EU competition law's fair trial revolution: much ado about nothing?

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Competition law; European Court of Human Rights; Judicial review; Margin of appreciation; National competition authorities; Right to fair trial

1. Introduction

In the last decade, the right to fair trial came to be one of the central issues of EU competition law discourse. This can be attributed to the adoption of the Charter of Fundamental Rights (which was elevated to the level of the founding treaties). Although the "constitutionalisation" of fundamental rights should not have necessarily entailed any substantive change, since the CJEU has always read the protection of human rights into EU law,[1] it still brought human rights requirements to the fore and competition law is no exception.

The discourse on the right to fair trial in competition proceedings was given a huge boost by the ECtHR's recent judgments (such as *Menarini*,[2] *Delta Pekárny*[3]), which corroded traditional doctrines and notions. For instance, the judgment in *Delta Pekárny* casts a shadow on national systems where dawn raids are not subject to prior judicial authorisation; in *Menarini*, the ECtHR considered the exclusion of the power of *de novo* judicial review to fall foul of the ECHR.

This article addresses an important facet of the judicial review of competition authorities' decisions. It gives a brief overview of the general administrative law models on the status of margin of appreciation in judicial review. In other words, it gives a concise introduction into the *ancien régime*. This is followed by an analysis of the recent judgments of the ECtHR and CJEU. The requirement of fair trial in the context of antitrust law was addressed by the ECtHR in *Menarini* and by the CJEU in *KME (industrial tubes)*,[4] *Chalkor*[5] and *KME (copper plumbing tubes)*.[6] These cases redefined the standard of review.[7] The article ends with the author's conclusions and proposals.

In this article it is argued that although the "fair trial revolution" did bring about a judicial review standard enabling closer examination, complex economic matters slipped through the net of judicial scrutiny. It is doubtful whether after the "fair trial revolution" complex economic issues will be subject to a stricter treatment than they were in the *ancien régime*. Furthermore, it is argued that the new EU standard is not fully in line with the ECtHR's *Menarini* judgment: the Commission still has a margin of appreciation in cases involving complex economic issues; although this has no practical relevance in hardcore cartel cases, it may have a pivotal role in quite a few other matters (concerted practices, abuse of dominant position) which are similarly considered to be criminal in nature.

2. The ancien régime of judicial review: the competition authority's margin of appreciation

The national competition authority's margin of appreciation, in essence, may be traced back to two main causes. First, while the executive has to operate within the frame established by the law, it does have certain prerogatives of policy-formation. Courts may intervene only if it transgresses these limits but may not interfere with the executive's decision on how to use its powers within the limits of the law. Secondly, while courts have the legal monopoly to interpret the law, they lack the expertise and resources to adjudicate non-legal issues; hence, provided they are independent and trustworthy, expert administrative agencies are better placed to assess complex non-legal issues than courts. Of course, courts may use experts to address non-legal issues in legal proceedings, however, it appears to be an imperfect solution to subordinate the expert administrative agency's assessment to a court-appointed expert in cases hinging on economic issues. This tenet certainly does not restrict courts in filtering the activity of administrative agencies from the perspective of legality. However, it seems to be perverse to vest courts with a competence they cannot fully exercise.

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[1] *Testa v Bundesanstalt für Arbeit, Nuremberg* (41/79) [1981] E.C.R. 1979; [1981] 2 C.M.L.R. 552 at [18].

[2] *A Menarini Diagnostics SRL v Italy* (43509/08), judgment of 27 September 2011.

[3] *Delta Pekárny AS v Czech Republic* (97/11), judgment of 2 October 2014.

[4] *KME Germany AG v European Commission* (C-272/09 P) [2012] 4 C.M.L.R. 8 (*industrial tubes*).

[5] *Chalkor AE Epexergasias Metallon v European Commission* (C-386/10 P) [2012] 4 C.M.L.R. 9.

[6] *KME Germany AG v European Commission* (C-389/10 P) [2012] 4 C.M.L.R. 1 (*copper plumbing tubes*).

[7] See, e.g. Igor Nikolic, "Full judicial review of antitrust cases after KME: a new formula of review?" [2012] E.C.L.R. 587. The EFTA Court did this in *Posten Norge AS v EFTA Surveillance Authority* (E-15/10) [2012] 4 C.M.L.R. 29 at [84]–[102].

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The administrative agencies' margin of appreciation may be examined on four levels: abstract interpretation of the law, fact pattern, subsumption (application of the general legal test to the facts of the case) and expert questions.

The first and foremost question is who should define the general terms of competition law. For instance, in US antitrust law, due to the *Chevron* doctrine,[8] administrative agencies may have a legally recognised leeway, albeit this seems to be fairly restricted in antitrust matters.[9] In German competition law, courts have unlimited power as to the construction of the law.[10] The same holds true for EU competition law.[11]

The comparative models vary as to fact-finding. For example, in US antitrust law, as a general rule, the "substantial evidence" test is used.[12] The traditional approach of EU competition law, at least theoretically, enabled the court to carry out an unlimited review, however, the aspects of this review were fixed. EU courts inspected the legality of the procedure, including the question of whether the Commission established the facts appropriately and whether or not it carried out all the necessary examinations.[13] German competition law follows a peculiar approach in that it vests courts with full review power.[14]

It is generally accepted that administrative agencies have some sort of a margin of appreciation as to the application of the general legal test to concrete cases (subsumption). The general standard of review is that the court may not replace the agency's decision with its own opinion. It may inquire whether the agency's assessment is reasonable but may not carry out a *de novo* review. If there is more than one reasonable answer to a question, the administrative agency may choose any of these. The court cannot quash the decision merely because it would have decided otherwise. Nonetheless, German law, especially in competition matters, has a much more stringent standard.[15]

Complex economic issues are normally subject to special treatment, since this is the point where generalist courts lack the special expertise expert administrative agencies are supposed to have. In *Woodpulp*[16] the CJEU employed experts but made their analysis part of its legal assessment. In *Remia*,[17] in relation to the appraisal of complex economic matters (in this case, "determining the permissible duration of a non-competition clause incorporated in an agreement for the transfer of an undertaking"), the CJEU held that

> "[t]he Court must (…) limit its review of such an appraisal to verifying whether the relevant procedural rules have been complied with, whether the statement of the reasons for the decision is adequate, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or a misuse of powers."[18]

3. The ECtHR's Menarini judgment: adversarial proceeding or full-blown judicial review

In *Menarini*, the Italian competition authority imposed a fine in value of €6 million for price-fixing and market-sharing. Menarini, after its appeal was rejected, had recourse to the ECtHR with reference to the violation of the right to fair trial. Its claim was based on the argument that Italian courts could not and did not exercise full review; they had no power to review the merits of the case or to engage in fact-finding.

The ECtHR, in consideration of the weight of the penalty, regarded the matter as criminal in nature.[19] It should be added that the jurisprudence of the ECtHR distinguishes between criminal and criminal-like sanctions

[8] *Chevron USA v NRDC* 467 U.S. 837, *FTC v Indiana Federation of Dentists* 476 U.S. 447, 454. See D. Bruce Hoffman and M. Sean Royall, "Administrative litigation at the FTC: past, present, and future" (2003) 71 *Antitrust Law Journal* 324, Justin Hurwitz, "Chevron and the limits of administrative antitrust" (2014) 76 *University of Pittsburgh Law Review* 209, Royce Zeisler, "Chevron deference and the FTC: how and why the FTC should use Chevron to improve antitrust enforcement" (2014) (1) *Columbia Business Law Review* 266.

[9] James Campbell Cooper, "The perils of excessive discretion: the elusive meaning of unfairness in Section 5 of the FTC Act" (2015) 3(1) *Journal of Antitrust Enforcement* 93.

[10] See Thomas von Danwitz, "Europäisches Verwaltungsrecht. Enzyklopädie der Rechts- und Staatswissenschaft 28" (Springer, Berlin & Heidelberg 2008), BVerfGE 15, 275 (282), BVerfGE 64, 261 (279), BVerfGE 88, 40 (56), BVerfGE 101, 106 (123), BVerfGE 103, 142 (156).

[11] Obviously, the CJEU established general legal tests in numerous cases without any hint of self-restraint. See, e.g. *General Motors Continental NV v Commission of the European Communities* (26/75) [1975] E.C.R. 1367; [1976] 1 C.M.L.R. 95, *United Brands Co v Commission of the European Communities* (27/76) [1978] E.C.R. 207; [1978] 1 C.M.L.R. 429, *IMS Health GmbH & Co OHG v NDC Health GmbH & Co KG* (C-418/01) [2004] E.C.R. I-5039; [2004] 4 C.M.L.R. 28, *Tetra Pak International SA v Commission of the European Communities* (C-333/94 P) [1996] E.C.R. I-5951; [1997] 4 C.M.L.R. 662.

[12] *Ash Grove Cement Co v FTC* 577 F.2d 1368, 1378 (9th Cir. 1978), *RSR Corp v FTC* 602 F.2d 1317, 1320 (1979).

[13] See Damien Geradin and Nicolas Petit, "Judicial Remedies under EC Competition Law: Complex Issues Arising from the Modernization Process" Fordham Corporate Law, 2005, p.27, *http://ssrn.com/abstract=877967* [Accessed 31 March 2016], Maciej Bernatt, "Transatlantic Perspective on Judicial Deference in Administrative Law", Institute for Consumer Antitrust Studies Working Papers, Loyola University Chicago, 20 August 2015, pp.28–31, forthcoming in (2016) 22 *Columbia Journal of European Law*, *http://ssrn.com/abstract=2648232* [Accessed 31 March 2016].

[14] See Mahendra P. Singh, *German Administrative Law in common law perspective* (Berling & Heidelberg & New York & Tokyo: Springer-Verlag, 1985), p.77, Konrad Redeker, Hans-Joachim Oertzen, Martin Redeker, Peter Kothe and Helmuth von Nicolai, *Verwaltungsgerichtsordnung* (Stuttgart: Verlag W. Kohlhammer, 2004), p.850, Klaus Rennert, § 114, in *Verwaltungsgerichtsordnung* (München: Verlag C.H. Beck, 2006), pp.952–953, Heinrich Amadeus Wolff, § 114, in *Verwaltungsgerichtsordnung* (Baden-Baden: Nomos, 2006), p.2106.

[15] Karsten Schmidt, § 70, in Ulrich Immenga and Ernst-Joachim Mestmäcker (eds), GWB. *Gesetz gegen Wettbewerbsbeschränkungen* (München: C.H. Beck, 1992), pp.1944–1945, Jürgen Kollmorgen, § 71, in *Kommentar zum deutschen und europäischen Kartellrecht* (Eugen Langen & Hermann-Josef Bunte, Luchterhand, Neuwied & Kriftel 2001), pp.1250–1251, Frank Immenga, "Kap. 9. Kartellverfahren", in *Handbuch zum deutschen und europäischen Kartellrecht 721* (Frankfurt am Main: Knut Werner Lange, Verlag Recht und Wirtschaft GmbH, 2006), Rainer Bechtold, § 71, in *Kartellgesetz. Gesetz gegen Wettbewerbsbeschränkungen 500* (München: C.H. Beck, 2006), Stephanie Birmanns, § 71, in *Frankfurter Kommentar zum Kartellrecht* (Köln: Verlag Dr. Otto Schmidt Köln, 2006), pp.22–23.

[16] *A Ahlstrom Osakeyhtio v Commission of the European Communities* (C-89/85) [1993] E.C.R. I-1307; [1993] 4 C.M.L.R. 407.

[17] *Remia BV v Commission of the European Communities* [1985] E.C.R. 2545; [1987] 1 C.M.L.R. 1.

[18] *Remia* [1985] E.C.R. 2545 at [34].

[19] *Remia* [1985] E.C.R. 2545 at [34]–[41].

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and subjects them to disparate requirements.[20] As a corollary, the ECtHR established that the principle of full adversarial proceeding accruing from art.6 has to prevail in at least one point of the competition proceeding.[21]

If the principal proceeding is judicial or quasi-judicial in nature, where the requirements of the adversarial proceeding and equality of arms are met and where the function of "prosecution" and the function of "decision-making on the merits" are separated, the requirements of art.6 may be fulfilled.[22] In case the principal proceeding is adversarial in nature, a more relaxed judicial review may suffice. In other words, if the first decision in the competition matter is rendered as a result of a judicial or quasi-judicial proceeding, no full-blown review is required and a more deferential approach may be acceptable. This may be the case if the structure of the competition procedure follows the "split" model, where the function of "investigation" and "prosecution", on the one hand, and the function of "decision-making on the merits" (both as to fact-finding and legal interpretation), on the other, are separated. In this structure, the adjudicator may be a court (as, for instance, in Austria,[23] Finland[24] and Sweden)[25] or an administrative tribunal that is considered, due to its independence and status, to be judicial-like.

If the competition procedure follows the "unitary" model, where in the principal proceeding the functions of investigation, prosecution, and adjudication are united in one entity (as is normally the case in continental Europe), the centre of gravity of the right to fair trial shifts to the phase of judicial review.[26] In such cases, the right to fair trial is ensured only if the reviewing court has full jurisdiction to carry out a comprehensive, full-fledged review.[27] That is, its review powers should not be subject to (any) restriction: it shall review both factual and legal questions and have the power to carry out a *de novo* review and to second-guess the competition authority's factual assessment and legal interpretation.[28]

4. The new age of judicial review in EU competition matters?

The requirement of fair trial in the context of antitrust law was addressed by the CJEU in *KME (industrial tubes)*,[29] *Chalkor*[30] and *KME (copper plumbing tubes)*.[31] These cases redefined the standard of review.

In EU competition law,[32] the standard of review is primarily defined in art.263 TFEU: the basis of judicial review is "legality"; this is supplemented by art.261 TFEU, which provides that as regards administrative fines the CJEU may be vested with full review powers.[33] On the basis of this authorisation, art.31 of Regulation 1/2003 conferred on the CJEU an "unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment." The Court "may cancel, reduce or increase the fine or periodic penalty payment imposed."

Article 47 of the Charter of Fundamental Rights enshrines the right to an effective remedy and to fair trial; and the Charter applies to EU institutions and to Member States "when they are implementing Union law",[34] that is, NCAs come under the scope of the Charter when they apply EU competition rules.

The CJEU addressed the question of fair trial in the context of competition proceedings in three recent judgments. These judgments were nearly identical in terms of substance and were rendered on the very same day (8 December 2011): *KME (industrial tubes)*, *Chalkor*, and *KME (copper plumbing tubes)*.

In these cases, the Court held that although the Commission does have a margin of appreciation in complex economic questions, this does not mean that the review powers of EU courts are incomprehensive:

> "As regards the review of legality, the Court of Justice has held that whilst, in areas giving rise to complex economic assessments, the Commission has a margin of discretion with regard to economic matters, that does not mean that the Courts of the European Union must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must those Courts

[20] *Jussila v France* (2007) 45 E.H.R.R. 39 at [43].
[21] See Heike Schweitzer, "Judicial Review in EU Competition Law" in Damien Geradin and Ioannis Lianos (eds), *Research Handbook on EU Antitrust Law* (Edward Elgar Publishing, forthcoming), pp.24–25, fn.116, *http://ssrn.com/abstract=2129147* [Accessed 31 March 2016].
[22] Cf. Pieter Van Cleynenbreugel, "Constitutionalizing Comprehensively Tailored Judicial Review in EU Competition Law" (2012) 18 *Columbia Journal of European Law* 519, 541. ("One of the essential aims of judicial review as perceived by Article 6 ECHR in these types of cases is to compensate for the lack of full-fledged adversarial debate at the administrative level.")
[23] *Bundesgesetz gegen Kartelle und andere Wettbewerbsbeschränkungen* (Kartellgesetz 2005 — KartG 2005).
[24] Finnish Competition Act (948/2011). See Mikael Wahlbeck, Antti Järvinen and Katja Jaakkola, Finland, in *Cartel Regulation 2016 - Getting the Deal Through* 69, para.2 (Law Business Research 2016).
[25] Tommy Pettersson, Johan Carle and Stefan Perván Lindeborg, Sweden, in *Cartel Regulation — Getting the Deal Through* 219, point 2 (Law Business Research 2014).
[26] Wouter P.J. Wils, "The Compatibility with Fundamental Rights of the EU Antitrust Enforcement System in Which the European Commission Acts Both as Investigator and as First-Instance Decision Maker" (2014) 37(1) *World Competition: Law and Economics Review*, King's College London Law School Research Paper No.2014-21, 2–3, 6–7, *http://ssrn.com/abstract=2363440* [Accessed 31 March 2016].
[27] Cf. Renato Nazzini, "Judicial review after KME: an even stronger case for the reform that will never be" (2015) 40(4) *European Law Review* 490, 507. Contra Pieter Van Cleynenbreugel, "Constitutionalizing Comprehensively Tailored Judicial Review in EU Competition Law" (2012) 18 *Columbia Journal of European Law* 519, 538 ("The particular interpretation granted to 'full jurisdiction' in Menarini demonstrates that the ECHR does not mandate unlimited jurisdiction as a minimum review standard.").
[28] *Menarini* (43509/08) at [59].
[29] *KME (industrial tubes)* [2012] 4 C.M.L.R. 8.
[30] *Chalkor* [2012] 4 C.M.L.R. 9.
[31] *KME (copper plumbing tubes)* [2012] 4 C.M.L.R. 1.
[32] In general, see José Carlos Laguna de Paz, "Understanding the limits of judicial review in European competition law" (2014) 2(1) *Journal of Antitrust Enforcement* 203.
[33] "Regulations adopted jointly by the European Parliament and the Council, and by the Council, pursuant to the provisions of the Treaties, may give the Court of Justice of the European Union unlimited jurisdiction with regard to the penalties provided for in such regulations."
[34] Article 51 of the Charter of Fundamental Rights.

> 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.[35]
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> In carrying out such a review [of legality], the Courts cannot use the Commission's margin of discretion — either as regards the choice of factors taken into account in the application of the criteria mentioned in the Guidelines or as regards the assessment of those factors — as a basis for dispensing with the conduct of an in-depth review of the law and of the facts."[36]

Specifically as to the setting and the review of the fine, the Court stressed that EU courts have unlimited jurisdiction. This is certainly not a novel development, taking into account that in relation to fines both the TFEU and Regulation 1/2003 enshrine the principle of unlimited review powers:

> "The review of legality is supplemented by the unlimited jurisdiction which the Courts of the European Union were afforded by Article 17 of Regulation No 17 and which is now recognised by Article 31 of Regulation No 1/2003, in accordance with Article 261 TFEU. That jurisdiction empowers the Courts, in addition to carrying out a mere review of the lawfulness of the penalty, to substitute their own appraisal for the Commission's and, consequently, to cancel, reduce or increase the fine or penalty payment imposed."[37]

From the above, the CJEU drew the conclusion that the review standard of EU courts is in line with the requirements of fair trial:

> "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."[38]

The above statement of the CJEU may be criticized from various perspectives. Although the Court did not define the conditions erected by the right to fair trial embedded in art.47, if this is conceived in accord with *Menarini* and identified with full review powers, the standard of review advanced by the CJEU, aside from the review of the fine, is not capable of fulfilling the requirements emerging from art.47. Namely, when stating that "in areas giving rise to complex economic assessments, the Commission has a margin of discretion with regard to economic matters", the Court also intimated that judicial reviews cannot permeate into certain elements of Commission decisions, i.e. as to certain elements, the review power is not unconstrained and the Court cannot carry out a fully *de novo* review.[39]

The above contradiction is especially salient at the point where the CJEU tries to whitewash the GC, advancing that

> "although the General Court repeatedly referred to the 'discretion', the 'substantial margin of discretion' or the 'wide discretion' of the Commission (…), such references did not prevent the General Court from carrying out the full and unrestricted review, in law and in fact, required of it."[40]

As the CJEU put in *Chalkor*

> "it is necessary to establish whether, in the present case, the General Court carried out the requisite review, without taking account of the abstract and declaratory description of judicial review (…), since that description does not constitute a response to the pleas in law relied on by the appellant in its action and has proved not to constitute the necessary basis for the operative part of the judgment under appeal."[41]

In sum, the CJEU held that with the exception of complex economic issues EU courts have unlimited review jurisdiction. However, in regard to complex economic

[35] *KME (industrial tubes)* [2012] 4 C.M.L.R. 8 at [94], *Chalkor* [2012] 4 C.M.L.R. 9 at [54] and *KME (copper plumbing tubes)* [2012] 4 C.M.L.R. 1 at [121].
[36] *KME (industrial tubes)* [2012] 4 C.M.L.R. 8 at [62] and *KME (copper plumbing tubes)* [2012] 4 C.M.L.R. 1 at [129].
[37] *KME (industrial tubes)* [2012] 4 C.M.L.R. 8 at [103], *Chalkor* [2012] 4 C.M.L.R. 9 at [63] and *KME (copper plumbing tubes)* [2012] 4 C.M.L.R. 1 at [130].
[38] *KME (industrial tubes)* [2012] 4 C.M.L.R. 8 at [106], *Chalkor* [2012] 4 C.M.L.R. 9 at [67] and *KME (copper plumbing tubes)* [2012] 4 C.M.L.R. 1 at [133].
[39] See Ian Forrester, "A Bush in need of pruning: the luxuriant growth of light judicial review" in Claus-Dieter Ehlermann and Mel Marquis (eds), *European Competition Law Annual 2009: Evaluation of Evidence and its Judicial Review in Competition Cases* (Oxford: Hart Publishing, 2011), p.407, Renato Nazzini, "Judicial review after KME: an even stronger case for the reform that will never be" (2015) 40(4) *European Law Review* 490, 507 ("A deferential standard of review continues to apply to complex economic or technical assessments, whether such assessments are relevant to the issue of infringement or to the fine. This position is legally untenable under the current institutional structure as it sacrifices the right to effective judicial protection to considerations of efficiency and superior expertise of the administrative authority, which is a clear breach of art.47(2) EU Charter. One may predict that, over time, even this last bulwark of judicial deference to the Commission will be eroded and, eventually, a correctness standard of review will apply across the board."). Contra Andrea Usai, "How switching towards an adversarial system might make fairness and efficiency bedfellows in cartels enforcement" [2014] E.C.L.R. 542.
[40] *KME (industrial tubes)* [2012] 4 C.M.L.R. 8 at [109], *Chalkor* [2012] 4 C.M.L.R. 9 at [82] and *KME (copper plumbing tubes)* [2012] 4 C.M.L.R. 1 at [136].
[41] *Chalkor* [2012] 4 C.M.L.R. 9 at [47]. Cf. Wils, "The Compatibility with Fundamental Rights of the EU Antitrust Enforcement System in Which the European Commission Acts Both as Investigator and as First-Instance Decision Maker" (2014) 37(1) *World Competition: Law and Economics Review*, King's College London Law School Research Paper No.2014-21, 12 ("[W]hile it is essential that the General Court in fact exercises full jurisdiction, it is also important that that court is seen to exercise such jurisdiction. It would therefore be preferable for the Courts to no longer use the language of 'manifest error', 'discretion', 'margin of appreciation', 'complex economic assessments' and the like when reviewing decisions imposing fines, so as to avoid any confusion."); Pieter van Cleynenbreugel, "Efficient justice in the service of justiciable efficiency? Varieties of comprehensive judicial review in a modernised EU competition law enforcement context" (2014) 10(1) *The Competition Law Review* 35, 41 ("Rhetoric does not match results in this area of the law").

issues, the Commission does have a certain margin of discretion and EU courts must not substitute their own economic assessment for that of the Commission. Furthermore, arguably, what EU courts had done under the label of deferential review, they may do also under the label of full-blown review.

The aftermath of the *KME (industrial tubes)*, *Chalkor* and *KME (copper plumbing tubes)* triumvirate reveals that the margin of appreciation in complex economic matters remained an integral part (or integral limit) of the courts' review analysis, although it may have turned narrower. In *Groupement des cartes bancaires*, while quashing the GC's judgment for "dispensing with an in-depth review of the law and of the facts"[42] and refraining "from reviewing the Commission's legal classification of information of an economic nature",[43] the CJEU also confirmed that the Commission enjoys a margin of assessment "by virtue of the role assigned to it in relation to competition policy"[44] and that "the General Court must not substitute its own economic assessment for that of the Commission, which is institutionally responsible for making those assessments".[45] The review in this regard is confined to examining "whether the evidence relied on is factually accurate, reliable and consistent", and whether it

> "contains all the relevant 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".[46]

In other words, EU courts in economic matters shall inquire whether the Commission ascertained the relevant factors, whether it collected the relevant data, and whether it drew reasonable conclusions. In *Telefonica*,[47] the CJEU verbatim repeated the foregoing statements[48] when affirming the judgment of the GC, asserting that the GC's review did satisfy "the requirements of an unrestricted review for the purpose of Article 47 of the Charter."[49]

The argument that the CJEU's review jurisdiction is not unrestrained, hence, it does not afford the safeguards required by art.47 of the Charter, was specifically addressed in *Otis*.[50] In the principal proceeding of this preliminary ruling, the defendants argued that the EU courts' review "in the sphere of competition law is insufficient because of, inter alia, the margin of discretion which those Courts allow the Commission in economic matters."[51] The CJEU rejected this argument outright:

> "59. The Court of Justice has stated in this connection that, whilst, in areas giving rise to complex economic assessments, the Commission has a margin of discretion with regard to economic matters, that does not mean that the EU Courts must refrain from reviewing the Commission's interpretation of information of an economic nature. Those Courts must, among other things, not only establish whether the evidence relied on is factually accurate, reliable and consistent but also ascertain 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 (…).
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> 60 The EU Courts must also establish of their own motion that the Commission has stated reasons for its decision and, among other things, that it has explained the weighting and assessment of the factors taken into account (…).
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> (…)
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> 63. The review provided for by the Treaties thus involves review by the EU Courts of both the law and the facts, and means that they have the power to assess the evidence, to annul the contested decision and to alter the amount of a fine. The review of legality provided for in Article 263 TFEU, supplemented by the unlimited jurisdiction in respect of the amount of the fine, provided for in Article 31 of Regulation No 1/2003, therefore meets the requirements of the principle of effective judicial protection in Article 47 of the Charter."

Though the above standard of review might be in line with art.47 of the Charter, it clearly seems not to differ from the ancient standard (prevailing before the "fair trial revolution"), established, for instance, in *Tetra Laval*[52]:

> "Whilst the Court recognises that the Commission has a margin of discretion with regard to economic matters, that does not mean that the Community Courts must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must the Community Courts, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent

[42] *Groupement des cartes bancaires (CB) v European Commission* (C-67/13 P) EU:C:2014:2204; [2014] 5 C.M.L.R. 22 at [45].
[43] *Groupement des cartes bancaires* [2014] 5 C.M.L.R. 22 at [46].
[44] *Groupement des cartes bancaires* [2014] 5 C.M.L.R. 22 at [45].
[45] *Groupement des cartes bancaires* [2014] 5 C.M.L.R. 22 at [46].
[46] *Groupement des cartes bancaires* [2014] 5 C.M.L.R. 22 at [46].
[47] *Telefonica SA v European Commission* (C-295/12 P) EU:C:2014:2062; [2014] 5 C.M.L.R. 18.
[48] *Telefonica* [2014] 5 C.M.L.R. 18 at [54] and [56].
[49] *Telefonica* [2014] 5 C.M.L.R. 18 at [59].
[50] *European Commission v Otis NV* (C-199/11) EU:C:2012:684; [2013] 4 C.M.L.R. 4.
[51] *Otis* [2013] 4 C.M.L.R. 4 at [58].
[52] *Commission of the European Communities v Tetra Laval BV* (C-12/03 P) [2005] E.C.R. I-987; [2005] 4 C.M.L.R. 8.

> 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."[53]

As it is today, in the *ancien régime*, the CJEU essentially examined three things: whether the relevant factors were identified, whether the relevant data was collected, and whether the conclusions drawn were reasonable (that is, the question was not whether the court would have come to the very same conclusion but whether or not the conclusion itself was reasonable). In fact, the two standards are very congruent.

It is interesting to contrast the CJEU's stance with the Hungarian Supreme Court's (Kúria's) judgment in Case *Kfv.III.37.690/2013/29*,[54] where the Court was much sharper both in terms of language and substance. In short, the Kúria held that the decision of the Hungarian Competition Office (HCO) is nothing more than an "indictment", deserves no deference, and that the doctrine of margin of appreciation does not apply in this regard. The Kúria underscored, although the ECtHR's jurisprudence does know the doctrine of margin of appreciation, as established in *Menarini*, "in competition matters it does not allow this to national courts."

> "[During judicial review, the HCO's decision] has to be treated as if it were an 'indictment'. This means that (…) what the plaintiffs have to demonstrate is not that the defendant [HCO] assessed the evidence in a manifestly unreasonable manner or its legal balancing was manifestly unreasonable, it is sufficient if they demonstrate that there is a more reasonable assessment of the evidence, there is a more reasonable legal balancing."

Accordingly, the Kúria established that Hungarian courts have to carry out a full-blown *de novo* review and "complex economic matters" are no exception to this requirement. As an apologia for the CJEU, it has to be noted that the Kúria put aside Hungarian national law (s.339/B of the Code on Civil Procedure) to give way to the EU and international human rights requirements (given that the Charter of Fundamental Rights was applicable, as the HCO was "implementing" EU competition law).[55] On the other hand, the CJEU has no competence to put aside the constitutional provisions of the founding treaties (here the TFEU), albeit it may certainly interpret them.

Notwithstanding the above, there was no difference between the Kúria's and the CJEU's judgment as to the practical outcome of the case at stake: the Kúria, similar to the CJEU in *KME (industrial tubes)*, *Chalkor* and *KME (copper plumbing tubes)*, and the ECtHR in *Menarini*, established that though the lower court used the wrong label, it did in fact carry out a full-blown review, so the judgment's reasoning had to be corrected but the operative part did not. The operation was successful but the patient died.

5. Conclusions

Although this is not made explicit in the case law, the requirement of unlimited judicial review does not cover, nor can it cover all fields of competition law.[56] *KME (industrial tubes)*, *Chalkor* and *KME (copper plumbing tubes)* all concerned hardcore violations (cartels). Under the traditional stare decisis doctrine (if it were part of EU law, which it is not), it could be plausibly argued that the holding of these cases is confined to (hardcore) cartels. However, the doctrine established in this jurisprudence may be easily extrapolated to all "behaviour-controlling" domains of competition law, such as the ban on restrictive agreements as enshrined in art.101 TFEU and on abuse of dominant position as enshrined in art.102 TFEU. However, merger control law seems to be devoid of the features that warranted (for instance, in *Menarini*) the courts' unrestricted review power and the suppression of the competition authority's margin of appreciation. Merger control is a "licensing" procedure and may not be regarded as criminal or quasi criminal in relation to art.6 ECHR.[57] As a theoretical possibility, in very extreme cases, art.6 ECHR may come into the picture if the breach of the notification duty or the prohibition of implementation results in a penalty comparable to the fines imposed in cases involving restrictive agreements and abuse of dominant position.

The reader of the recent jurisprudence on the standard of review may easily get the impression that it is no exaggeration to speak about a revolution in Europe. Unfortunately, when taking a closer look at the case law, it becomes clear that it is very far from a qualitative change taking the form of a leap.

First, decisions in complex economic matters, under the label of margin of appreciation, are still sheltered, to a certain extent, from *de novo* review. The width of this margin of appreciation may be dubious but one thing is certain: it exists and it is obviously relevant. As a corollary, the requirement of unrestricted review powers, as championed by the ECtHR in *Menarini*, is not met as to the entire spectrum of antitrust law. In case of hardcore violations, this may be of little importance, since these are based on outright prohibitions. However, there are numerous matters where the potential penalty is enormous

[53] *Tetra Laval* [2005] E.C.R. I-987 at [39].
[54] For a general analysis see Miklós Boronkay, "Hungary: constitutional requirements in competition litigation" (2015) 8(4) *Global Competition Litigation Review* R69.
[55] Article 51 of the Charter of Fundamental Rights.
[56] See Schweitzer, "Judicial Review in EU Competition Law" in Geradin and Lianos (eds), *Research Handbook on EU Antitrust Law* (forthcoming), pp.43–41; as to state aid see Pieter van Cleynenbreugel, "Efficient justice in the service of justiciable efficiency? Varieties of comprehensive judicial review in a modernised EU competition law enforcement context" (2014) 10(1) *The Competition Law Review* 35, 43.
[57] See Wils, "The Compatibility with Fundamental Rights of the EU Antitrust Enforcement System in Which the European Commission Acts Both as Investigator and as First-Instance Decision Maker" (2014) 37(1) *World Competition: Law and Economics Review*, King's College London Law School Research Paper No.2014-21, 8–9.

and a complex economic assessment needs to be carried out.[58] The establishment of a concerted practice may be economics-intensive in cases where this is based on the assertion that there is no reasonable explanation to the firms' parallel behaviour but a cartel.[59] Agreements which are anti-competitive by effect may necessitate a complex effects-analysis and, obviously, may likewise be regarded as criminal in nature. Abuse-of-dominant-position cases quite often involve complex economic analysis (concerning the existence of dominance and the effects of conduct).

It is to be noted that the above matters involving complex economic issues may trigger similarly high fines and that such cases may be regarded as criminal in nature as hardcore cartel cases. A concerted practice may qualify as a hardcore violation if it has an anti-competitive object; the same way that cartels concluded in smoke-filled hotel rooms. Furthermore, although in terms of the penalty's monetary value hardcore violations carry the day, the fines imposed in non-hardcore cases may still be comparable. While the highest cartel fine per undertaking has been €715 million (imposed on Saint Gobain in *Carglass*),[60] this is significantly less than what Intel endured for abusing its dominant position (€1,060 million).[61]

Secondly, it is very telling that in the above cases both the ECtHR and the CJEU established that even though the lower court (national court, GC) followed a flawed legal test in its reasoning, this had no impact on the judgment's legal fate. The lower court—although it stressed squarely the contrary—did not do what it said it was doing. In other words, although the lower court asserted in its reasoning that it followed a restricted review standard, it in fact unequivocally and clearly defied the legal principle it enthroned and carried out a full-blown review.

This is perverse, not only because this legal principle had no impact on the merits of any of the cases, but also because it points out the contradictions of the regulation and framing of judicial review. It reveals how difficult it is to establish which review standard a court applies in a case. Did the court affirm an element of the competition authority's decision because it came to the very same conclusion or because it regarded it as reasonable despite the fact that it would have reached a different conclusion? If the lower court can veil its act with appropriate phraseology, can it shield itself from condemnation?[62] It follows that it is not sufficient to vest the court with unlimited review powers as it also has to be given the corresponding capacity so it will not recoil from exercising its full jurisdiction.

It is a legitimate expectation that if courts are vested with competence, they should also be supplied with the resources necessary to exercise this power. If the requirement of full and unrestricted judicial review extends to complex economic issues, it calls for a structural arrangement where this unlimited power is not only legally established but also practically feasible. Otherwise, the change of the label will not entail the change of the substance.

From the above perspective, the CJEU's approach is very understandable. The centre of gravity of adjudication (decision making on the merits) should shift to courts with the exception of complex economic matters. It would be unfortunate to vest EU courts with a power they cannot professionally exercise. If *de novo* review were mandated, a generalist court could approach such a challenge in three ways. First, it may seemingly exercise an unrestricted review, changing the label but not changing the substance. It may adopt the Commission's assessment as its own in questions where earlier it refrained from making its own decision with reference to the Commission's margin of appreciation. Secondly, it may appoint an expert, risking that this "easy come" competence, as far as complex economic issues are concerned, easily shifts to the court-appointed expert. Thirdly, it may turn from generalist to specialist, but this cannot be accomplished without some structural reform.

[58] Renato Nazzini, "Judicial review after KME: an even stronger case for the reform that will never be" (2015) 40(4) *European Law Review* 490, 506.
[59] *A Ahlstrom Osakeyhtio* [1993] E.C.R. I-1307.
[60] See the Commission's statistics, *http://ec.europa.eu/competition/cartels/statistics/statistics.pdf* [Accessed 31 March 2016].
[61] IP/09/745: Antitrust: Commission imposes fine of €1.06 billion on Intel for abuse of dominant position. Brussels, 13 May 2009.
[62] Pieter van Cleynenbreugel, "Efficient justice in the service of justiciable efficiency? Varieties of comprehensive judicial review in a modernised EU competition law enforcement context" (2014) 10(1) *The Competition Law Review* 35, 44–45.