6 of the ECHR are present and the reviewing courts are not precluded from reviewing the central issue the deferential standard of review concerning competition agency determinations' of complex economic nature should pass the test of Article 6 of the ECHR. However, the ECHR does not distinguish administrative cases as such. They are classified as either civil or criminal in a sense of Article 6 of the ECHR. The administrative law cases that involve heavy fines (such as cases dealt with in the course of EU Article 101-102 TFEU infringement proceedings) are classified in the ECtHR jurisprudence as criminal.<sup>111</sup> They fall out of the scope of "the hard core of criminal law" and so fully blown criminal procedural safeguards do not have to be provided.<sup>112</sup> The factual and legal determination as well as imposition of fine may be delegated at first instance to administrative authority that do not meet the requirements of tribunal in a sense of Article 6 of the ECHR<sup>113</sup>, most importantly it is not fully independent and impartial.<sup>114</sup> However, in such situation the question is whether

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<sup>110</sup> Case C-344/98, *Masterfoods v HB Ice Cream*, [2000] ECR I-11369, paragraph 46 ("In *Masterfoods* the CJEU held that "The Commission, entrusted by [Article 105(1) TFEU] with the task of ensuring application of the principles laid down in [Articles 101 and 102 TFEU], is responsible for defining and implementing the orientation of Community competition policy. It is for the Commission to adopt, subject to review by the Court of First Instance [now: the GC] and the Court of Justice, individual decisions in accordance with the procedural rules in force and to adopt exemption regulations".) For this reason the Commission is entitled to give differing degrees of priority to the complaints brought before it (*Id.*) and generally set its enforcement priorities (see Wouter Wils, *Discretion and Prioritisation in Public Antitrust Enforcement, in Particular EU Antitrust Enforcement*, 34 *World Competition* (2011); available at SSRN: <http://ssrn.com/abstract=1759207>, at 7-10).

<sup>111</sup> See the judgement of 24 February 1994 in case *Bendenoun v France*, no. 12547/86, paragraph 52 and of 23 July 2002 in case *Janosevic v Sweden*, no. 34619/97, paragraph 90 for tax law cases. For financial law cases see ECtHR decision of 27 August 2002 in case *Didier v France*, no. 58188/00 and a judgment of 11 June 2009 in *Dubus v. France*, no. 5242/04, paragraph 36. For such classification of competition law cases see the detailed analysis in ECtHR judgement of 27 September 2011 in case *Menarini v Italy*, no. 43509/08, paragraphs 38-45; compare also the opinion of AG Sharpston of 10 February 2011 in *KME*, *supra* note 26, paragraph 64 and opinion of AG Léger of 3 February 1988 in case C-185/95 P, *Baustahlgewebe v Commission*, paragraph 31. The application of Article 6 of the ECHR under its criminal head Article 101-102 cases takes place because *Engel* conditions are met: although practices restricting competition are classified as administrative and not criminal, the general and abstract character of the prohibition as well the deterrent, repressive, severe and stigmatising character of fines (not compensatory one) decides about criminal character of the proceedings concerning these practices. For *Engel* criteria see the ECtHR judgement of 8 June 1976 in case *Engel and others v the Netherlands*, no. 5100/71, paragraph 82 and the ECtHR judgement of 21 February 1984 in case *Öztürk v Germany*, no. 8544/79, paragraph 50.

<sup>112</sup> The ECtHR judgment of 23 November 2006 in case *Jussila v. Finland* [GC], no. 73053/01, paragraph 43.

<sup>113</sup> The ECtHR judgment in *Öztürk*, *supra* note 111, at paragraph 58 and more recently in *Jussila*, *supra* note 112, at paragraph 43; *Menarini*, *supra* note 111, at paragraph 59 and the ECtHR judgment of 4 March 2014 in case *Grande Stevens and Others v Italy*, no. 18640/10, at paragraphs 138-139.

<sup>114</sup> *Bendenoun*, *supra* note 111, at paragraph 46 and *Janosevic*, *supra* note 111, at paragraph 81; *Jussila*, *supra* note 112, at paragraph 43; in *Findlay*, a criminal case *sensu stricto* the ECtHR held that such case must be heard already at first instance by tribunal that fully meets the requirements of Article 6 (judgment of 25 February 1997 in case *Findlay v. the United Kingdom*, no. 22107/93, paragraph 79). A "tribunal" is characterised in ECtHR's jurisprudence in the substantive sense of the term by its judicial function, that is to say determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner; it must also satisfy a series of further requirements - independence, in particular of the executive; impartiality; duration of its members' terms of office; guarantees afforded by its procedure - several of which appear in the

deferential standard of review will pass the test of Article 6 of the ECHR. In other words we may ask whether the standard established in *Bryan* and confirmed among others in *Tsfayo* and *Sigma*, all of which were classified by the ECtHR as civil cases<sup>115</sup>, may govern the review of competition agency's decisions in which fines are imposed.

In *Sigma* the ECtHR the Court did not find necessary to determine whether the criminal limb of Article 6(1) of the ECHR was applicable in that case. It stated only that paragraph 1 of Article 6, violation of which was alleged by the applicant, applies in civil matters as well as in the criminal sphere.<sup>116</sup> By doing so the ECtHR lost a chance to explain whether in practical terms there is any difference as to the required scope of procedural safeguards under Article 6(1) of the ECHR<sup>117</sup> between cases classified as civil and those criminal cases that in *Jussila* words fall out of the scope of hard core of criminal law. Some scholars indirectly suggest that *Sigma* test determining the notion of sufficiency of judicial review could find application in the criminal in a sense of Article 6 of the ECHR EU competition law cases.<sup>118</sup> However, the ECtHR jurisprudence does not confirm this.<sup>119</sup> Rather when discussing the required scope of judicial review of administrative decisions imposing fines ("non-hard core" criminal cases) the ECtHR uses slightly different language and never

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text of Article 6(1) itself (see the judgment of 29 April 1988 in case *Belilos v Switzerland*, no. 10328/83, paragraph 64).

<sup>115</sup> See also other cases, *supra* note 108.

<sup>116</sup> *Sigma*, *supra* note 103, at paragraph 126; compare also *Albert and Le Compte*, *supra* note 84, paragraph 30 ("the Court does not believe that the two aspects, civil and criminal, of Article 6 para. 1 are necessarily mutually exclusive") and more recently in *Volkov*, *supra* note 108, at paragraph 92. The applicant in *Sigma* argued, that the fines imposed by national broadcasting authority were in fact of a criminal nature and that therefore the complaint could also be examined under the criminal head of the Article 6 § 1 and relied on the findings of the ECtHR in *Jussila*. The ECtHR denied dealing with the sufficiency of review of fines by the Cyprus Supreme Court because these issues were not raised by the applicant before that court in the legal points on which its recourses were based (*Sigma*, *supra* note 103, at 167). The ECtHR was also persuaded by the Government position that a number of Supreme Court judgments in judicial review proceedings indicate that the Supreme Court has the competence to examine the necessity and proportionality of the fines in its judicial review role (*Sigma*, *supra* note 103, at 168).

<sup>117</sup> Paragraphs 2 and 3 of Article 6 of the ECHR may find application only in criminal cases (compare the wording of these provisions).

<sup>118</sup> Nazzini, *supra* note 43, at 989 ("The distinction between the determination of a "criminal charge" and the determination of "civil rights and obligations" is relevant but only as a contextual element of the functionalist analysis that specifies the intensity of the protection in each individual case. There is no obstacle in principle, therefore, to extending the jurisprudence of the Court in cases concerning civil rights and obligations to the determination of criminal charges, particularly in the light of the overbroad definition of "criminal charge" under Article 6(1)"). For a different opinion see Editorial Comments, *supra* note 43, at 1411. Nicholas Khan and Wouter Wils also refer to *Sigma* in the analysis of judicial review of EU Commission decisions; see Nicholas Khan, *supra* note 29, at 564 and Wouter Wils, *supra* note 32, at 8. See also Andreas Scordamaglia-Tousis, *supra* note 32, at 149.

<sup>119</sup> In the judgment of 17 April 2012 in case *Steininger v Austria*, no. 21539/07 the ECtHR after discussing the standards of assessing sufficiency in civil cases stemming from *Bryan* noted that "(i)n the present case, however, the criminal head of Article 6 § 1 applies to the proceedings at issue and in its case-law the Court followed a different approach as regards the scope of review of criminal sanctions imposed by administrative authorities" (paragraph 52).

relies on *Bryan*, *Tsfayo*, *Sigma* and its other “civil” cases.

In two cases against Austria decided in 1995: *Umlauf* and *Schmautzer* the ECtHR described what “full jurisdiction” means in cases concerning criminal charge in a sense of Article 6 of the ECHR where the first instance adjudicative body does not meet the requirement of Article 6 of the ECHR. Both cases involved the fines imposed for violation of road law. The ECtHR defined laconically characteristics of a “judicial body that has full jurisdiction”. Such body should have a power to quash in all respects, on questions of fact and law, the decision of the body below<sup>120</sup> as well as examine all the relevant facts.<sup>121</sup>

This standard was invoked and further developed in 2002 in *Janosevic*, the case concerning the imposition of tax surcharges qualified as criminal sanctions within the autonomous meaning of Article 6(1).<sup>122</sup> The ECtHR did not make any reference to *Bryan* standard even if at this time it was invoking this standard in administrative cases concerning civil rights or obligations in a sense of Article 6 of ECHR. Instead, the ECtHR found that the system where tax authorities are entitled to impose sanctions like tax surcharges is not incompatible with Article 6(1) so long as the taxpayer can bring any such decision affecting him before a judicial body that has full jurisdiction, including (in *Umlauf* words) the power to quash in all respects, on questions of fact and law, the challenged decision.<sup>123</sup> The ECtHR found that the Swedish administrative court had jurisdiction to examine all aspects of the matters before them and was not restricted to points of law but could also extend to factual issues, including the assessment of evidence.<sup>124</sup> If it disagreed with the findings of the Tax Authority, they had the power to quash the decisions appealed against.<sup>125</sup> Insufficient review was instead found to be provided in *Steininger* (2012). The ECtHR after consciously rejecting the possibility of relying on *Bryan* standard<sup>126</sup> on the basis of *Umlauf/Schmautzer* and *Janosevic* found that Austrian administrative court’s decision merely related to questions of law by simply referring to a previous decision on a similar matter and contained no answer to the applicant company’s complaint relating to the facts.<sup>127</sup> For this reason such review could not be qualified “as adequate ‘full review’ of the applicant company’s criminal conviction

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<sup>120</sup> *Schmautzer*, *supra* note 84, paragraph 36; judgement of 23 October 1995 in case *Umlauf v Austria*, no. 15527/89, paragraph 39

<sup>121</sup> *Schmautzer*, *supra* note 84, at paragraph 35; *Umlauf*, *supra* note..., paragraph 38.

<sup>122</sup> *Janosevic*, *supra* note 111, at paragraph 81; compare also the judgement of 23 July 2002 in case *Västberga Taxi Aktiebolag and Vulic v. Sweden*, no. 36985/97.

<sup>123</sup> *Janosevic*, *supra* note 111, at paragraph 81. The ECtHR relied on *Umlauf*, *supra* note 120. Compare also the ECtHR judgment of 13 February 2003 in case *Chevol v France*, no. 49636/99, paragraph 77.

<sup>124</sup> *Janosevic*, *supra* note 111, at paragraph 82.

<sup>125</sup> *Id.*

<sup>126</sup> *Steininger*, *supra* note 119, at paragraph 52.

<sup>127</sup> *Id.*, at paragraph 57.

passed by an administrative authority”.<sup>128</sup>

*Umlauf/Schmautzer* standard (and not on *Bryan*) was also invoked by the ECtHR in 2004 in *Silvester's Horeca Service*<sup>129</sup>, in 2011 in *Menarini*<sup>130</sup>, in 2012 in *Segame*<sup>131</sup> and in 2014 in *Grande Stevens*.<sup>132</sup> Out of these four cases *Menarini* is the most often commented in the literature. This case is particularly famous in competition law circles as it is seen to confirm the accordance of the EU competition law enforcement system in view of its similarity to Italian one with Article 6 requirements.<sup>133</sup> In this case the ECtHR reminded that in criminal cases falling out of the scope of the hard core of criminal law<sup>134</sup> it is permissible to have administrative authority delivering the decision and imposing fines as long as this decision is reviewed by the judicial body that has full jurisdiction<sup>135</sup> and then provided the analysis of sufficiency of judicial review. It found the Italian's courts review of the Italian competition authority's decision imposing fine on company for its participation in cartel was indeed in accordance with Article 6 of the ECHR.<sup>136</sup> The ECtHR observed that judicial review was not limited to the questions of legality only. The Italian courts (Lazio administrative court

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<sup>128</sup> *Id.*, at paragraph 57. The same conclusion was reached by the ECtHR in view of the similarities of the facts in the judgement of 4 April 2013 in case *Julius Kloiber Schlachthof and Others v Austria*, no. 21565/07, paragraphs 28-34.

<sup>129</sup> The ECtHR judgement of 4 March 2004 in case *Silvester's Horeca Service v Belgium*, no. 47650/99, paragraph 26.

<sup>130</sup> *Menarini*, *supra* note 111, at paragraph 59.

<sup>131</sup> The ECtHR judgement of 7 June 2012 in case *Segame v France*, no. 4837/06, paragraph 55.

<sup>132</sup> *Grande Stevens*, *supra* note 113, at paragraph 139.

<sup>133</sup> Alexander Italianer, the Director General of DG Competition observed in October 2011 that the judgement in *Menarini* confirms “the legitimacy of administrative systems, a model followed by many competition agencies. It also corroborates the case law of the European Court of Justice which has repeatedly found the EU system of competition enforcement to fulfil the requirements of Article 6 ECHR on the right to a fair trial”, see Alexander Italianer, *Best Practices for antitrust proceedings and the submission of economic evidence and the enhanced role of Hearing Officer*, [http://ec.europa.eu/competition/speeches/text/sp2011\\_12\\_en.pdf](http://ec.europa.eu/competition/speeches/text/sp2011_12_en.pdf), p. 3. See also Wouter Wils, *supra* note 32, at 7. Many authors have criticized EU system in this respect, see for example Donald Slater, Sebastian Thomas and Denis Waelbroeck, *Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?*, 8 The Global Competition Law Centre Working Papers Series – GCLC Working Paper 7 (2004), available at <http://www.coleurop.be/file/content/gclc/documents/GCLC%20WP%2004-08.pdf>; James Killick, Pascal Berghe, *This is not the time to be tinkering with Regulation 1/2003 – It is time for fundamental reform – Europe should have change we can believe in*, 6 *CompLRev*, 259, 264–271 (2010); Ian S. Forrester, *Due Process in EC Competition Cases: A Distinguished Institution with Flawed Procedures*, 34 *European Law Review*, 817, 827–831 (2009).

<sup>134</sup> The ECtHR did not use exactly the *Jussila* language but in fact confirmed it by stating that the nature of an administrative procedure may differ in several respects from the nature of criminal proceedings in the strict sense of the term. Even if these differences do not discharge the Contracting States from their obligation to comply with all the guarantees offered by the criminal aspect of Article 6, they can still influence the ways of their application, see *Menarini*, *supra* note 111, at paragraph 62.

<sup>135</sup> *Menarini*, *supra* note 111, at paragraph 59.

<sup>136</sup> *Id.*, at paragraphs 63-67. See however strong dissent by Judge Pinto de Albuquerque. *Menarini* questioned that the legality review exercised by Italian courts (under which the courts were checking the qualification of facts to law) did not cover factual determinations that were a central issue in the case (*Menarini*, paragraphs 13-17). For a comment see for example Marco Bronckers, Anne Vallery, *Fair and Effective Competition Policy in the EU: which Role for Authorities and which Role for the Courts After Menarini*, 8 *European Competition Journal*, 283, 285-289 (2012).



and subsequently Council of State) could determine whether, in relation to the particular circumstances of the case, the competition authority had made proper use of his powers. They were able to examine the validity and proportionality of the administrative decision and even check technical assessments. In the instant case various allegations of fact and law were also analyzed and so the evidence collected was assessed. The ECtHR was satisfied with the judicial review in this particular case and so did not answer in complex way the question what is the required scope of judicial review of administration's discretionary powers<sup>137</sup> and whether any deference for competition authority's determination is permissible in a view that this is a specialized area of law that requires expert knowledge and involves the use of discretion. *Bryan/Tsfayo* rationale did not find application even implicitly.<sup>138</sup>

**3.5.** The ECtHR has established also the standards of judicial review of penalties imposed by the administrative authorities. *Silvester's Horeca Service*, *Menarini*, *Segame* and *Grande Stevens* cases show that under the principle of full jurisdiction the courts reviewing administrative authority's decision imposing fines should have a power both to lower and annul it. Very little suggest that the ECtHR may be ready to accept a deferential standard of review in this respect.

In *Silvester's Horeca Service* the Court of Appeal of Brussels was only called upon to examine the reality of offenses of VAT and review the legality of tax penalties claimed, without being competent to assess whether or grant a full or partial waiver thereof. It could "relieve the debtor of the obligations are legally imposed by the authorities, only for reasons of expediency or fairness".<sup>139</sup> Such review was found by the ECtHR not to be satisfactory from Article 6 point of view.<sup>140</sup>

Conversely, the ECtHR found the review of fines to be sufficient in *Segame*<sup>141</sup>, *Menarini*<sup>142</sup> and *Grande Stevens*.<sup>143</sup> In *Segame* the ECtHR observed that the applicant

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<sup>137</sup> The ECtHR was satisfied with the Council of State opinion that the Italian courts may control whether the administration has made proper use of its discretionary powers (even if they may not substitute its opinion for this of administration), see *Menarini*, *supra* note 111, at paragraphs 53 and 63.

<sup>138</sup> Andreas Scordamaglia-Tousis seems to have a different opinion in this respect, see Andreas Scordamaglia-Tousis, *supra* note 32, at 149.

<sup>139</sup> *Silvester's Horeca Service*, *supra* note 129, at paragraph 28.

<sup>140</sup> *Id.*, at paragraphs 28, 30. See also the ECtHR judgement of 26 September 1995 in *Diennet v. France*, no. 18160/91, paragraph 34 ("Conseil d'Etat (...) cannot be regarded as a "judicial body that has full jurisdiction", in particular because it does not have the power to assess whether the penalty was proportionate to the misconduct".)

<sup>141</sup> *Segame*, *supra* note 131, at 56-59.

<sup>142</sup> *Menarini*, *supra* note 111, at paragraphs 65-66.

<sup>143</sup> *Grande Stevens*, *supra* note 113, at 149 (The Court of Appeal "was also called upon to assess the proportionality of sanctions in relation to the seriousness of the alleged conduct. In fact, it has also reduced the amount of fines and the duration of the ban imposed for certain applicants (...) and examined their various allegations of legal or factual.")

company was able to lodge an application with the administrative court to be exempted from paying the additional tax and the fines<sup>144</sup>. The administrative court had broad powers and full jurisdiction to assess all the elements of fact and law and could not only quash or uphold an administrative decision, but also change it or replace it with its own decision and rule on the rights of the interested party.<sup>145</sup> It could exempt the taxpayer from the disputed taxes and penalties or modify the amount thereof within the limits prescribed by law, and where penalties were concerned, it could lower the rate within the limits of the applicable legal provisions.<sup>146</sup> The applicant could also discuss before the court the base used to calculate the tax in order to persuade the administrative court to reduce it.<sup>147</sup> However, interestingly for competition law context, the ECtHR accepted the system where the fiscal fine is expressed as a percentage of the unpaid tax.<sup>148</sup> In the opinion of the ECtHR such a system is needed for fiscal measures to be sufficiently effective to preserve the interests of the State.<sup>149</sup> It is also permissible on the grounds that “such cases differ from the hard core of criminal law for the purposes of the Convention”.<sup>150</sup>

In *Menarini* the ECtHR relied also on *Silvester's Horeca Service* and found that—correctly—Italian courts have full jurisdiction over the penalty imposed as they could verify its appropriateness and if needed change it. The ECtHR observed that indeed the courts engaged in a detailed analysis of the proportionality of the sanction itself. Similar situation appeared in *Grand Stevens*. The ECtHR observed that the reviewing court was called upon to assess the proportionality of sanctions in relation to the seriousness of the alleged conduct and confirmatively noted that it has also reduced the amount of fines and the duration of the ban imposed for certain applicants.<sup>151</sup>

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<sup>144</sup> *Segame*, *supra* note 131, at paragraphs 56.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*, at paragraph 57.

<sup>148</sup> The applicant was complaining that in such a system the administrative courts did not have the power to vary the fiscal fine in the absence of any legal provision to that effect (*id.* at paragraph 58) The ECtHR answered “that the law itself, to a certain degree, makes the fine proportionate to the seriousness of the taxpayer’s conduct, by expressing it as a percentage of the unpaid tax, the calculation of which the applicant company had ample opportunity to discuss in this case” (*id.* at paragraph 59).

<sup>149</sup> *Id.*, at paragraph 59.

<sup>150</sup> *Id.*

<sup>151</sup> *Grande Stevens*, *supra* note 113, at 149. In *Sigma* (case decided under Article 6 civil head) the ECtHR was not assessing the compatibility of the review of fines with the requirements of Article 6 ECHR. However, it was content to observe that the Cyprus Supreme Court has the competence to examine the necessity and proportionality of the fines (*Sigma*, *supra* note 103, at 168).

## **4. Assessment and recommendations**

**4.1.** The question about permissibility of deferential review in the EU competition law in the light of requirements of Article 6 of the ECHR is complex. Slightly different conclusions stem from the ECtHR's jurisprudence in administrative cases classified as civil and from administrative cases classified as criminal. Using standards from civil line of jurisprudence in discussion about required scope of judicial review in administrative cases qualified as criminal (such as cases dealt with in EU Article 101-102 TFEU infringement proceedings) even if inspiring for a discussion may not always bring fully precise conclusions.

**4.2.** In administrative proceedings concerning civil rights or obligations deferential standard of review is permissible in particular if (1) subject matter of the decision involves a specialized issue requiring professional knowledge or experience and the exercise of administrative discretion or concern policy matters in the specialized area of law; (2) administrative proceedings offer many of Article 6 safeguards and the decision is delivered by the authority that is impartial and independent. The more of these elements are present (for example the more quasi-judicial the process before the administrative authority is) the more likely it is that the ECtHR will be satisfied with the limited standard of review. The ECtHR might even accept the review where the courts check only whether the administrative authority's factual finding or the inferences based on them were neither perverse nor irrational. In any case, however, the court must be empowered to determine the central issue in dispute and have a power to remand the case to the administrative authority. Thus we may conclude that there is a floor for deference when it comes to administrative cases influencing individual's civil rights or obligation. From the ECHR perspective judicial review in case of competition authorities' mergers or commitment decisions can be more limited than in case of competition authorities decisions that impose fines for a violation of the prohibition of practices restricting competition.

**4.3.** In administrative cases classified as criminal (Article 101-102 infringement proceedings concern such cases) the ECtHR never directly suggested that limitations in the standard of review may be justified in the view of subject matter of the decision (professional knowledge or exercise of administrative discretion) or because of specialized area of law being involved. Instead, the ECtHR on many occasions held that the decision of an administrative authority that does not fulfill itself the conditions of Article 6 of the ECHR must be subject to subsequent control by a court that has full jurisdiction: a court that has a power to quash in all respects, in fact or in law, decision rendered by the administrative authority. Such court must in particular have jurisdiction to address all issues of fact and law relevant to the case before it

as well as actually assess not only legal issues but also factual ones. Additionally full review of penalty is required including the court power to assess its proportionality and power to modify its amount (within the limits prescribed by law) or to annul it.

In practice however, the ECtHR accepts quite limited standard of review of administrative decisions in criminal cases. It does not expect full rehearing of the evidence and does not require that the courts to have a power to substitute its own view for this of the administrative authority. It rather takes case by case approach and sees its task mainly as a control over the sufficiency of the judicial review in the case under complaint. Thus in some instances (for example in *Menarini*) it accepts a review that is formally limited to legal questions if in fact it goes further so as the evidentiary issues are also reviewed.<sup>152</sup>

It is doubtful whether in criminal cases the ECtHR will start using directly the *Bryan/Tsfayo* test so as to agree for the limitations of judicial review on the basis on the subject-matter of the decision appealed against. However, it is not impossible to reject a possibility that such factors will indirectly play a role in ECtHR's acceptance of a more lenient standard of review in particular criminal case under complaint.<sup>153</sup> On the other hand it is well-justified to claim that quite limited standard of review in criminal cases will be seen by the ECtHR to be in accordance with Article 6 of the ECHR if many of Article 6 safeguards will be present during the administrative phase of the proceedings. In *Menarini* the fact that Italian competition authority was considered by the ECtHR to be independent might have played a role in the reasoning in this case.<sup>154</sup> More interestingly, different result would have been reached by the ECtHR in *Grande Stevens* if the prosecutorial and adjudicative functions had been more separated during administrative phase of proceedings<sup>155</sup> or if the applicant had had an access to oral hearing during administrative phase of proceedings.<sup>156</sup>

**4.4.** Even if we assess the EU courts judicial review on the basis of Article 6 standard applicable in criminal cases we may quite comfortably conclude that in many cases the EU courts have exercised the judicial review in accordance with Article 6 requirements. The ECtHR is very rarely ready to condemn a given model of judicial review as such.<sup>157</sup> All

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<sup>152</sup> See the concurring opinion of Judge Andras Sajó in *Menarini*, *supra* note 111.

<sup>153</sup> Probably in *Sigma* the ECtHR would have reached the same conclusion as to the sufficiency of judicial review if the case reviewed had been classified as criminal in a sense of Article of the ECHR.

<sup>154</sup> *Menarini*, *supra* note 111, at paragraph 40.

<sup>155</sup> *Grande Stevens*, *supra* note 113, at paragraphs 122-123 and 136-137.

<sup>156</sup> *Id.*, at paragraphs 122-123. In *Grande Stevens* lack of access to oral hearing during administrative phase of proceedings or during the proceedings before the court the exercised full jurisdiction over the administrative proceedings combined with the lack of objective impartiality during the administrative proceedings led the ECtHR to the conclusion that Article 6 of the ECHR was violated in this case.

<sup>157</sup> The only example of such situation is the line of ECtHR's judgments in Austrian cases invoked above in which the ECtHR found that very limited review of Austrian administrative courts does not pass Article 6 test.

depends on how in the case under complaint the court exercised their reviewing powers. The ECtHR is not concerned so much about formal qualification of the review (such as limited or legality review). Thus the fact that the EU Courts keep on holding that the EU Courts have a margin of discretion with regard to economic or technical matters does not seem to be problematic as long as the EU courts follow in the case at stake their self-imposed obligation to establish whether the evidence relied on by the Commission is factually accurate, reliable and consistent and 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.

Lack of such close look would still be found by the ECtHR to be permissible in case of commitment proceedings as it is possible for the Commission to invoke *Bryan/Sigma* standard and claim that subject matter of the commitment decision involves a specialized issue requiring professional knowledge or experience and the exercise of administrative discretion. Thus even very deferential approach presented by the CJEU in *Alrosa* could possibly pass the test of Article 6 of the ECHR on condition that the ECtHR concluded that sufficient procedural safeguards had been provided during the administrative proceedings before the Commission and that still the EU Courts had reviewed a central issue of the case.<sup>158</sup>

What seems to be the most problematic from Article 6 of the ECHR point of view is the deferential standard of review in the field of fines. Again, the formal unlimited jurisdiction provided in Article 31 of Regulation 1/2003 if not exercised in practice will not prevent the ECtHR from finding a violation of Article 6 of the ECHR. However, such scenario does not seem very likely in the light of *Grande Stevens* in all cases where the GC uses its powers to correct the amount of fine imposed by the Commission.<sup>159</sup> Also in cases where the amount remain unchanged the EU Courts will probably be satisfied with the scope of judicial review as long as the EU Courts deeply review the facts that bring the Commission to the conclusion that given amount of fine is appropriate in the given case and so will control the proportionality of the fine.<sup>160</sup> It seems also that even these areas of Commission fining policy

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<sup>158</sup> EU Commitment proceedings are criticized for insufficient guarantees of right to be heard, see for instance Nicolò Zingales, *Towards a Fair and Balanced System of Antitrust Commitments: Safeguards for the Pursuit of the Public Interest in Accordance with the Rule of Law*, ASCOLA Conference Paper (2014).

<sup>159</sup> The General Court pretty often reduces the fine imposed by the Commission in cartel cases especially in consequence of the Commission's wrongful assessment of the duration of the cartel, see the data provided by Andreas Scordamaglia-Tousis, *supra* note 32, at 431-446.

<sup>160</sup> *Chalkor*, *supra* note 50, at paragraph 62 ("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-

where the EU Courts directly admit the existence of the Commission discretion the judicial review could be found by the ECtHR to satisfy Article 6 requirements. In *Siemens Österreich* the General Court after admitting the existence of the Commission has a broad discretion in assessing whether the evidence provided by the leniency applicant represents added value<sup>161</sup> in fact did not refrain from controlling whether the Commission's decisions shows that in the instant case the information provided did not in fact added any significant value.<sup>162</sup> Such review would most probably satisfy the ECtHR. In the very end the defense of the EU judicial review before the ECtHR could rely on *Segame* and claim that certain limitation in judicial review of fines in the competition law field falling out the scope of hard core of criminal law is needed for the competition law system to be effective.<sup>163</sup>

**4.5.** As U.S. experience proves some deference left to administrative authorities may enable them to conduct the enforcement policy that answers to new market developments and changing economic conditions that might influence free market economy.<sup>164</sup> On the other hand very aggressive judicial review of competition agency's decisions may in certain instances put at risk correct enforcement priorities in the field of competition law.<sup>165</sup> There is a need for such construction of judicial review that both safeguards parties' rights to fair trial and takes into account arguments in favor of deference. The ECHR standards of judicial review seem to answer correctly to such needs. The ECtHR does not require *de novo* rehearing of evidence before the court and in many occasions accepts quite limited review of administrative authorities' decisions.

The ECtHR acceptance of limited review depends on whether procedural safeguards are provided during the administrative phase of proceedings. There is a place for improvement in this respect when it comes to the proceedings before the Commission. Especially greater division of prosecutorial and adjudicative function is needed so as the

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depth review of the law and of the facts"); see also *Schindler*, *supra* note 82, at paragraph 38. Compare Pieter Van Cleynenbreugel, *supra* note 40, at 532.

<sup>161</sup> *Siemens Österreich*, *supra* note 74, at paragraph 221.

<sup>162</sup> *Id.*, paragraphs 224-225 (" (...) The only instance in which the Commission expressly referred to the declaration made by the VA Tech Group pursuant to the Leniency Notice was in relation to the fact that several GIS project packages in and outside Europe were discussed between October 2002 and February 2004. Even supposing the applicants were justified in claiming that it is because of them that the Commission gained access for the first time to the distinction made, as of 2002, between European project packages, referred to as 'EP', and other project packages, referred to as 'P', the added value of that information cannot be classed as significant for the purposes of point 21 of the Leniency Notice".)

<sup>163</sup> Compare *Segame*, *supra* note 131, at paragraph 59.

<sup>164</sup> Maciej Bernatt, *Explaining Paradoxes: Judicial Deference in Public Enforcement of Competition Law in U.S. and the EU*, Working Paper, available at request.

<sup>165</sup> *Id.*

objective impartiality is guaranteed.<sup>166</sup> In *Menarini*—the case used very often in defense of the correctness of the model of the proceedings before the Commission—the ECtHR was not dealing with the question of impartiality of Italian competition authority.<sup>167</sup> The focus was on the sufficiency of judicial review. Instead, in subsequent *Grande Stevens* the ECtHR found that the guarantees of impartiality in the proceedings before Italian Companies and Stock Exchange Commission were insufficient<sup>168</sup> what combined with lack of access to public, oral hearing both before the administrative authority and the reviewing court brought the ECtHR to the conclusion that Article 6 of the ECHR was violated.<sup>169</sup> Taking into account this judgment one could recommend further improvements of decision-making process in the proceedings before the Commission.<sup>170</sup> The reading of *Grande Stevens* may suggest that the lack of objective impartiality combined with lack of direct access to the decision-maker at oral hearing<sup>171</sup> and other, further limitation of right to fair trial in the case under complaint (for instance lack of possibility to cross-examine the Commission’s witness<sup>172</sup>) could bring the ECtHR to conclusion that the EU violated Article 6 of the ECHR even if the judicial review exercised by the EU courts was found by the ECtHR to be sufficient. Even if likelihood that ECtHR finds a violation of ECHR in the future is limited the EU should consider undertaking reforms that would further minimize such risk. Potential clash with ECHR system even in a single case could undermine the legitimacy of competition law enforcement system in the EU as a whole and so diminish its effectiveness with adverse effects for consumers.

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<sup>166</sup> Compare Renato Nazzini, *supra* note 43, at 1002-1003. For different opinion see Wouter Wils, *The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis*, 27 *World Competition* 201 (2004), available at <http://ssrn.com/abstract=1319251>, at 24-25.

<sup>167</sup> Maciej Bernatt, *supra* note 22, at 274.

<sup>168</sup> For similar conclusion see *Dubus*, *supra* note 111, at paragraphs 58-60.

<sup>169</sup> *Grande Stevens*, *supra* note 113, at paragraphs 122-123 and 136-137.

<sup>170</sup> For a proposal of distinguishing two units: one responsible for investigation and the other for preparing the draft of the decision see Arianna Andreangeli, *supra* note 39, at 240–243. Compare also the proposal of establishing an adjudication unit outside the Directorate-General for Competition that would report directly to the Commissioner for competition, Renato Nazzini, *supra* note 43, at 1002.

<sup>171</sup> Neither the Commissioner responsible for the competition nor other commissioners are present at the oral hearing, see the Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ C 308/06, 20.10.2011, paragraph 108. The oral hearing is also not public. For comment see Ian S. Forrester, *supra* note 133, at 823 and 833–834.

<sup>172</sup> Under the EU principle of defence there is no requirement that undertakings concerned should be afforded, in the administrative procedure, the opportunity to cross-examine the witnesses heard by the Commission (see *Aalborg Portland*, *supra* note 49, at paragraph 200). For this reason the undertakings complaints in this respect based on Article 6(3)(d) of the ECHR are rejected by the EU Courts, see *Siemens Österreich*, *supra* note 74, paragraphs 229-235.

## **5. Conclusion**

Analysis of the ECtHR jurisprudence leads to conclusion that current practice of reviewing of EU Commission's decisions in the field of competition law by the EU Courts is not very likely to be found by the ECtHR in violation of Article 6 of the ECHR after the EU accesses to the ECHR. Nevertheless, there is a place for improvements of administrative process before the Commission so as Article 6 safeguards are more broadly guaranteed. Further studies of comparative character seems indispensable to answer the question whether—in the light of functions of deference—the deferential standard of review of competition authorities' decisions may be beneficial for the effective enforcement of competition law. Confirmation of such thesis would provide for yet another argument for maintaining a current model of judicial review in the EU.