Due Process and Fair Trial in EU Competition Law

The Impact of Article 6 of the European Convention on Human Rights

Cristina Teleki

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Introduction

Legal principles of due process and fair trial play a central role in the process of fostering the rule of law, human rights and democracy in the procedures implementing competition law in the European Union (EU), in particular, in relation to corporate bigness. The European Commission enforces EU competition law, cumulating investigative, prosecutorial and adjudicative functions. At the same time, the judicial branch of the EU practices a deferential judicial standard of review in competition law cases which appears to favour the executive branch of the European Union in relation to powerful economic operators and persons affected in alleged violations of competition law.

This setup can lead to the *erosion of democratic principles of governance in the EU*, in particular, the separation of powers, accountability and the respect of individual fundamental rights. Such concerns are not new. Schwarze prophesized in his classical work *European Administrative Law*, that "what appears to be an absolute subjection of the administration to the rule of law cannot be achieved".[1] Everson has voiced that "the dark hour of the executive poses a fundamental challenge to both the rule and role of modern law" in two particular and interrelated ways.[2] The emphasis on the technical models of implementation and oversight of and by the government lead to the "scientification of large areas of human activity", which raises concerns about the role of law as corrective action within the public sphere.[3] More recently Chiti, while presenting EU administrative law as a "genuinely complex gravitational field in which internal and external forces co-exist one next to the other", highlighted that in its 60-year long history, EU administrative law remained underdeveloped in two major ways.[4] EU administrative law has failed first, to recognize the relevance and role of *administrative discretion*, "which remains a taboo in EU institutional discourse" and, second, to develop fully-fledged *accountability regimes*.[5]

1 Schwarze, Jürgen. *European Administrative Law.* London: Sweet and Maxwell, 2006, p. 209.

2 Everson, Michelle. "Agencies: the "Dark Hour" of the Executive?" *Legal Challenges in EU Administrative Law: Towards an Integrated Administration*. Eds. Herwig C.H. Hofmann and Alexander H. Türk. Cheltenham: Edward Elgar, 2009, pp. 116–135, p. 125.

3 Everson, *op. cit.*

4 Chiti, Edoardo. "Is EU Administrative Law Failing in Some of Its Crucial Tasks?" *European Law Journal* 22.5 (2016): pp. 576–596, p. 581.

5 Chiti, *op. cit.*, p. 588.

I question in this book whether the administrative practice of the European Commission in EU competition law contributes to the democratic deficit of governance in the European Union. This question becomes of particular importance in light of what Schmidt-Aßmann and Rademacher described as a worldwide trend "towards recognizing the individual right of effective review by an independent body as an important characteristic of the international legal order".[6] Schmidt-Aßmann and Rademacher describe the emergence in international law of "an overarching guarantee of protection of individual rights against acts of public power".[7] In her recent book *Beyond Human Rights: The Legal Status of the Individual in International Law*, Peters takes this argument a step forward by proposing that the individual's position should be strengthened under international law.[8] An individual who has access to international justice can bring claims and contributes – directly or, at least, indirectly – to the creation of international law.

In this context, the case-law of the European Court of Human Rights (ECtHR) on the *right to a fair trial* provides safeguards which, if incorporated into the substance of EU law, could strengthen the democratic capital of the EU. The right to a fair trial – also referred to as Article 6(1) ECHR or due process – is defined in the European Convention on Human Rights (ECHR) as follows:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

This provision has generated a substantial number of cases that has affected the ECtHR to develop into a *self-regulating tribunal*. The principles developed in the case-law of the ECtHR concerning the independence of administrative agencies and the right to effective judicial protection are of particular importance in this context because they deal with both shortcomings identified by Chiti in EU administrative law, that is administrative discretion and accountability regimes.

6 Schmidt-Aßmann, Eberhard and Timo Rademacher. "Rechtsschutzgarantien des internationalen Rechts." *Jahrbuch des öffentlichen Rechts der Gegenwart* 61 (2013): pp. 61–88, p. 62. (personal translation).

7 Schmidt-Aßmann and Rademacher, *op. cit.*, p. 88. (personal translation).

8 Peters, Anne. *Beyond Human Rights: The Legal Status of the Individual in International Law*. Cambridge: Cambridge University Press, 2016.

This monograph has the strong ambition of keeping a strong foothold in past scholarship in order to elucidate the question of addressing corporate bigness in modern democracies. Therefore, the work borrows and recycles notions that might be familiar to lawyers, political scientists and economists, such as self-regulation, administrative state, the economic man, problems of organized complexity, system thinking etc.

The second foothold attempts to stride forward a few ideas. The first idea is that the ECtHR remains relevant to the debate on bigness, especially due to its self-regulating nature. The second idea is that, the ECtHR and the EU are part of a pan-European system of fundamental rights protection. The EU and the ECtHR must find a way to work together, despite the current blockage of the accession of the EU to the ECHR by the Court of Justice of the European Union (CJEU). The third idea is that the critique concerning the independence of EU Commission as competition enforcement agency and of the ensuing deferential judicial review is essentially a critique of the design of EU law.

The current book might be of interest to scholars concerned about fundamental rights in the EU and specifically to scholars interested in due process. The discussion in Part 3 about the independence of competition agencies might be of interest for the transposition of Directive 1/2019 meant to strengthen the independence of National Competition Authorities (NCAs). In addition, in light of the fact that the accession of the EU to the ECHR has not been finalized yet, this book sheds a light on a few potential consequences of the accession. Also, some elements of the current analysis – independence of the European Commission and deferential review – could be applied in relation to the common agricultural law, EU pharmaceutical law or EU criminal law.

The current work is placed within a larger intellectual context which includes the evolution of the bureaucratic executive power, the curse of bigness and the changing constitutional design of the EU.

The Curse of Bigness – In a recent book, *The Curse of Bigness: Antitrust in the New Gilded Age*, Wu notes that "we have managed to recreate both the economics and politics of a century ago – the first Gilded Age – and remain in grave danger of repeating more of the signature errors of the twentieth century".[9] He highlights that – as witnessed in the past – extreme economic concentration yields inequality and suffering, which in turn feed nationalistic and extremist tastes. The tendency towards bigness is not new in the history of mankind, as the history of former empires suggests. The history of industrialization,

9 Wu, Tim. *The Curse of Bigness: Antitrust in the New Gilded Age*. New York: Columbia Global Reports, 2018, p. 10.

however, brought about a form of bigness not known before: the *big organization*. Public or private, the big organization posed new questions both about its operation from within and about controlling it from the outside. These questions strike at the core of the democratic debate which is necessarily concerned about the governmental power to be exercised in relation to the big organization.

The concerns voiced by Wu result from observing the monopolization movement that started in the late nineteenth century and led to a new economic form: the giant, monopoly corporation. This was accompanied by the Social Darwinism movement that went so far as to propose to diminish by slaughter the sick in order to speed the renewal of population. Early monopolists used Social Darwinism to justify the survival of only the strongest and fittest on the market. In this sense, Wu quotes Rockefeller having said that "growth of a large business is merely a survival of the fittest (…) the working out of a law of nature, and a law of God".[10]

Nowadays, the rule of concentrated economic power affects industries like finance, media, airlines, telecommunications and, more importantly, the digital technology industry, where giants such as Google, Apple, Facebook and Amazon, play an important role in people's lives.[11] This debate is particularly astute in the context of the growing concerns about artificial intelligence and general artificial intelligence because there is a race in this field which is largely a race between companies. If the race is successful, the company that will control general artificial intelligence might also control the future of humanity.[12]

One – especially if one is a scholar – must however not fall prey to the biased tendency of connecting corporate bigness with evil. As Justice McKenna reminded in *US Steel* "we must adhere to the law and the law does not make mere size an offence, or the existence of unexerted power an offence".[13] It is in this context that Wu asks a fundamental question which is relevant to this book: "Are extreme levels of industrial concentration actually compatible with the premise of rough equality among citizens, industrial freedom, or democracy itself?"[14] To answer his own question, Wu proposes to resurrect and renovate the main tenets of the Brandeisian economic vision

10 Wu, *op. cit.*, p. 27.
11 Wu, *op. cit.*, pp. 11–12.
12 Chace, Calum. *Surviving AI: The Promise and Peril of Artificial Intelligence*. London: Three Cs, 2015.
13 *United States v. United States Steel Corp.*, 251 U.S. 417 (1920).
14 Wu, *op. cit.*, p. 12.

which "took matters like bigness and concentration as inseparable from the very nature of democracy, and the conditions under which its citizens would live".[15]

Louis D. Brandeis – an American lawyer who is regarded as one of the most important antitrust theoreticians to have ever sat on the US Supreme Court – helped Woodrow Wilson conceive his 1912 New Freedom electoral campaign by forging a link between the control of bigness – monopolies – and democratic principles. This vision remained popular in the US for the rest of the 20th century and is currently enjoying a revival.[16] The neo-Brandeisians are primarily concerned with more aggressive antitrust laws, merger control and trust-busting. At the same time, "the curse of bigness" that Brandeis coined referred not only at concentration of economic power. In fact, Brandeis believed that concentration of political or administrative power was akin to alienating the state from democracy and from the citizen. Bigness, as Brandeis suggested, was a curse wherever it occurred.[17]

These are thus some of the most interesting challenges of modern democracies:

– *Understanding corporate bigness and its impact on the society;*
– *Deciding how to address corporate bigness in a democratic society;*
– *Addressing corporate bigness while respecting fundamental rights;*
– *The role that the law should play in the process of addressing bigness.*

This book deals with the third and fourth challenge – the attempt to address bigness by the EU Commission and the CJEU.

In the EU, the European Commission is mandated by Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) to discipline and to sanction bigness – cartels and abuses of dominant position. In addition, the EU Commission is mandated by the Council Regulation No 139/2004 (EU Merger Regulation) to implement merger control by prohibiting mergers and acquisitions which would significantly reduce competition in the Single Market.[18]

At the same time, when enforcing EU competition law, the European Commission represents the kind of bigness Brandeis warned against, by exercising a wide discretion and policing powers that, at times, can appear limitless.

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15 Wu, *op. cit.*, p. 34.

16 Ramsey, David. *Antitrust and the Supreme Court*. El Paso: LFP Scholarly Publishing LLC, 2012, p. 40.

17 Rosen, Jeffrey. *Louis D. Brandeis: American Prophet.* New Haven: Yale University Press, 2016.

18 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (EC Merger Regulation), OJ L 24, 29.1.2004, pp. 1–22.

Administrative discretion could be limited in at least three ways: by the Treaties establishing administrative discretionary regimes, by the courts or by procedural participatory rights. In the EU, the exercise of administrative discretion in competition law proceedings is not contained by the EU Treaties. Second, both the General Court of the EU (former Court of First Instance, CFI) – which acts as a first instance court in EU competition law cases – and the CJEU – which acts as an appellate and last instance court in EU competition cases – perform a deferential judicial review. Most scholars agree that the deferential judicial review performed by the EU Courts does not limit the EU Commission's administrative discretion. Lastly, the regime of procedural participatory rights in EU competition law – whose main engine is the principle of due process – is far from having a real impact on the EU Commission's administrative discretion.

In the same vein, the role played by fundamental rights, including principles of due process, in EU law is growing. Thus, *on the one hand*, EU Commission fights bigness with a clear focus on powers of investigation and minimal due process during EU competition enforcement proceedings. *On the other hand*, the recent legislation adopted by EU concerning the *direct enforcement* of Articles 101 and 102 TFEU by NCAs appears to prioritize fundamental rights. As a recent piece of EU legislation described in Section 7.6. below shows, the member states of the EU must ensure that NCAs can operate in full independence and impartiality when enforcing EU competition law.[19] The same rules however do not apply to the EU Commission itself.

From Growing Power of the Bureaucratic Executive to Doubting Chevron – The industrial revolution seems to have been at the origin of corporate bigness. The same phenomenon of growth took place however in government, with an increasing power for the executive branch, a growing number of executive agencies and attacks against the judiciary when attempting to place limits on the executive. *Bureaucratic theory*, highlighted in Section 9.2.1. below, is one of the ideas developed to explain and support this phenomenon. Lawyers, however, have been rather divided both about the virtues of bureaucracy and its compatibility with democracy.

At the beginning of the last century the growing power of bureaucracy was associated with despotism and a voluntarily misleading view of the world. James M. Beck, former Solicitor General of the United States, wrote in his

19 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ L 11, 14.1.2019, p. 3–33.

1932 book *Our Wonderland of Bureaucracy*, that bureaucracy "primarily refers in a democratic government to the aggrandizement of the Executive at the expense of the Legislative branch of the government".[20] In a broader sense, Beck argued, bureaucracy "refers to the irrepressible war between the individual and the State, and involves the question as to the just limits, under the higher law, of the State over the property and life of the individual".[21]

On the other side of the Atlantic, Lord Hewart of Bury, Lord Chief Justice of England, argued in his 1929 book *The New Despotism* that there was "in existence a persistent and well-contrived system, intended to produce, and in practice producing, a despotic power which at one and the same time places Government departments above the Sovereignty of Parliament and beyond the jurisdiction of the Courts".[22] Hewart announced that "the time has come for the departmental despot, who shall be at once scientific and benevolent, but above the all a law to himself".[23] Hewart imagines that if the new departmental despot had a soliloquy, it would comprise the following rules which, in the context of the present book, deserve full mention:

1. The business of the Executive is to govern.
2. The only persons fit to govern are experts.
3. The experts in the art of government are the permanent officials (…).
4. But the expert must deal with things as they are. The "foursquare man" makes the best of the circumstances in which he finds himself.
5. Two main obstacles hamper the beneficent work of the expert. One is the Sovereignty of Parliament, and the other is the Rule of Law.
6. A kind of fetish-worship, prevalent among an ignorant public, prevents the destruction of these obstacles. The expert, therefore, must make use of the first in order to frustrate the second.
7. To this end let him, under Parliamentary forms, clothe himself with despotic power, and then, because the forms are Parliamentary, defy the Law Courts.
8. This course will prove tolerably simple if he can: (a) get legislation passed in skeleton form; (b) fill up the gaps with his own rules, orders, and regulations; (c) make it difficult or impossible for Parliament to check the said rules, orders, and regulations; (d) secure for them the force of statute; (e) make his own decision final; (f) arrange that the fact of his decision shall

20 Beck, James M. *Our Wonderland of Bureaucracy*. New York: The Macmillan Company, 1932, p. *x*.

21 Beck, *op.*cit., p. *x*.

22 Hewart, Lord of Bury. *The New Despotism*. London: Ernest Benn Limited, 1929, p. 14.

23 Hewart, *op. cit.*, p. 14.

be conclusive proof of its legality; (g) take power to modify the provisions of statutes; and (h) prevent and avoid any sort of appeal to a Court of Law.

9. If the expert can get rid of the Lord Chancellor, reduce the judges to a branch of the Civil Service, compel them to give opinions beforehand on hypothetical cases, and appoint them himself through a business man to be called "Minister of Justice", the coping-stone will be laid and the music will be the fuller.[24]

Von Mises contended that the voluntary *abandonment of congressional rights* through *delegation* as the main source of modern bureaucracy-making rendered bureaucracy undemocratic.[25] He warned that "delegation of power is the main instrument of modern dictatorship. It is by virtue of delegation of power that Hitler and his Cabinet rule Germany. It is by delegation of power that the British Left wants to establish its dictatorship and to transform Great Britain into a socialist commonwealth".[26] The process of "transfer of effective power over human lives from the constitutionally visible offices of government, the nominally sovereign offices, to the vast network that has been brought into being in the name of protection of the people from their exploiters" has not stopped.[27] Anthropologist David Graeber called this phenomenon total or predatory bureaucratization which was not just a political realignment, it was a cultural transformation in that bureaucratic techniques developed in financial and scientific circles such as performance reviews, focus groups, surveys "came to invade the rest of society – education, science, government – and eventually, to pervade almost every aspect of everyday life".[28]

Other social scientists focused on less grim accounts of the bureaucracy. Bureaucracy appeared to Max Weber as a superior and inevitable form of social organization that wove rationality and formalism into the social fabric guaranteeing thus its strength:

> The decisive reason for the advance of bureaucratic organization has always been its purely technical superiority over any other form of organization. The fully developed bureaucratic mechanism compares with

24 Hewart, *op. cit.*, pp. 20–21.

25 Von Mises, Ludwig. *Bureaucracy*. New Haven: Yale University Press, 1944, p. 5.

26 Von Mises, *op. cit.*, pp. 5–6.

27 Nisbet, Robert A. *The New Despotism*. California: Institute for Humane Studies, Inc., 1976, p. 4.

28 Graeber, David. *The Utopia of Rules: On Technology, Stupidity, and the Secret Joys of Bureaucracy*. London: Melville House, 2016, p. 21.

> other organizations exactly as does the machine with the non-mechanical modes of production. Precision, speed, unambiguity, knowledge of the files, continuity, discretion, unity, strict subordination, reduction of friction and of material and personal costs – these are raised to the optimum point in the strictly bureaucratic administration (...). As compared with all collegiate, honorific, and avocational forms of administration, trained bureaucracy is superior on all these points.[29]

In the same vein, *public choice theorists* have been concerned with "the use of economic tools to deal with traditional problems of political science".[30] Buchanan, one of the founding fathers of the Public Choice Theory and a Nobel Prize winner, posited that (1) the *individual persons* were the basic component units of the social order and that (2) the government was "that complex of institutions through which individuals make collective decisions, and through which they carry out collective as opposed to private activities".[31] The government and its extension, the bureaucracy, appear thus as a benevolent institution, motivated by the desire to promote the public good. Two immediate conclusions have been deducted from these initial hypotheses. The first is that substantive or procedural limits on the government imply limiting its ability to provide for general welfare and, therefore, to answer the individual persons' desires. The second conclusion is that one of the main functions of the government was to limit failures of markets.[32]

The paradigm pendulum appears thus to be moving between opposite visions when it comes to the issue of the growing power of the executive branch. The public and academic debate accompanying the New Deal captured these intellectual tumults. In his book *The New Deal and the Problem of Monopoly: A Study in Economic Ambivalence*, historian Ellis W. Hawley, presents an extensive account of this dilemma:

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29 Weber, Max. "Technical Advantages of Bureaucratic Organisation." *From Max Weber: Essays in Sociology*. Eds. Hans Gerth and C. Wright Mills. New York: Oxford University Press, Digital Print, 2007, pp. 358–359.

30 Tullock, G. "Public Choice." *The New Palgrave Dictionary of Economics*. Eds. Durlauf S.N., Blume L.E. London: Palgrave Macmillan, London, 2008.

31 Buchanan, James. "An Economist's Approach to Scientific Politics." *The Collected Works of James M. Buchanan: Volume 13: Politics as Public Choice*. Carmel: Liberty Fund, 2000, p. 4.

32 Clarck, J.R. and Lee R. Dwight. "The Impact of the Calculus of Consent." *Public Choice, Past and Present: The Legacy of James M. Buchanan and Gordon Tullock*. Ed. Lee R. Dwight. New York: Spinger, 2013, p. 2.

> The search in the twentieth-century America (...) was for some solution that would reconcile the practical necessity with the individualistic ideal, some arrangement that would preserve the industrial order, necessarily based upon a high degree of collective organization, and yet would preserve America's democratic heritage at the same time. Americans wanted a stable, efficient industrial system, one that turned out a large quantity of material goods, insured full employment, and provided a relatively high degree of economic security. Yet at the same time they wanted a system as free as possible from centralized direction, one in which economic power was dispersed and economic opportunity was really open, one that preserved the dignity of the individual and adjusted itself automatically to market forces. And they were unwilling to renounce the hope of achieving both.[33]

Control of the executive – expressed as growth of the bureaucratic capacity or its tempering – becomes thus a central issue for democratic systems. Simon argued that *human behaviour* should be factored in when constructing administrative theory. He wrote in his influential book *Administrative Behavior* that

> the central concern of administrative theory is with boundary between the rational and the non-rational aspects of human social behaviour. Administrative theory is peculiarly the theory of intended and bounded rationality – of the behaviour of human beings who *satisfice* because they have not the wits to *maximize*.[34] (original emphasis)

Simon distinguished between the economic man, who *maximizes*, always selecting the best alternative from all those available to him and the administrative man, who *satisfices*, preferring the course of action that is satisfactory or "good enough".[35] It is this impossibility to maximize, then, that requires control over the administration.

Unlike political scientists, legal scholars conceive of three main regimes to control the executive:

(1) Large accountability regimes imposed on the administration;
(2) Judicial review of administrative action and

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33 Hawley, Ellis W. *The New Deal and the Problem of Monopoly: A Study in Economic Ambivalence*. New York: Fordham University Press, 1995, p. 473.

34 Simon, Herbert A. *Administrative Behavior: A Study of Decision-Making Process in Administrative Organization* (*2nd edition*). New York: The Macmillan Company, 1961.

35 Simon, *op. cit*.

(3) Participatory rights for individuals in legal proceedings opposing the administration.

Judicial review thus steps into the forefront of the democratic debate because participatory rights can be successfully exercised against administrative action only if judicial review is permissive and large. The opposite – deferential judicial review – is however still largely practiced in many modern democratic systems, including the EU.

Deferential judicial review – known as the *Chevron doctrine* in the US – originated in a case challenging the interpretation of an environmental statute and has been very influential in American administrative law.[36] Initially, Justice John Paul Stevens delivered the following opinion on behalf of a unanimous court:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.
>
> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

In 2001, the US Supreme Court narrowed the scope of application of the Chevron doctrine of deference.[37] Under a preliminary step called "Chevron

36 *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

37 *United States v. Mead Corp.*, 533 U.S. 218 (2001).

step zero", a court must first determine whether as a matter of design agencies or courts were intended to possess interpretive authority over a statute.[38] One of the most outspoken critics of the Chevron doctrine recognized that "it is not immediately apparent why a court should ever accept the judgment of an executive agency on a question of law".[39] This, however, did not prevent the Chevron doctrine to become the consensus among the US Supreme Court.[40] In the same vein, deferential judicial review became the preferred *modus operandi* of the CJEU when interacting with the EU Commission on disputes involving complex and technical matters.

Recently, the fate of the Chevron doctrine appears to be changing. First of all, as the New York Times reported, "with surprising frankness, the White House has laid out a plan to fill the courts with judges devoted to a legal doctrine that challenges the broad power federal agencies have to interpret laws and enforce regulations, often without being subject to judicial oversight".[41] In the past, nominations for federal judgeship in the US depended on the nominee's opinion concerning abortion or other divisive social issues. Currently, one test guides the nomination – whether the candidate is ready to rein the administrative state.[42]

Second, the consensus concerning Chevron within the US Supreme Court appears to be broken. In fact, "open divisions about Chevron have appeared among the justices. (…) all nine justices have at least once signed an opinion explicitly holding that Chevron should not apply in a situation where the administrative law textbooks would previously have said that it must apply".[43]

These developments suggest that, at least in the US, the fate of the administrative state is changing.

The European Union has in many ways a unique executive and bureaucracy. Nevertheless, its claimed *sui generis* nature has not escaped the tumultuous intellectual debates surrounding the growth and control of its administration. The European Commission became a behemoth of power, combining legislative, executive and adjudicative functions. Many of the warnings identified

38 Sunstein, Cass R. "Chevron Step Zero." *Virginia Law Review* 92.2 (2006): pp. 187–249.

39 Scalia, Antonin. "Judicial Deference to Administrative Interpretations of Law." *Duke Law Journal* 1989.3 (1989): pp. 511–521.

40 Kagan, Michael. "Loud and Soft Anti-Chevron Decisions." *Wake Forest Law Review* 53.37 (2018).

41 Peters, Jeremy H. "Trump's New Judicial Litmus Test: Shrinking 'the Administrative State.' " *The New York Times.* 26 May 2018. Available at https://www.nytimes.com/2018/03/26/us/politics/trump-judges-courts-administrative-state.html accessed on 23 February 2021.

42 Peters, Jeremy H., quoted above.

43 Kagan, *op. cit.*, p. 12.

by the early thinkers – the voluntary abandonment of the legislative power by the European Parliament, the delegation of power to unelected offices and deferential judicial review – abound in the EU. Whether the winds of change affecting the Chevron doctrine will also affect deferential judicial review in the EU is still to be seen.

The Growing Importance of Fundamental Rights in Europe and in the EU – In September 2019, the conference organized for the inauguration of Finland's Presidency to the EU was dedicated to strengthening democracy, rule of law and fundamental rights as the "the essential building blocks of our societies and the very foundation of the European project".[44] The works of the conference prove the central role played by fundamental rights. The Minister of Justice Anna-Maja Henriksson highlighted that

> the international operating environment is increasingly difficult to predict, challenging both the EU and its member states. There is a risk that problems in the realization of fundamental rights, the functioning of democratic processes and the rule of law will start to undermine the foundations of our societies. The EU's strength comes from its unity. That is why we need joint discussions and shared tools for strengthening the value base of our societies.[45]

In the same vein, Lasser, focusing on the influence of the ECtHR's case-law, described the *fundamental rights revolution* taking place on the European continent. Fundamental rights have become a *lingua franca* across jurisdictions operating as "a common legal denominator and as a pool of common legal terms transferable within and across European polities".[46] The fundamental rights revolution is taking place within a complex and competitive inter-institutional arena that is also evolving because of the advance of fundamental

44 Finland's Presidency of the Council of the European Union. "How to Strengthen Democracy, Rule of Law and Fundamental Rights – Tools Discussed in a Presidency Conference." *News Item*. Available at: https://eu2019.fi/en/article/-/asset_publisher/how-to-strengthen-democracy-the-rule-of-law-and-fundamental-rights-ideas-emerging-from-a-presidency-conference accessed on 23 February 2021.

45 Finland's Presidency of the Council of the European Union. "How to Strengthen Democracy, Rule of Law and Fundamental Rights on Agenda in Helsinki on 10–11 September." *Press Release*. Available at: https://eu2019.fi/en/article/-/asset_publisher/perusoikeudet-oikeusvaltioperiaate-ja-demokratia-esilla-helsingissa-10-11-syyskuuta?_101_INSTANCE_YCurs8qvI1NM_languageId=en_US accessed on 23 February 2021.

46 Lasser, Mitchel de S.-O.-L'E. *Judicial Transformations: the Rights Revolution in the Courts of Europe*. New York: Oxford University Press, 2009, p. 2.

rights. Lasser also highlights that "the rise of judicial power and the advent of individual rights have (…) gone hand in hand".[47]

Lasser concludes that

> If European law takes precedence over domestic law, European fundamental rights effectively *become the most powerful legal norms* at both the domestic and the supranational levels. They reign supreme among superior European norms; and (…) they have become applicable virtually across the board in any and all controversies.[48] (emphasis added)

The entry into force of the Treaty on European Union (TEU) with its Charter of Fundamental Rights of the European Union (the Charter) took place within the context described above and marked a new stage in the history of the EU. The Charter – except for becoming the most important document concerning fundamental rights in the EU, has affected the constitutional design of the EU in at least three ways.

First, as noted in 2011 by Presidents Costa and Skouris, the Charter "has become of primary importance in the recent case-law of the CJEU".[49] *Second*, the Charter's potential *federal effect* may result in fundamental rights standards "applicable right across the EU regardless of whether national measures fall within or outside the scope of application of EU law".[50] Since most of EU law is implemented by the national administrative authorities of the EU Member States – which "often act as, and indeed are, the executive branch" of the Union – the Charter can be said to represent another stage of integration through law in the EU.[51]

Lastly, EU fundamental rights became integrated into a fresh vision of what the European political economy represented. This vision welcomed "the individual more deeply into the process of European political economy, making it harder for her to assert her position *against* these processes. However, it also

47 Lasser, *op. cit.*, p. 27.

48 Lasser, *op. cit.*, p. 4.

49 ECtHR. *Joint Communication from Presidents Costa and Skouris*. 24 Jan 2011, paragraph 1. Available at https://www.echr.coe.int/Documents/UE_Communication_Costa_Skouris_ENG.pdf accessed on 23 February 2021.

50 Groussot, Xavier, Laurent Pech and Gunnar Thor Petursson. *The Scope of Application of EU Fundamental Rights on Member States' Action: In Search of Certainty in EU Adjudication*. Eric Stein Working Paper No. 1/2011, Czech Society for European and Comparative Law, p. 3.

51 Weiler, J.H.H. *The Jurisprudence of Human Rights in the European Union: Integration and Disintegration, Values and Processes*. Cambridge: Harvard Law School, 1996, p. 4.

led to new possibilities for her to assert her position *within* these processes".[52] (original emphasis) This point answers the dignitarians who have criticized the lack of concern for the dignity and position of the persons affected by the European governance.[53]

The Charter is relevant for the individual citizens of the EU, but also for the EU institutions. The provisions of the Charter, however, are far from being clear and generate numerous discussions concerning its interpretation.

For the purpose of this book, the relevant legal provisions of the TEU and the Charter can be summarized as follows.

First of all, pursuant to Article 2 of the TEU, the EU is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights. Article 6(1) TEU stipulates that the Charter has the same legal value as the Treaties and Article 6(2) TEU instructs that the Union shall accede to the ECHR. Finally, Article 6(3) stipulates that fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the member states, constitute general principles of EU law.

Second, Article 52(3) of the Charter states that, in so far as the Charter contains rights which correspond to those guaranteed by the ECHR, their meaning and scope are to be the same as those laid down by the ECHR. According to the explanation of Article 52(2), this provision is "intended to ensure the necessary consistency between the Charter and the ECHR by establishing the rule that, in so far as the rights in the present Charter also correspond to rights guaranteed by the ECHR, the meaning and scope of those rights, including authorized limitations, are the *same as those laid down by the ECHR*".[54] In addition, the meaning and the scope of the guaranteed rights are to be determined by the text of those instruments, but also by the case-law of the ECtHR and by the CJEU. Finally, anyhow, "the level of protection afforded by the Charter may never be lower than that guaranteed by the ECHR".[55]

Lastly, Article 47(1) of the Charter provides that everyone whose rights and freedoms guaranteed by EU law are violated has the *right to an effective remedy*

52 Chalmers, Damien and Sarah Trotter. "Fundamental Rights and Legal Wrongs: The Two Sides of the Same EU Coin." *European Law Journal* 22.1 (2016): pp. 9–39, p. 27.

53 Mendes, Joana. "Participation and Participation Rights in EU Law and Governance." *Legal Challenges in EU Administrative Law: Towards an Integrated Administration*. Eds. Herwig C.H. Hofmann and Alexander H. Türk. Cheltenham: Edward Elgar, 2009, pp. 257–287, p. 286.

54 Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14.12.2007, pp. 17–35, p. 33.

55 Explanations relating to the Charter of Fundamental Rights, quoted above, p. 33.

before a tribunal in compliance with the conditions laid down in this article. Article 47(2) stipulates that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone is to have the possibility of being advised, defended and represented. Article 47(3) provides that legal aid is to be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

According to the explanations relating to Article 47, which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, have to be taken into consideration for the interpretation of the Charter, the second paragraph of Article 47 of the Charter corresponds to Article 6(1) of the ECHR.[56]

One would expect that the developments in fundamental rights in the EU would spill over all areas of EU law, including competition law. This is not the case however and EU competition law remains adamantly unconcerned with the growing importance of fundamental rights in the Union. It is therefore both important and interesting to study the interplay between the growing momentum of fundamental rights in the Union and the enforcement of the EU competition law.

This study is also important due to one additional reason. As Figure 1 below shows, when the domestic courts and the NCAs enforce EU competition law they are bound to respect the Charter. However, since all the member states of the EU are also signatories to the ECHR, they are also bound to respect the ECHR. On the other hand, since the EU has not completed its accession to the ECHR, when the EU Commission and the EU Courts enforce EU competition law, they are bound only by the Charter. This situation results therefore in a *double burden* on the NCAs and the domestic courts of the EU member states which have to respect fundamental rights arising from two international instruments when implementing EU competition law. In addition, since the interpretation of the ECHR by the ECtHR and of the Charter by the CJEU differs, the burden on the NCAs and the domestic courts is not only numerical. In fact, they must follow procedures that satisfy both the ECHR, the Charter and the case-law outlining their respective interpretations.

Another way of looking at the problem enunciated in Figure 1 is to argue that, because Article 52(3) of the Charter establishes an *equivalence* between the provisions of the Charter and provisions of the ECHR, both the EU

56 Explanations relating to the Charter of Fundamental Rights, quoted above, p. 29.

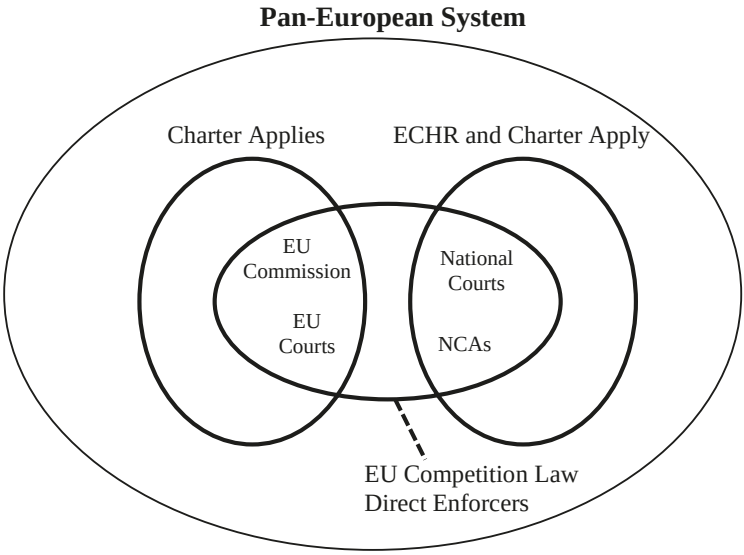

FIGURE 1 The applicability of the ECHR and of the Charter to EU competition law

Commission and the CJEU must respect the ECHR. Arguments in favour of the *indirect application of the ECHR in the EU* could be drawn from this line of thought. Another idea that can be deduced from the principle of equivalence established in Article 52(3) is that the EU and the ECtHR belong to a pan-European system of fundamental rights protection.

The Way Forward – This book sets out to examinee if and how the EU competition law enforcement procedure fulfils the requirements of Article 6(1) ECHR which guarantees the right to a fair trial. Two concepts form the core of the right to a fair trial in competition law disputes: independence of the administrative agency acting as adjudicator and effective judicial review. These concepts will be analysed at length from the perspective of Article 6(1) ECHR.

This book works, as shown in Figure 2 below, with the *overarching assumption* that the two supranational legal systems developed at the Council of Europe (CoE) and the European Union represent sub-systems of a single pan-European system that has fundamental rights protection as one of its functions. The fundamental rights system developed by the CoE is composed of the ECHR and the ECtHR. The system dealing with the enforcement of competition law in the EU is composed of the European Commission, the CJEU, the domestic competition authorities and the domestic courts of the EU member states.

The *second overarching assumption* is that, due to their proximity, the two sub-systems concerned with fundamental rights protection must influence each other. The core of the present book deals with the type and extent of this influence.

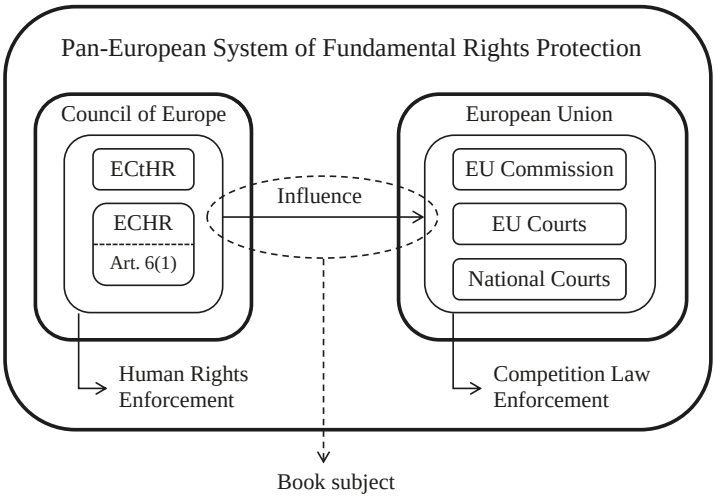

FIGURE 2 The influence of the Council of Europe human rights enforcement system on the EU competition law enforcement system

The *third overarching assumption* is that a mismanaged influence between the elements of the same system can lead to the breakdown of the system itself. Thus, the two supranational legal systems may inevitably collide. Due to their size and importance, this collision can lead to damaging the components. The ECtHR risks taking the blow.

The monograph is divided into four parts. Part 1 is a presentation of the theoretical foundations underlying the research: EU competition law and the ECtHR.

Part 2 is also a prefatory chapter offering an in-depth analysis of the notion of due process and the right to a fair trial. *Due process* is a fundamental notion in the American legal system that is directly linked to judicial review as a tool for law-making and rebalancing the checks and balances system. However, when the ECHR was adopted, the wording used was that of the right to a fair trial. Whether the choice of wording was the result of a desire to distance the European tradition from the American one of judicial review is a matter of speculation. What is not a matter of speculation, however, is the fact that the ECtHR used the right to a fair trial to enlarge its jurisdiction. A detailed analysis of the case-law concerning the applicability of Article 6(1) ECHR shows that the ECtHR has progressively rendered the right to a fair trial applicable to disputes that have previously been considered as belonging to public law. This meant that the member states had to develop domestic normative frameworks and judicial practices in order to satisfy the guarantees enshrined in Article 6(1) ECHR. The chapter concludes that the ECtHR is a self-regulating tribunal and that it is due to its self-regulating nature that its case-law remains relevant in Europe.

Parts 3 and 4 follow a two-step analysis. First, they provide a detailed analysis of the case-law of the ECtHR on two of the most important guarantees enshrined in the right to a fair trial – the right to an independent and impartial tribunal and the right to an effective judicial review. Second, they attempt to apply the principles distilled from the case-law of the ECtHR to verify if the EU Commission can be deemed to be an independent and impartial tribunal and if the judicial review performed by the CJEU satisfy the requirements of Article 6(1) ECHR. For this purpose, Part 3, first, describes the legislative, executive and judicial functions that the EU Commission exercises and, second, the procedure for the enforcement of Articles 101 and 102 TFEU. In the same vein, Part 4 describes the standard of review applied by the EU courts in competition law cases.

An important question can be raised at this point. Namely, why should the safeguard of independent and impartial "tribunal" be applicable to the EU Commission? The answer can be found in the interpretation of Article 6(1) ECHR, whose wording speaks about the "right to an independent and impartial tribunal established by law". The early case-law of the ECtHR applied a *literal interpretation* of the ECHR and interpreted the "tribunal established by law" meaning the courts and tribunals forming the judicial branch of a state.[57] Two developments, however, changed this situation. On the one hand, the ECtHR developed its case-law and interpretation tools, gaining both self-confidence and external recognition. On the other hand, member states increasingly entrusted adjudicatory powers to numerous administrative agencies in order to satisfy the demands of the growing administrative state.

The ECtHR, therefore, embraced a *functional and teleological interpretation* of the ECHR. The administrative agencies performing adjudicatory powers have thus been included in the notion of "tribunal established by law".

In order to assess the independence and impartiality of administrative agencies performing adjudicatory powers, the ECtHR takes into account the design of the administrative agency at issue and the type of judicial review available against the decisions of the administrative agencies. As Figure 3 shows, if the administrative agency with adjudicatory powers fulfils the independence requirements enshrined in Article 6(1) ECHR, then minimal judicial review suffices to render the scheme compatible with the right to a fair trial. If, on the contrary, the administrative agency with adjudicatory powers does not fulfil the independence requirements enshrined in Article 6(1) ECHR, then

57 ECtHR. *De Cubber v. Belgium*, application no. 9186/80, judgement of 26 Oct 1984.

FIGURE 3 The syllogism applied by the ECtHR to test the compatibility of adjudication exercised by administrative agencies with the right to a fair trial

only effective judicial review can render the scheme compatible with the right to a fair trial.

1 Scope

This book is placed at the intersection of EU competition law and fundamental rights. It asks the *general research question* of how the fundamental rights discourse and the changing constitutional design of the EU affects the nature of European competition law. Articles 101 and 102 TFEU which prohibit, respectively, cartels and the abuse of dominant position are chosen as the main focus. Mergers are only studied marginally, although the findings remain relevant for mergers as well.

In order to answer this question, the current research is structured around two *central points of interest*: the case-law of the ECtHR on the right to a fair trial and EU competition law. On the one hand, the functioning of the ECtHR and its case-law on the right to a fair trial is scrutinized in great detail. This analysis is performed in Part Two of the work. On the other hand, this research investigates how the right to a fair trial has affected the theory and practice of two highly debatable notions: the independence and impartiality of the European Commission and the deferential judicial review practiced by the EU courts in competition law cases. These issues will be analysed in Part 3 and Part 4 of the current work.

The commitment to simple research questions is complicated in the context of the present book by the fact that the work itself is placed within the *ratione materiae* continuum formed by fundamental rights and competition law, and the jurisdictional continuum formed by the ECtHR and the CJEU. At

the same time, working on the notion of a fair trial and due process necessarily touches upon bigger questions that are relevant in every democratic system. It is for this reason that the current research will occasionally invoke and rely on works of *inter alia* legal philosophers, political scientists, economists and anthropologists.

There are also a few *peripheral points of interest* that were chosen for their capacity to shed light of the main research question. They are described in Chapter 2 and resurge at various points as source of argument or counterargument. These issues are the following:

– Systems thinking offers a novel perspective on the functioning of the ECtHR, one which supports the continuing importance of its case-law for EU law. System thinking is used in the current research to justify the proposal that the ECtHR is a *self-regulating tribunal*;
– *New Public Management Movement* (*NPM*) is a widely-researched topic with many tenets. In this book, NPM is invoked to argument that resistance to due process in EU competition law could be linked to NPM's focus on efficiency, abundant use of soft-law and preference for alternative procedures;
– One question that arises throughout the book concerns the reasons for which EU competition law is considered special and thus falling outside the normal realm of law. *Specialness* is a central feature of EU competition law that affects both the practice of the EU Commission and the judicial review applied by the EU Courts;
– EU competition law appears to remain focused on *consumers*, whereas the EU has changed its focus towards the *citizen*. This book suggests that this difference in language is not anodyne;
– The *EU must accede to the ECHR*, despite the fact that currently this process is blocked by the CJEU.

2 Methodology

Aspiring scholars of EU law have many reasons to rejoice. In the past, European legal doctrine has been written "to a relatively large degree by the staff of administrative and judicial institutions and to a smaller extent by the academics".[58] A 1997 study found that almost 44% of European law doctrine has been

58 Schepel, Harm and Rein Wesseling. "The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe." *European Law Journal* 3.2 (1997): pp. 165–188, p. 173.

produced by non-academics: 17% by officials of the EU Commission, 11% by judges and 8% by lawyers.[59] In addition, they showed that 24 of the 32 most prodigious EU law writers have been employed by one of the EU institutions.[60] Currently, the EU legal doctrine appears to be dominated by academics from both common law and continental law traditions, although writers who work or have worked for the EU institutions continue to play an important role in the debate.

A large variety of research methods are available to scholars of EU law. Monograph or survey, historical or theoretical, ancient or contemporary are a few of the options that scholars are advised to select from for elucidating research topics.[61]

At the same time, a developing critique of EU legal scholarship guards against some of the most common fallacies that trap legal minds. Much of the past scholarship on Community law has had two features. First, it was essentially *sympathetic to the integration project* and was built around the view that the CJEU was "a hero who greatly advanced the cause of integration".[62] Second, Community law scholarship was *traditional in character* in the sense that it was dedicated mainly to the description of legal doctrine and the analysis of case-law.[63] Third, the "tendency towards reactive, event-driven and counter-dependent approach to EU legal studies" has been highlighted as a weakness.[64] Walker noted that theoretical concerns in EU legal studies "often tend to be shaped by highly specific, infra-systemic developments and thus to highlight the peculiarity of EU «legal problems» rather than their continuity with problems which have stimulated theoretical reflection before or elsewhere".[65] Lastly, legal scholars have been criticized for "solutionism", easily providing roadmaps for law-making, while having

59 Schepel and Wesseling, *op. cit.*, pp. 172–176.

60 Schepel and Wesseling, *op. cit.*, p. 174.

61 Eco, Umberto. *How to Write a Thesis*. Cambridge: Massachusetts Institute of Technology, 2015, pp. 10–17.

62 Alter, Karen J. and Sophie Meunier-Aitsahalia. "Judicial Politics in the European Community: European Integration and the Pathbreaking Cassis de Dijon Decision." *Comparative Political Studies* 26.4 (1994): pp. 535–561, p. 535.

63 Arnull, Anthony. "The Americanization of EU Law Scholarship." *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs*. Eds. Anthony Arnull, Piet Eeckhout and Takis Tridimas. Oxford Scholarship Online: 2009, pp. 415–431, p. 416.

64 Walker, Neil. *Legal Theory and the European Union*. EUI Working Papers Law No. 2005/16, European University Institute, p. 3.

65 Walker (2005), *op. cit.*

"little knowledge about the facts and causes behind the problem they are studying".[66]

Walker has also highlighted the important methodological implications of the fact that the EU and EU law are works-in-progress: "we lack both the confidence and the knowledge of retrospective wisdom. Not only are we faced with a situation in which law is asked to contribute perhaps in unprecedented ways to the making of a political community, but we do not know how far or for how long it will succeed".[67]

This book attempts to integrate a few of the critiques described above:

(1) The current study fully embraces and is based on *traditional methods of legal research*: literature review, analysis of the case-law of the ECtHR and analysis of the case-law of the EU Courts. It embraces a *developmental approach* to the case-law of the ECtHR and the CJEU on due process. The in-depth analysis of case-law is pursued with a desire to identify jurisprudential patterns and theoretical grounds because, as highlighted by Advocate-General Gant, "in any legal work, theory can be built only by successive stokes and emerges from the reconciliation of judgements; it is a culmination".[68] Also, a sense of history and genealogy can support understanding the status quo.[69]

(2) This exercise of comparison is placed within the larger intellectual frame of the dialogue between the ECtHR and the EU. This application allows to theorise that the ECtHR is a self-regulating tribunal and that it belongs, together with the EU, to a Pan-European system of fundamental rights. This conclusion is arrived at using concepts from systems theory. In this sense, Arnull has written that current EU law scholarship "is in rude health" because "to the established tradition of sophisticated doctrinal analysis have been added the insights afforded by theoretical, contextual and interdisciplinary work".[70] With some ambition towards *interdisciplinarity*, this book engages a dialogue between historians, political scientists and economists in order to grace the proposed arguments. Also, it combines sources from common law systems and continental systems, integrating opinions of scholars from the UK, the

66 Van Gestel, Rob and Hans-Wolfgang Micklitz. "Why Methods Matter in European Legal Scholarship." *European Law Journal* 20.3 (2014): pp. 292–316, p. 302.

67 Walker (2005), *op. cit.*, p. 9.

68 C-5/66 (Joined Cases C-5/66, C-13/66, C-14/66, C-16/66, C-21/66), *Kampffmeyer and Others v Commission of the EEC*, ECLI:EU:C:1967:8.

69 Hervey, Tamara, Robert Cryer, Bal Sokhi-Bulley and Ali Bohm. *Research Methodologies in EU and International Law*. Portland: Hart Publishing, 2011, p. 47.

70 Arnull, *op. cit.*, p. 431.

US, France, Germany and Switzerland between others. Sources in French and German have also been consulted.

(3) Whereas some scholars focus on a "catalogue" approach to due process, analysing all the guarantees enshrined in Article 6(1) ECHR and how they are reflected in EU competition law, other scholars focus on only one or a few of these safeguards.[71] The current book follows the second approach focusing on the independence of the EU Commission as adjudicator in competition proceedings and the deferential judicial review performed by the EU Courts.

(4) The current research combines *holistic* and *reductionist* perspectives to clarify the influence of the ECtHR on European competition law enforcement. In this sense, Duxbury, comparing legal scholarship in the US and the UK, noted that "the English have preferred the microscope to the telescope, the Americans vice versa; both preferences can be commended, and both can be criticized".[72] This research assumes that applying the "telescope" – that is the holistic paradigm – to the interaction between the EU and the ECtHR is a worthy endeavour that can elucidate how the structural capital of the two systems is translated into relational capital between them. At the same time, the structural capital of the two elements cannot be fully grasped without a "microscope", that is a reductionist approach to those elements.

(5) Unlike the US, where antitrust law belonged since its creation to the field of criminal law, EU competition law suffers from a few nuances.[73] The issue of fundamental rights in EU competition law is approached in the literature using a two-step method of analysis. First, scholars presume that EU competition law is *administrative* – the orthodox vision – or *criminal* – the heterodox vision – in nature. Based on this categorization, they deduct a set of safeguards that should be secured during the proceedings. If EU competition law is administrative in nature, less strict fair trial guarantees should apply. If, however, EU competition law is criminal in nature, then fully-fledged fair trial safeguards should be guaranteed during the proceedings. A valuable representative of the former is Schwarze, who has described EU competition law as a part of EU administrative law, arguing that the sanctions imposed in EU competition law proceedings are administrative acts by an executive body,

71 Adreangeli, Arianna. *EU Competition Enforcement and Human Rights*. Cheltenham: Edward Elgar, 2008.

72 Duxbury, Neil. "A Century of Legal Studies." *The Oxford Handbook of Legal Studies*. Eds. Cane, Peter, Tushnet and Mark. Oxford: Oxford University Press, 2003, pp. 950–974.

73 Although most enforcement actions are civil law actions, the Sherman Antitrust Act adopted in 1890 is also a criminal law that can lead to the prosecution and sentencing of individuals and business by the US Department of Justice.

exercised within an administrative procedure.[74] This is indeed the predominant paradigm in the literature. It is worth mentioning that older works on EU criminal law ignore both EU competition law and the uneasy question about the sanctions imposed by the EU Commission in competition cases.[75] Nevertheless, braver and more recent works on EU criminal law take a different course. They acknowledge the fact that, even if EU criminal law and EU competition law appear disconnected both substantially and procedurally, the subjects should eventually collide in light of the growing domestic criminal law to pursue EU competition law offences.[76]

To address this conundrum, I have chosen to follow the case-law of the ECtHR which works with *autonomous legal notions* and presumes that competition law proceedings are criminal in nature. It is important to highlight the fact that the "criminal in nature" jurisprudence and scholarship is different from the scholarship focusing on the criminalization of competition law in Europe.[77] The "criminal in nature" approach attaches a particular importance to the punitive character of competition law sanctions, but does not fully remove EU competition law from the field of administrative law. This apparent contradiction is tempered by jurisprudential wisdom. On the one hand, as the in-depth analysis of the applicability of Article 6(1) ECHR demonstrates in Chapter 5, the distinction between administrative disputes and criminal disputes is irrelevant for the purpose of applying Article 6(1) ECHR. What is more, even a minimal approach to Article 6(1) ECHR would require an independent and impartial tribunal to adjudicate EU competition law disputes. On the other hand, the ECJ has held early on that the procedural safeguards guaranteed in competition law proceedings "are an application of the fundamental principle of Community law which requires the right to a fair hearing to be observed in all proceedings, *even those of an administrative nature*".[78] (emphasis added)

(6) The approach of most scholars interested in due process matters in EU competition law has been to consider that this issue has been settled in the case *Menarini*, in which the ECtHR found that the fines imposed in domestic

74 Schwarze, *op. cit.*

75 Miettinen, Samuel. *Criminal Law and Policy in the European Union*. New York: Routledge, 2013.

76 Harding, Christopher. "The Relationship Between EU Criminal Law and Competition Law." *Research Handbook on Criminal Law*. Eds. Valsamis Mitsilegas, Maria Bergström and Theodore Konstadinides. Cheltenham: Edward Elgar, 2016.

77 Cseres, Katalin J., Maarten Pieter Schinkel and Floris O.W. Vogelaar, eds. *Criminalization of Competition Law Enforcement: Economic and Legal Implications for the EU Member States*. Cheltenham: Edward Elgar, 2006.

78 C-100/80 (joined cases 100 to 103/80), *Musique Diffusion française v Commission*, ECLI:EU:C:1983:158, paragraph 10.

competition law proceedings were criminal in nature and that full judicial review should complete administrative proceedings involving agencies that lack independence.[79] Most scholars use *Menarini* to justify the existing competition law enforcement system. Thus, in a recent book, Ibáñez Colomo has argued that "if the review performed by EU courts fulfils de facto the *Menarini* conditions, it matters little that they show little willingness to give the Commission a margin of appreciation".[80]

This approach consists in reducing the case-law of the ECtHR to a single case. Whereas some cases have in the past established legal principles and became precedents, the reduction of the case-law of the ECtHR on competition law to a single case is highly problematic. Therefore, this book pursues a detailed analysis of the large majority of cases adopted by the ECtHR which are of relevance to competition law disputes.

(7) In relation to the *applicability of fundamental rights to legal persons*, in *DEB*, the CJEU has pointed out that the word "person" in Article 47 of the Charter "may cover individuals, but, from a purely linguistic point of view, it does not exclude legal persons".[81]

(8) I make ample use of drawings and charts in this book in an attempt to render the subject more legible and interesting. In addition, visuals also contribute to breaking the linearity that written verbal expression imposes and to rendering the perception process more compelling. Data from opinion polls and mass media are occasionally analysed and integrated as well.

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79 ECtHR. *A. Menarini Diagnostics S.R.L. v. Italy*, application no. 43509/08, judgement of 27 Sep 2011.

80 Ibáñez Colomo, Pablo. *The Shaping of EU Competition Law*. Cambridge: Cambridge University Press, 2018, p. 148.

81 C-279/09, *DEB*, ECLI:EU:C:2010:811, para. 38.

PART 1

Foundations

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CHAPTER 1

Central Issues of Research

1.1 EU Competition Law – A Paradox within EU Law

Bork's seminal book *The Antitrust Paradox: A Policy at War with Itself* started by pointing out the main features of American anti-trust. First of all, American anti-trust was a largely *unknown* policy despite being *ubiquitous* due to the "elaborate deployments of governmental force in areas of life still thought committed primarily to private choice and initiative".[1] Second, American anti-trust was popular as very little intellectual and almost no political opposition to its features was shown. Lastly, American anti-trust appeared to Bork *exportable* as jurisdictions in Europe and Asia followed the American example.[2] At the same time, anti-trust was *a policy at war with itself* because certain anti-trust doctrines preserved competition, while others suppressed it.[3] This policy produced inconsistent case-law because the courts could not clearly spell the purpose of anti-trust laws.

The contours of European competition law are both similar and different from those described by Bork. They could be summarized as follows:

(1) *The congenital nature of EU competition law* – EU competition law was created and developed in the same time as the legal context that generated it, that is EU law. It therefore borrows some of the features of EU law, while remaining reminiscent of its ancestors, the American anti-trust law and French and German administrative law.

A seasoned writer about the European Union, Deirdre Curtin wrote that,

> as an object of research, it is certainly true to say that the EU is unidentified and travels at great speed. The EU is largely unidentified in that it escapes the conventional labels such as nation, state, empire, region, federation. Yet it possesses elements of several of these categorizations (international organizations, state, political system, etc.). The speed of institutional change is undeniable; from a weak advisory parliamentary assembly to a more powerful European Parliament with co-legislative

1 Bork, Robert H. *The Antitrust Paradox: A Policy at War with Itself*. New York: The Free Press, 1993, p. 2.

2 Bork, *op. cit*.

3 Bork, *op. cit.,* p. 7.

> rights; from a weak court to a strong court, a court that can for example, rule on issues that would appear purely national.[4]

The institutional change within the European Union has been described using both fluid and static perspectives. Lord Denning referred to the EU as an incoming tide, other authors viewed it as a day-by-day, brick-by-brick construction.[5][6]

While important parts of EU law bathe under the sun of constant transformation, EU competition law remained adamantly resistant to change, its substance and procedure have suffered very little alteration over the years. Competition policy was at the heart of the European integration project, yet only three regulations and two implementing regulations have been adopted to provide guidance for this important field. Also, since the beginning, the great majority of legal rules handling the enforcement of competition law on the European market have been and remain soft law rules.

In addition, given the importance of European competition law experience, one might expect that experience to have been thoroughly studied and its story well told. However, the opposite appears to be true, as only small segments and limited aspects of European competition policy have been described at all. Gerber highlighted that, "as a result, both scholarly and public images of these experience are fundamentally and dangerously flawed. Ideologies, national and linguistic boundaries and sheer ignorance have combined to generate images that are filled with half-truths, non-truths and distortions".[7]

(2) *Politization of separation of powers in EU competition law enforcement* – Ad Geelhoed – an Advocate-General of the CJEU – has argued that EU law has mainly been, until recently, public economic law "aimed at the establishment and proper functioning of the internal market" and that EU economic law was "characterized not so much by ethical preferences, but by choices of a more instrumental nature".[8] This initial arrangement had deep constitutional

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4 Curtin, Deirdre. *The Executive Power of the European Union: Law, Practices and the Living Constitution.* Oxford: Oxford University Press, 2009, p. 5.

5 *HP Bulmer Ltd v J Bollinger SA* [1974] 2 WLR 202.

6 De Witte, Bruno. "The pillar structure and the nature of the European Union: Greek temple or French gothic cathedral?" *The European Union after Amsterdam: A Legal Analysis.* Eds. T. Heukels, N. Blokker and M. Brus. The Hague: Kluver Law International, 1998, pp. 51–68.

7 Gerber, David J. *Law and Competition in Twentieth Century Europe: Protecting Prometheus*. Oxford: Oxford University Press, 1998, p. 2.

8 Geelhoed, Ad. "The expanding jurisdiction of the EU Court of Justice." *The EU Constitution: The Best Way Forward*. Eds. D. Curtin, A.E. Kellerman and S. Blockmans. The Hague: TMC Asser Press, 2005, p. 403.

consequences. Advocate General Shapston highlighted in her opinion in *KME Germany and Others v Commission* that

> EU competition law is shaped by the interplay between the Commission, as investigator, prosecutor, decision-maker, and the adjudicator, providing a measure of external control. However, the case-law has never clarified the exact meaning, scope of rationale of the margin of discretion accorded to the Commission, having regard to the institutional balance between the two.[9]

This remains one of the most important critiques raised against EU competition law both by academics and practitioners. Except for the conflict of interests that it raises, considerable *interdependence of procedural and substantive law* results from the fact that the Commission acts both as a decision-making body and as a party. More precisely, in EU competition law, substantive rules contain procedural standards and a plethora of procedural rules comprise substantive rules.[10]

Indeed, the current system of enforcement of EU competition law consists of two layers, as described in Figure 4 below: An administrative authority – the European Commission – which assumes the functions of investigator, prosecutor, and decision-maker, and a judicial authority – the General Court (GC) or the Court of Justice of the European Union (CJEU) – which holds limited authority over the review of legality of the Commission's decision and unlimited authority over the review of fines. The second, judicial, layer of the enforcement system is triggered only when the affected parties contest the Commission's decision. Otherwise, EU competition law enforcement involves only the first, administrative layer.

In addition, as Figure 5 below shows, the decisions adopted by the EU Commission in competition law cases are *prepared* by the bureaucratic branch of the Commission – the Directorate-General for Competition (DG COMP), assisted by other DG s – and are *adopted* by its political branch – the College of Commissioners.

Presidents of the US have occasionally been involved in shaping US anti-trust law by establishing the agendas of US anti-trust enforcement agencies, by stuffing them with pro-bigness or anti-bigness champions and by initiating "big cases meant to demonstrate the superiority of government power to

9 Opinion of Advocate General, C-272/09 P, *KME Germany and Others v Commission*, ECLI:EU:C:2011:63, point 44.

10 Schwarze, *op. cit.*, p. 1174.

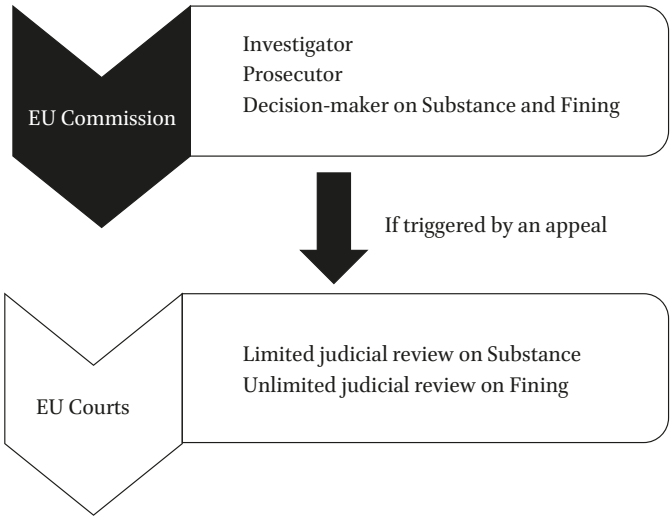

FIGURE 4 The current two-layered enforcement system of EU competition law

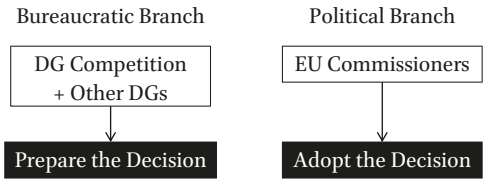

FIGURE 5 Decision-making process for the enforcement of EU competition law

that of powerful private business".[11] Unlike the US, in the EU the participation of the political branch in competition law enforcement is constant. The EU Commissioners for Competition are politicians that are actively participating and deciding the procedural outcomes of competition enforcement proceedings. This blunt involvement of the Union's political forces into its adjudicative activities can be of concern. As Chapters 8 to 12 below will illustrate in detail, the enforcement of competition law raises a few serious concerns about bias that are not answered by the existing safeguards.

The second layer of the EU competition law enforcement system is represented by the *judicial branch of the EU*. Established in 1952, the European Court of Justice (ECJ) has its seat in Luxembourg and consists currently of two courts: the Court of Justice of the European Union and the General Court (GC). The GC – initially called the Court of First Instance (CFI) – was created

11 Ramsey, *op.cit.*, p. 4.

in 1988 for the purpose of dealing with disputes involving complex facts.[12] Competition and civil service litigation were the first types of disputes transferred to the GC. The GC became, thus, to be known as the "Competition court of the European Union".[13] Brunessen describes the GC as the "Administrative Court of the European Union" because one of its functions is to assess the legality of the decisions adopted by the EU Commission and other institutions, bodies, offices and agencies.[14] In competition law matters, the GC performs the functions of a first-instance court and the CJEU those of an appeal court.

The CJEU has built its reputation by audaciously asserting legal principles to protect and support the EU as a newly-created legal order. This exercise of audacity often went against the will of the member states or of the general public. At the same time, in the field of competition law, the CJEU has often imposed on itself a limitation that allows the European Commission to receive preferential deferential treatment in cases that concern complex economic and technical evidence. The deferential judicial review is increasingly hard to justify in view of the fact that competition law disputes tend to lack conceptual homogeneity, involve evidentiary hurdles that can border speculation and are prone to serious errors resulting in high costs.[15]

The CJEU has justified deferential judicial review by holding that an institutional balance characterizes the relationships between the EU institutions.[16] Craig has shown that, as opposed to strict separation of powers, institutional balance "characterized the disposition of legislative and executive power" in the EU from the outset.[17] In competition law cases, the principle of institutional balance partially accounts for the respect that the CJEU shows for the Commission's margin of discretion and for the ensuing deferential judicial review.

12 88/591/ECSC, EEC, Euratom: Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities, OJ L 319, 25.11.1988. Date of end of validity: 31/01/2003.

13 Prek, Miro and Silvère Lefèvre. "Competition litigation before the general court: Quality if not quantity?" *Common Market Law Review* 53 (2016): pp. 65–90.

14 Brunessen, Bertrand. *Le juge de l'Union européenne, juge administratif*. Bruxelles: Bruyant, 2015, pp. 169–183.

15 Geradin, Damien and Nicolas Petit. "Judicial Review in European Union Competition Law: A Qualitative and Quantitative Approach." *The Role of the Court of Justice of the European Union in Competition Law Cases.* Eds. Massimo Merola and Jacques Derennes. Bruxelles: Bruylant, 2012, pp. 32–36.

16 C-9/56, *Meroni v High Authority*, ECLI:EU:C:1958:7, paragraph 133.

17 Craig, Paul Philip. "Institutions, Power and Institutional Balance." *The Evolution of EU Law*. Eds. Paul Craig and Gráinne de Búrca. Oxford: Oxford University Press, 2011, pp. 41–84, p. 41.

(3) *Growing importance of EU Commission-made competition law* – Ibáñez Colomo has highlighted that "since its inception, the EU system has revolved, by and large, around expert administrative authorities".[18] An administration that combines the roles of investigator and decision-maker – as the EU Commission does – may be more prone to opportunistic behaviour than a competition law system centred around courts and private litigation. Ibáñez Colomo adds that

> as a result, and somewhat paradoxically, it cannot be excluded that the system eventually becomes less predictable, and also more prone to enforcement errors, than one revolving around generalist courts. Administrative action tainted by opportunism may become less concerned with predictability and consistency and more with advancing the policy objectives of the authority. This attitude may be exacerbated if the review courts show deference to the knowledge of the expert decision-maker.[19]

Prek and Lefèvre – Judge and Legal Secretary at the GC – have noted that a constant decline in the proportion of competition litigation in the judicial activity of the GC can be observed.[20] This is due, on the one hand, to the success of the commitments procedure and to the CJEU's decision in *Alrosa* which prevents the GC from engaging into effective judicial review of the commitments decisions adopted by the EU Commission.[21] They suggest that "the move toward a less confrontational administrative procedure means that there is less likelihood that the undertakings concerned will challenge the outcome of this procedure".[22]

On the other hand, the deployment of the Commission's leniency programme and the settlement procedure create more incentives for the concerned undertakings to cooperate with the EU Commission and to, therefore, avoid litigation.[23]

(4) *Specialness of EU competition law* – Lawyers have a special interest and loyalty to ideas. They build and defend them in intellectual battles that can last

18 Ibáñez Colomo, *op. cit.*

19 Ibáñez Colomo, *op. cit.*, p. 68.

20 Prek and Lefèvre (2016), *op. cit.*, p. 65.

21 T-170/06, *Alrosa v Commission*, ECLI:EU:T:2007:220.

22 Prek and Lefèvre (2016), *op. cit.*, p. 67.

23 Waelbroeck, Denis. *Le développement en droit européen de la concurrence des solutions négociées* (*engagements, clémence, non-contestation des faits et transactions*) *: Que va-t-il rester aux juges ?* GCLC Working Paper No. 01/08, Global Competition Law Centre.

for centuries. However, if Sigmund Freud or Carl Yung wrote this book, they would be concerned with other types of ideas than those which interest lawyers. They would be looking for the beliefs that generate the ideas with which a lawyer operates.

Two such beliefs are of interest at this point. The first is the fact that *EU law is special*. As Walker explained "EU law was special first and foremost because the European supranational project was an indisputably good cause, a triumph of rationality over passions, of common interest over national insularity, and perhaps most seductively for the legal academic, of law over politics".[24]

The second belief concerns the nature of competition law and seems to dominate the field. This is the idea that *competition law is special* and that it should, therefore, remain sealed away from exogenous influences. This idea is brought as argument in the majority of papers concerning the subject. It is used to justify every aspect of competition policy in the EU, starting with the constant increase of fines and finishing with the deferential judicial review performed by the EU courts. This dominant intellectual position should unsettle researchers breeding scholarly tolerance and learning to hold opposing views. A lawyer committed to logic might rightfully argue that every field of law is special and that a discussion about competition law being more special is both futile and impossible to argue using logic. Still, as Gerber has noted,

> a central feature of European competition law tradition has been the idea that competition law is special and that using law to protect competition moves outside law's normal domain. In this view, competition law is a new type of law which deals with problems for which traditional legal mechanisms are inappropriate, and thus it requires correspondingly non-traditional methods and procedures.[25]

This idea can be traced back to the beginnings of the EU. A review of the first Reports on the Activity of the European Community for Coal and Steel (ECCS) shows that competition policy has been an integral part of the construction of the Common Market. In the early reports, competition policy was the only policy covered, other than the development of the Common Market.[26]

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24 Walker (2005), *op. cit.*, p. 5.

25 Gerber, *op. cit.*, p. 12.

26 European Community for Coal and Steel. "Summary of the Second General Report on the Activities of the Community (April 13, 1953-April 12, 1954)." *Bulletin* 4 (1954). Available at http://aei.pitt.edu/50821/1/B0220.pdf accessed on 23 February 2021.

The first Competition Policy Reports issued by the Commission of the ECCS, European Economic Community (EEC) and European Atomic Energy Community (EAEC) highlight the early emphasis placed on competition policy in somewhat self-aggrandizing statements.

The first Competition Policy Report highlighted that

> competition is the best stimulant of economic activity since it guarantees the widest possible freedom of action to all. An active competition policy pursued in accordance with the provisions of the Treaties establishing the Communities makes it easier for the supply and demand structures continually to adjust to technological development. Through the interplay of decentralized decision-making machinery, competition enables enterprises continuously to improve their efficiency, which is the sine qua non for a steady improvement in living standards and employment prospects within the countries of the Community. From this point of view, *competition policy is an essential means for satisfying to a great extent the individual and collective needs of our society*.[27] (emphasis added)

A year later, the Commission showed that the general movement towards industrial combination was gathering strength in the Common Market. International concentration of operations in the Common Market showed a marked increase from 1966 to 1970. Consequently, the Summit Conference of Heads of State or of Government of the enlarged Community called for the broadest possible use of Article 235 of the EEC Treaty, which empowered the Council, acting unanimously on Commission proposals, after consulting the Parliament, to take any powers not provided for elsewhere necessary to achieve a specific Community objective. This political decision led the Commission to advise the Council of its intention "to submit, independently of the application of Article 86 to specific cases, proposals designed to introduce a more systematic control of merger operations of a given scale".[28] From that point on, the Commission's tasks in the field of competition policy have only increased.

The early competition policy reports point to two aspects that will come to define competition policy in the EU. First, the Commission's focus on the development and enforcement of competition policy has not been accompanied by

27 Commission of the European Economic Community. *First Report on Competition Policy*. Luxembourg: Office for Official Publications of the European Communities, 1972. p. 11.

28 Commission of the European Economic Community. *Second Report on Competition Policy*. Luxembourg: Office for Official Publications of the European Communities, 1973. pp. 11–12.

a focus on procedure or due process guarantees for the participants. In fact, the reports describe the Commission as a solitary fighter guarding the Common Market against enterprises that are either unaware that their behaviour is damaging the construction of the Common Market or which willingly behave in a way that hampers the Commission's efforts. Second, the Commission had to work with the member states in order to prevent them from adopting protectionist policies or to lobby them to adopt and implement fully-fledged competition policies.

The belief that competition law is special is widely shared within the academic community. Thus, Graells noted that,

> given the *specific architecture of the EU competition law* enforcement system under Regulation 1/2003, and as long as an effective (arguably, soft or marginal) judicial review mechanism is already available to the undertakings affected by sanctions derived from EU competition law infringements, no significant changes are required in order to make the system comply with Articles 6(1) ECHR.[29] (emphasis added)

A first mark of specialness identified by the author is the fact that the DG COMP is among the most sophisticated competition law enforcement bodies worldwide, exhibiting a level of expertise that demands respect. Second, the European Commission and the NCAs form part of the European Competition Network (ECN), a body that coordinates and facilitates the exchange of information and best practices. The peer review exercised is a special and beneficial type of control within the ECN.[30] Also, as stressed by numerous authors, competition law enforcement is far from being a neutral exercise of economic regulation. Rather, it is a policy-oriented enforcement that adheres to incomplete and broad rules and "the final decision to be reached will be conditioned by the ultimate goal the competition authority wants to achieve".[31]

(5) *Indifference to fundamental rights* – European competition law appears to have remained cloistered from the ongoing fundamental rights revolution in

29 Graells, Sanchez. "The EU's Accession to the ECHR and Due Process Rights in EU Competition Law Matters: Nothing New Under the Sun?" *The Accession of the EU to the ECHR*. Eds. V. Kosta, N. Skoutaris and V. Tzevelekos. Oxford: Hart Publishing, 2014, pp. 255–270.

30 Graells, *op. cit.*, pp. 260–261.

31 Marra, Alessandro, and Alessandro Sarra. "Incomplete Antitrust Laws and Private Actions for Damages." *European Journal of Law & Economics* 30 (2010): pp. 111–135. Crane, Daniel A. "Rules Versus Standards in Antitrust Adjudication." *Washington and Lee Law Review* 64.1 (2007): pp. 49–110. Graells, *op. cit.*, p. 262.

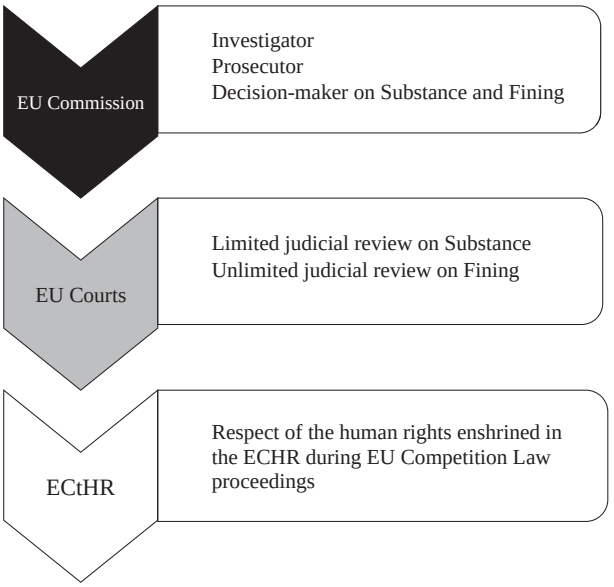

FIGURE 6 The presumptive three-layered enforcement system of EU competition law following the accession of the EU to the ECtHR

the EU.[32] While the European Union, its institutions and case-law have made strides towards greater legitimacy and accountability, the same cannot be said about competition law, which has remained deaf to the calls of scholars and practitioners. These elements create the environment for a type of exceptionalism that fails to marry easily with democracy.

In light of the features described above, the primary goal of this book is to investigate how the case-law of the ECtHR on Article 6(1) ECHR interacts with the system described above. In view of the accession of the European Union to the ECHR, it had initially been assumed, as Figure 6 below shows, that a successful accession would add a third level of control, tasked with monitoring the respect of fundamental rights during EU competition law proceedings by the ECtHR.

The failed accession of the EU to the ECHR led to the reassessment of the interaction between the case-law on the right to a fair trial and the EU competition law. One way to do this is to presume that the EU will accede to the ECHR and to imagine ways in which the enforcement of EU competition law should be changed to adapt to the conditions prescribed in the case-law of the ECtHR.

32 Lasser, *op. cit.*, p. 4.

Another way is to assume that the accession of the EU to the ECHR will not be finalized and that the system of enforcement of EU competition law will stay as described in Figure 4 above.

Working with the "no accession" assumption – which at the time of writing stands true – raises important questions about the interaction between the EU and the ECtHR, at least in the field of fundamental rights protection.

1.2 The ECtHR – System Design as a Predictor of Success

Less than 200 km away from Brussels, another international organization was established in the wake of WWII. The Council of Europe was created in 1949 with the goal of upholding democracy, human rights and rule of law in Europe. The ECHR, an international treaty drawn up within the CoE, was opened for signature in 1950 and entered into force in September 1953.

Under the system established by the ECHR, which prevailed until 31 October 1998, three institutions were entrusted to enforce the obligations undertaken by the contracting states: the European Commission of Human Rights, the ECtHR and the Committee of Ministers of the Council of Europe.[33]

Under the original system, all applications brought by individual applicants or contracting states were subject to preliminary examination by the European Commission of Human Rights. The Commission determined the admissibility of each application and drew up a report expressing a non-binding opinion on the merits of the case. The Commission and/or a government of a state concerned could then decide to refer the case to the European Court of Human Rights for a final, binding adjudication. From 1 November 1998, the European Commission of Human Rights was replaced by a single, full-time ECtHR. The Court's judgments were final and binding for member states. If the Court found a violation of the ECHR, it had no power to quash the decisions of the national authorities. Nevertheless, Article 50 of the Convention mandated the Court to award *just satisfaction* in the form of financial compensation for pecuniary and non-pecuniary damages and reimbursement of the successful applicants'

33 Grabenwarter, C. *European Convention of Human Rights: Commentary*. Munchen: C.H. Beck, 2014.

Harris, D., M. O'Boyle, Ed Bates and C.M. Buckley. *Law of the European Convention on Human Rights*. Oxford: Oxford University Press, 2009.

Keller, H., and A. Stone Sweet, eds. *A Europe of Rights: The Impact of the ECHR on National Legal Systems*. Oxford: Oxford University Press, 2008.

costs and expenses. Article 54 ECHR entrusted the Committee of Ministers to supervise the execution of the Court's judgments.

The current book argues that the success of the human rights system generated by the ECHR is due to its design. As Figure 7 suggests, the design of the human rights protection system enforced by the ECtHR had five elements that cumulatively contributed to its success.

(1) Starting with the entry into force of Protocol No. 9 to the ECHR on 1 October 1994, applicants could bring themselves cases before the ECtHR. The *right to individual petition* is the cornerstone of the Strasbourg human rights system. It allows all citizens and residents of the contracting parties who allege that their human rights have been disrespected, either by an action or a lack of action of a state, to petition the ECtHR after they have exhausted all domestic remedies. The right to individual petition is free of charge. In addition, unlike domestic proceedings, applicants do not need to be represented by a lawyer when lodging an application.

Currently, some 820 million citizens and residents of all member states of the CoE can petition the ECtHR in relation to their grievances. Even if most of the applications lodged at the ECtHR are rejected as inadmissible, it is fair to propose that the applicants are the *agenda-setters* for the ECtHR. In addition, these applications speak about the state of justice and democracy in their countries of origin. As such, the ECtHR is unmatched as an international tribunal.

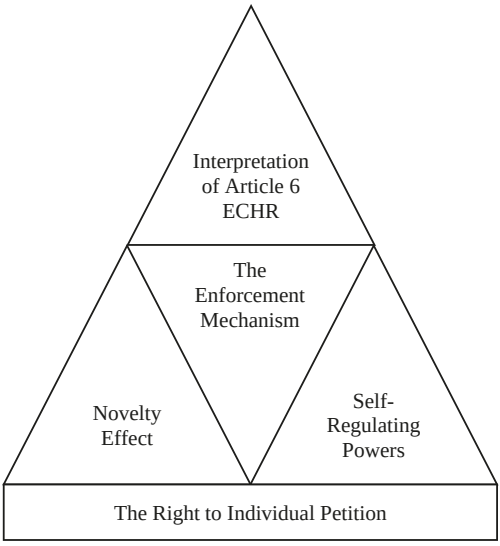

FIGURE 7 The five elements of the human rights system enforced by the ECtHR

(2) The entry into force of the ECHR and the establishment of the ECtHR have benefitted from a *novelty effect*. Concerning the relation between the ECHR and the UK, Simpson wrote that "there is no simple answer to the question why the members of the Council of Europe signed the Convention in 1950 and its first protocol in 1952. Nor is there any simple answer to the question what it was that they were signing".[34] He explains that the prevailing view was that the Convention would have no significant domestic effects and that "since British law and practice respected human rights this was unlikely to cause any serious domestic problems".[35]

These recent works show that, like the EU, the ECtHR also remained unidentified, escaping known labels and denominations by politicians and lawyers. In addition, the ECtHR remained uninteresting to legal scholars for a long time, allowing it to test and hone its concepts and procedural rules.

Unlike the EU, the ECtHR did not grow at great speed. In fact, the ECtHR as an institution *has developed slowly*. From its creation in 1959 until 1998, when the Court became the only enforcer of the Convention, only 1000 cases were referred to it by the Commission or by governments.[36] The Court delivered only 837 judgments and adopted 190 decisions rejecting applications.[37] Article 6(1) ECHR was raised in 455 of these cases and the ECtHR found a violation in 303 of these cases.

(3) The powers of interpretation vested in the ECtHR allowed it to become a *self-regulating tribunal*. Self-regulation allowed the ECtHR to oscillate between legal imagination and consistent application of its own precepts. It is also self-regulation that enabled the ECtHR to provide innovative solutions to a continent that was undergoing important democratization processes.[38]

(4) The *interpretation of Article 6(1) ECHR* led to an increasing number of disputes previously considered as belonging to public law to become justiciable. This has led to a progressive enlargement of the ECtHR's jurisdiction. Article 6(1) ECHR provided fertile ground for the ECtHR's quest towards self-regulation because of the central place it occupies in the Convention and because of the

34 Simpson, A.W. Brian. *Human Rights and the End of Empire: Britain and the Genesis of the European Convention*. Oxford: Oxford University Press, 2001.

35 Simpson, A. W. Brian. "Britain and the European Convention." *Cornell International Law Journal* 34.3 (2001): article 4.

36 ECtHR. *ECtHR Survey – Forty Years of Activity – 1959–1998*, p. 4. Available at https://www.echr.coe.int/Documents/Survey_19591998_BIL.pdf accessed on 23 February 2021.

37 ECtHR Survey, quoted above.

38 For a detailed analysis, see Chapter 6 below.

variety of questions that can be debated around it, such as access to justice, the shape of judicial mechanisms and separation of powers.

(5) The *enforcement mechanism* put in place by the ECHR is a key element to the design of the Strasbourg human rights system. The member states have undertaken to comply with final judgments of the Court finding violations of the Convention, as well as with Court's decisions taking note of friendly settlements.[39] The execution of the ECtHR's decisions is supervised by the Committee of Ministers of the Council of Europe, which reunites representatives of the governments of the 47 member states, assisted by the Department for the Execution of Judgments of the ECtHR. The member states enjoy a margin of appreciation regarding the measures that should be taken to remedy a violation of the ECHR. These measures are identified by the member state concerned, under collective supervision of the Committee of Ministers.[40] In other words, the supervision mechanism empowers the member state that has been found in breach of the Convention to be at the origin of the measure to remedy it. Lastly, the Committee of Ministers is also a collaborative platform, uniting members of the governments of the 47 member states, "trust thereby created is a major prerequisite for constructive cooperation between states in many matters, be they economic, legal or cultural".[41]

1.3 ECtHR as a Self-Regulating Tribunal

The jurisdiction of a national tribunal is usually established by domestic instruments of varying constitutional weight, such as constitutions, procedural codes and ordinary or secondary laws. In addition, national tribunals benefit from theories of legal interpretation which all lawyers study thoroughly during their training. Finally, a two-tiered or three-tiered court system evens the *ratione materiae* jurisdiction over legal matters, with a Supreme Court harmonizing the approach to all matters of jurisdiction over lower courts. This system ensures that a criminal matter will be settled by a criminal tribunal, following criminal law, instead of landing on the agenda of an arbitration tribunal. By

39 Articles 46 and 39(4) of the European Convention on Human Rights.

40 More information about the supervision process can be found at https://www.coe.int/en/web/execution/the-supervision-process accessed on 23 February 2021.

41 Council of Europe. *Supervision of the Execution of Judgements and Decisions of the European Court of Human Rights: 11th Annual Report of the Committee of Ministers 2017*, p. 15. Available at https://rm.coe.int/annual-report-2017/16807af92b accessed on 23 February 2021.

the same token, a legal issue concerning the applicability of an investment treaty will be handled by a specialized tribunal created to this end, instead of being settled by a military tribunal.

In other words, at the domestic level, the enquiries, "Who shall judge?", "How should the case be judged?" and "What is justiciable?" – which form the trinity of questions to establish justiciability – are answered by a predictable hierarchy of rules and organs. In case of the ECtHR, answering these questions leads to the understanding that the ECtHR functions as a self-regulating tribunal.

System theorists describe self-organization, resilience and hierarchy, as the most important characteristics of successful systems.[42] Meadows describe self-organization as the system's "ability to learn, diversify, complexify and evolve".[43] Open, self-regulating systems are capable of learning in which case "the system performs a reflective knowledge function, interpreting the environment based on its own knowledge".[44]

The concept of self-organization or self-regulation applies easily and intuitively to systems existing in the natural world. However, applying this concept to the functioning of an international tribunal requires solid arguments. In the paragraphs below I attempt to build this argument.

For the purposes of the current work, a *self-regulating tribunal* is one that combines two powers:

– It has competence to decide its own jurisdiction and
– It is able to have an impact on the flow and quality of applications being addressed to it.

The sources of the ECtHR's self-regulatory powers are both (1) internal and (2) external. The *internal sources* are (a) the design of the jurisdiction of the ECtHR and (b) the interpretation of the right to a fair trial. The *external sources* concern (a) the cooperation offered by the member states, including their judiciaries, (b) the attitude of the academic community and (c) the zeitgeist. I will analyse these elements one by one.

(1) *Internal Sources of the ECtHR's Self-regulatory Powers*

(a) The Design of the Jurisdiction of the ECtHR

At the ECtHR, the question "Who shall judge?" is answered in Article 19 ECHR by stipulating that "to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto,

42 Meadows, *op. cit.*, p. 75.
43 Meadows, *op. cit.,* p. 79.
44 Mele, Cristina, Jacqueline Pels and Francesco Polese. "A Brief Review of Systems Theories and Their Managerial Applications." *Service Science* 2.1/2 (2010): pp. 126–135, p. 128.

there shall be set up a European Court of Human Rights (…). It shall function on a permanent basis". Articles 20–23 continue to answer the same question by describing the criteria for office, election and dismissal of judges.

The answer to the question "How the case should be judged?" is found in the provisions that prescribe that cases can only be decided by a single judge, a committee, a chamber and the Grand Chamber.[45]

The question – "What is justiciable?" – finds an interesting answer in the ECHR. Article 32(1) ECHR provides that "the jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47".

The jurisdiction of the ECtHR will be shaped, first of all, by an application being lodged by "any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto".[46]

Second, the jurisdiction of the ECtHR will be shaped by the admissibility criteria enounced in Article 35 ECHR:

> 1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.
> 2. The Court shall not deal with any application submitted under Article 34 that (a) is anonymous; or (b) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.

The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:

> (a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or
> (b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the

45 Articles 26, 27 and 28 of the European Convention on Human Rights.
46 Article 34 of the European Convention on Human Rights.

> Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.

Lastly, Article 32(2) ECHR adds the most important ingredient for self-regulation. This provision stipulates that "in the event of dispute as to whether the Court has jurisdiction, the Court shall decide". In other words, in the event of an application being lodged at the ECtHR alleging a violation of the ECHR, an allegation that is disputed by the member state against whom the application is lodged, the ECtHR has the final say about its own jurisdiction over the case.

In addition, the rules of the ECtHR are adopted by the Court itself, with no apparent external input.[47]

(b) The Interpretation of the Right to a Fair Trial

The second internal element that has allowed the ECtHR to become a self-regulating tribunal is its case-law on the right to a fair trial. This provision is enshrined in Article 6(1) ECHR and appears to have been the main engine for expanding the jurisdiction of the ECtHR over numerous legal fields for which member states have initially claimed *ratione materiae* immunity. The case-law on the applicability of Article 6(1) ECHR has been the skeleton on which the ECtHR has built its self-regulation muscle.

There a few reasons for this, the most obvious of all being the need to meet a demand. Article 6(1) ECHR is invoked in almost all cases brought before the ECtHR, either independently, when applicants complain about the functioning of domestic jurisdictions, or in parallel with another provision of the ECHR. An example of the latter would be when applicants complain under Article 3 ECHR about torture, inhuman or degrading treatment and under Article 6(1) ECHR about the impossibility to have their rights under Article 3 ECHR recognized by domestic courts.

In addition, the cases brought under Article 6(1) ECHR are rarely political and attract little sustained attention from the public or the media. Compared to cases concerning the right to life or the right to private life, for example, cases that deal with the applicability of the right to a fair trial to employment disputes or constitutional disputes fascinate the minds of non-lawyers to a much lesser degree. This has provided the ECtHR with a safe, non-conflictual public environment to enlarge its jurisdiction.

47 ECtHR. *Rules of Court*. Strasbourg: 2008. Available at https://www.echr.coe.int/Documents/Rules_Court_ENG.pdf accessed on 23 February 2021.

An exception to this, however, concerns cases in which Article 6(1) ECHR was applied to competition law proceedings. Cases like *Menarini* attract more attention due to the implications that they could bear for European competition law.[48]

(2) *External Sources of the ECtHR's Self-Regulatory Powers*

(a) The Cooperation Offered by the Member States

Turning now to the external factors supporting the ECtHR's self-regulation, it is important to highlight that the success of the ECtHR comes from the fact that its decisions are enforced voluntarily. Each time a member state party to the Convention enforces the decisions of the ECtHR issued against it, that member state behaves cooperatively. Cooperation, thus, is essential for the ECtHR's self-regulatory powers.

(b) The Academic Community

The academic community has played an important role in promoting the work of the ECtHR and in training new generations of lawyers. Although more scientific research is needed to substantiate this point, common sense and a look at the curricula of master degree programs offered in Europe support the idea that academic circles have contributed to the ECtHR's self-regulatory quest. Academia can theoretically test the principles proposed by the ECtHR and can bring visibility to the ECtHR and its case-law by commenting on the ECtHR's work and by organizing conferences.

An exercise in imagination can further validate this argument. If the academic circles in Europe and in the rest of the world had never written about the ECtHR, had never commented on its case-law and had not provided human rights law courses, would the ECtHR have benefitted from the same reputation? The answer is probably negative.

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48 ECtHR. *A. Menarini Diagnostics S.R.L. v. Italy*, quoted above. See for example, Waelbroeck, Denis and Sven Frisch. "Après l'Arrêt *Menarini*. L'impact de la Convention européenne de Sauvegarde des Droits de l'Homme et des Libertés Fondamentales sur les Procédures en Droit de la Concurrence." *Scrutinizing Internal and External Dimensions of European Law. Les dimensions internes et externs du droit européen à l'épreuve. Liber Amicorum Paul Damaret, Vol. II.* Eds. Inge Govaere and Dominik Hanf. Brussels: Peter Lang, 2013, pp. 663–691.

Bronckers, Marco and Anne Vallery. "EU Competition Law After The Menarini Case." *MLex Magazine* 3.1 (2012): pp. 44–47.

(c) The Zeitgeist

The zeitgeist is the last external element that contributed to the ECtHR becoming a self-regulatory tribunal. Europe after WWII was a continent that focused on peace-building through democratisation, removal of tariffs and deeper commercial ties. Transactional supranationalism played a key role as states decided to trade more intensely with each other while transferring parts of their sovereign powers to supranational institutions. This process intensified after the fall of the Berlin Wall, when more states were accepted to partially trade their sovereignty for the right to belong and contribute to supranational organizations.

The ECtHR is one of the consequences of this process. In addition, the development and respect for international law has normalized the member states' cooperation with the ECtHR's.

The self-regulating nature of the ECtHR has been essential for the development and the protection of human rights in Europe and for the construction of a strong and respected ECtHR. This aspect of the ECtHR must be taken into account when analysing its impact on European competition law.

CHAPTER 2

Supporting Issues

The following peripheral issues help to deepen the understanding of the limited role that due process has played in EU competition law: (1) The growing importance of system thinking in social sciences; (2) The New Public Management movement; (3) The distinction between people, consumers and citizens; (4) The accession of the European Union to the ECHR and (5) The EU Charter of Fundamental Rights.

2.1 Systems Theory and Social Sciences

There are two main frameworks to analyse the world or any subject: topical, focused on one part only, or holistic, focusing on the whole that is formed by interacting parts. The second approach can be dated back to Aristotle's claim that knowledge can only be derived from the understanding of the whole rather than its parts. It was, however, only in the 20th century that this adage broke free from the constraints of popular wisdom when systems theory began to be legitimized as an interdisciplinary tool for analysis. Although systems theory had been initially and predominantly used in cybernetics, chemistry and biology, it quickly rose to prominence within the analytical ranks of social scientists as well. Currently, systems theory provides one of the most potent tools for analysis in any field of study.

Systems theory produces interesting findings when unmoored from its initial, classical science background. Katz and Kahn, for example, have successfully applied systems thinking to organizations, defined by them as open systems constantly re-defined by their interactions with the environment.[1] This has resulted in management gurus and practitioners fully embracing systems theory. Luhmann brought the systems theory matrix of analysis to sociology, politics and law, providing one of the most extensive, complex and compelling theories of society.[2]

A system is defined as "a set of things – people, cells, molecules, whatever – interconnected in such a way that they produce their own pattern of behaviour

1 Katz, Daniel, and Robert L. Kahn. *The Social Psychology of Organization*. New York: Wiley, 1966.
2 Luhmann, Niklas. *Social Systems*. Stanford: Stanford University Press, 1995.

over time".[3] Von Bertalanffy places interaction between parts or between the parts and their environment at the core of every existing system.[4] Tien and Berg go along the same lines when they define the types of systems and their components:

> A system can be natural (e.g., lake) or built (e.g., government), physical (e.g., space shuttle) or conceptual (e.g., plan), closed (e.g., chemicals in a stationary, closed bottle) or open (e.g., tree), static (e.g., bridge) or dynamic (e.g., human). In regard to its elements, a system can be detailed in terms of its components, composed of people, processes and products; its attributes, composed of the input, process and output characteristics of each component; and its relationships, composed of interactions between components and characteristics.[5]

Meadows highlights the relationship between the structure of the system and the behaviours exhibited by its elements and adds that "the least obvious part of the system, its function or purpose, is often the most crucial determinant of the system's behaviour".[6]

The current work attempts to apply the basic elements of systems theory to the field of fundamental rights protection in Europe. The use of systems theory can support attempts to explain why EU competition law has remained resistant to the developments in the field of fundamental rights in the EU. Systems theory also provides a clarification of the deferential judicial review performed and preferred by the EU courts. Lastly, and probably most importantly, the exercise of applying systems theory to the ECtHR results in arguing that the latter is a self-regulating tribunal.

2.2 The New Public Management Movement

Neither the Commission, in all its roles, nor the ECtHR have escaped the influence of the most important movement in administrative theory from the second half of the 20th century – the New Public Management. This

3 Meadows, Donella H. *Thinking in Systems: A Primer*. London: Earthscan, 2009. Page 2.

4 Von Bertalanffy, Ludwig. "General Systems Theory." *General Systems, Yearbook of Society for General Systems Research* 1 (1956): pp. 1–10.

5 Tien, James M., and Daniel Berg. "A Case for Service Systems Engineering." *Journal of Systems Science and Systems Engineering* 12.1 (2003): pp. 23–24.

6 Meadows, Donella H. *Thinking in Systems: A Primer*. London: Earthscan, 2009, p. 16.

section provides a description of the NPM movement and its influence on the Commission and the ECtHR.

The National Partnership for Reinventing Government and the National Performance Review were launched by US President Bill Clinton in March 1993. The goal of the endeavour has been to "make the entire federal government both less expensive and more efficient, and to change the culture of our national bureaucracy away from complacency and entitlement toward initiative and empowerment".[7] Based on this goal, the Phase I report, *Creating a Government That Works Better and Costs Less*, made 384 recommendations. It was supported by 38 "accompanying" reports which detailed 1,250 specific actions intended to save $108 billion in total, reduce the number of "overhead" positions, and improve government operations.[8]

What started as an American phenomenon quickly spread and gained momentum in the rest of the world as well. The importance of the American origin of this theory and phenomenon should not be overlooked. Caiden wrote that "most of the theories employed have originated in the United States. Most of the substantive measures advocated are drawn from American texts. Many of the experts employed by international bodies to expound the platform are Americans. Most models and sample laws are based on American sources".[9]

In his seminal work *Dismantling Democratic States*, Suleiman points out that all US Presidents have launched programs for government reorganization and for the elimination of waste. The proposal put forward by the Clinton-Gore administration differed from all the previous programs in two ways. First, the scope of proposed changes had not been previously matched. Second, and more importantly, this proposal suggested the

> embrace of norms that had hitherto been considered appropriate only for the private sector – customer orientation, entrepreneurism, competition among government agencies – and the implicit alliance that has

7 Remarks by President Clinton Announcing the Initiative to Streamline Government, 3 March 1993. Available at https://govinfo.library.unt.edu/npr/library/speeches/030393.html accessed on 23 February 2021.

8 National Partnership for Reinventing Government/John Kamensky. "A Brief History." January 1999. Available at https://govinfo.library.unt.edu/npr/whoweare/history2.html accessed on 23 February 2021.

9 Caiden, Gerald E. "Administrative Reform – American Style." *Public Administration Review* 54.2 (1994), p. 124.

> come to be made with social and political forces that seek to curtail the role of government for ideological or class interest.[10]

Suleiman describes four key concepts behind the NPM and how they differ from the previous attempts to reorganize governments: (1) Entrepreneurism; (2) Customer Orientation; (3) Flattening Hierarchies and (4) Alternative Forms of Implementation. Suleiman highlights that "most important in this view is the idea that the dangers of bureaucratic discretion that are said to be concomitant with entrepreneurism are not really dangers at all if bureaucrats are motivated to serve the public interest".[11] He notes that some elements of the NPM such as flexibility – defined as "a disdain for red tape coupled with emphasis on getting things done" – and the decreasing attention to formal rules and hierarchies hide a "scepticism about the existence of a public service institution".[12] Lastly, Suleiman points that "*procedural due process*, which is seen as the core legitimating concern that prompts the existence of red tape in the first place, is deemphasized in the literature on government reinvention". (emphasis added)[13]

A few consequences follow from the embrace of the NPM. First, there is a withering of the notion of public interest which, if construed as a flexible notion, justifies a diminished role for public bureaucracy.[14]

Second, in the NPM model, the state becomes a producer of services with citizens as customers. Suleiman notes that "paradoxically, the attempt to promote the consumer and to make him central to the new democracy was an attempt to combat cartels and the plutocrats".[15] Boorstin's work on consumption communities has argued that "now men were affiliated less by what they believed than by what they consumed".[16] Suleiman suggests that "the contemporary attempt to see the government as facing a horde of consumers that it needs to satisfy rather than as citizens to whom it has responsibility" is the "antithesis of the kind of citizenship required to sustain a democratic polity".[17]

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10 Suleiman, Ezra. *Dismantling Democratic States*. Princeton: Princeton University Press, 2005, p. 44.
11 Suleiman, *op. cit.*, p. 45–46.
12 Suleiman, *op. cit.*, p 47.
13 Suleiman, *op. cit.*, p 45.
14 Suleiman, *op. cit.*, p. 50.
15 Suleiman, *op. cit.*, p. 53.
16 Boorstin, Daniel J. *The Americans: The democratic experience*. New York: Random House, 1973, p. 147.
17 Suleiman, *op. cit.*, p. 54.

Lastly, Suleiman highlights that the weakening of the idea of collective interest leads to statist minimalism and politics and to the state no longer being able to ensure the impartial arbitration between competing claims.[18]

The NPM model was embraced in the European Union as well. The resignation of the Santer Commission in 1999, following perceived runaway tendencies of the European bureaucracy that culminated with a legitimacy crisis, started a wave of NPM reforms. The Committee of Independent Experts appointed by the EU Parliament in the wake of the crisis found that the EU Commission tolerated fraud and nepotism in breach of the principles of independence, integrity and discretion required from all members of the Commission.[19] The first report of the experts also found "an admission of a loss of control by the political authorities over the Administration that they supposedly were running".[20] Ellinas and Suleiman, in their extensive appraisal of the process, suggested that the proposed solution was "to make European officials more responsible through the enhancement of management practices".[21]

The EU Commission's White Paper on Governance of 2001 acknowledged that political leaders throughout Europe were facing a real paradox: "on the one hand, Europeans want them to find solutions to the major problems confronting our societies. On the other hand, people increasingly distrust institutions and politics or are simply not interested in them".[22] The White Paper on Governance proposed a wide-ranging series of reforms, some of which contain elements of NPM: greater use of policy tools such as regulations, framework directives, guidelines and recommendations, co-regulatory mechanisms and the further creation and development of EU regulatory agencies.

The European Commission under Romano Prodi made administrative reform one of its top priorities. Neil Kinnock was appointed vice president of the Commission and was put in charge of the modernization process of the EU Commission in 2000.

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18 Suleiman, *op. cit.*, pp. 55–59.

19 Committee of Independent Experts. *First Report on Allegations Regarding Fraud, Mismanagement and Nepotism in the European Commission.*15 Mar 1999. Available at http://www.europarl.europa.eu/experts/pdf/reporten.pdf accessed on 23 February 2021.

20 Committee of Independent Experts, quoted above, p. 137.

21 Ellinas, Antonis A., and Ezra Suleiman. *The European Commission and Bureaucratic Autonomy*. Cambridge: Cambridge University Press, 2012, p. 99.

22 Commission of the European Communities. *European Governance: A White Paper*. Brussels: COM(2001) 428 final. Available at https://ec.europa.eu/europeaid/european-governance-white-paper_en accessed on 23 February 2021.

Ellinas and Suleiman noted that there were four overarching themes of the modernization efforts put forward by the Kinnock Reforms.[23] The first was a "culture based on service" that led to new standards of behaviour for Commissioners and a Code for Good Administrative Behaviour.[24] The second theme was *efficiency*: "echoing NPM-type ideas (…) the overall goal was to encourage the various directorates and departments to focus more on results, rather than procedures".[25] The third theme of the reform proposal was the improvement of financial management and control, and the improvement of audit procedures. The last theme of the reform initiative was the modernization of human resources policies, and management ability was identified as the most important criterion for appointments.[26]

The reform of the European Commission took place at the same time as the accession of the Eastern countries leaving behind a totalitarian past. Coincidentally, on 1 May 2004, Regulation 1/2003 entered into force and 10 new member states joined the European Union. As will be shown later, Regulation 1/2003 put forward all the NPM elements described above in the enforcement of competition policy in the EU: customer orientation, the flattening of hierarchies, preference for alternative forms of implementation and the disdain for due process that characterizes entrepreneurism-derived flexibility.

The Kinnock reforms have been widely discussed in the academic world. Some observers consider that they have been the most successful attempt at modernizing European bureaucracy.[27] Other writers have remained sceptical. Ellinas and Suleiman concluded, after extensive interviews with the Commission's officials, that the progress achieved by the Kinnock reforms in modernizing the Commission has come at the expense of increasing its bureaucratization. They highlight that "the Kinnock reforms are probably unique in the universe of NPM-inspired administrative reforms in that they are thought to have reduced efficiency instead of enhancing it".[28]

As to the ECtHR, a recent paper has analysed the impact of NPM reforms put in place since at least 1994 to render the ECtHR more efficient.[29] Lambert

23 Ellinas and Suleiman, *op. cit.*, pp. 101–104.

24 European Commission (2001), quoted above.

25 Ellinas and Suleiman, *op. cit.*, p. 102.

26 Ellinas and Suleiman, *op. cit.*, p. 103.

27 Bauer, Michael. "The Politics of Reforming the European Commission." *Management Reforms in International Organizations.* Eds. Michael Bauer and Christoph Knill. Baden-Baden: Nomos, 2007, p. 52.

28 Ellinas and Suleiman, *op. cit.*, p. 122.

29 Lambert Abdelgawad, Elisabeth. "The Economic Crisis and the Evolution of the System Based on the ECHR: Is There Any Correlation?" *European Law Journal* 22.1 (2016): pp. 74–91.

Abdelgawad has shown that the efficiency-driven reforms have resulted in a different filtration of applications procedure, in a priority policy and in numerous pilot judgements, allowing the ECtHR to freeze cases until the Member State from which the applications originate solves the matter at the origin of the large number of applications. Efficiency of courts, alongside independence, has become a paramount principle. At the same time, the more worrisome trend has been to equate efficiency with the speed of the judicial decision-making process. Lambert Abdelgawad concluded that "NMP remains dominant if not domineering" and that "efficiency may have resulted in more rulings for each euro, but these savings have come at a very high price, to be paid by individuals whose Convention rights have been breached but who may be prevented from having access to the ECtHR in the very name of maximising the return of financial resources".[30]

As it will be shown in Part 3, the NPM movement and the Kinnock reforms have resulted in the adoption of measures strengthening the independence of the Commissioners, but also of the civil service of the EU Commission. At the same time, the impact of the Kinnock reforms on the adjudicatory branch of the EU Commission has rarely been described as positive.

2.3 Peoples, Consumers and Citizens

> The difference between the *almost right* word and the *right* word is really a large matter. 'tis the difference between the lightning bug and the lightning.
>
> MARK TWAIN

An analysis of the wording used by EU treaties and EU competition law legislation might offer an additional explanation about the reasons for which the latter remained separated from the due process developments taking place elsewhere.

The Treaty of Rome of 1957 had as its main task to establish a common market and to progressively approximate the economic policies of member states, "to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the states belonging to it".[31] The beneficiaries of the Treaty of Rome

30 Lambert Abdelgaward, *op. cit.*, p. 83 and 89.

31 Article 2 of the Treaty of Rome.

appear to be the member states and its "peoples". The word "person" appears in the Treaty of Rome as subject of the free movement of goods, persons, services and capital. The "person" of the Treaty of Rome is a rather passive one, as if carried away by the flow of free movement. The "consumer" is a variation of the "person" and it can be either a beneficiary of common agricultural policy or of competition policy. The word "citizen" does not appear in the Treaty of Rome.

In the same vein, the early Annual Competition Reports indicate that the main beneficiary of the Commission's work in the field of competition is the consumer. The Commission acknowledged that its competition policy

> encourages the best possible use of productive resources for the greatest possible benefit of the economy as a whole and for the benefit, in particular, of the *consumer*. In this respect, the Commission is not only concerned with increasing by means of the rules of competition the quantity of goods available for consumption, but is also taking action to promote better information for *consumers*.[32] (emphasis added)

The Treaty of Maastricht was the first document to refer to citizenship and introduced the "citizen" as the subject of EU law. The "citizen" of the Treaty of Maastricht had the right to be in the close vicinity of the decision-making process, had the right to move and reside freely in the territory of the member states and had the right to petition the European Parliament and the European Ombudsman. The focus on the "citizen" continued throughout all of the following Amsterdam, Nice and Lisbon Treaties. However, the competition rules established in the Treaty of Rome remained unchanged.

At the same time, competition policy viewed the "citizen" through its "consumer" lens. Karel van Miert wrote in the introduction to the 1995 Annual Report on Competition that "the single market must first and foremost serve people. It must be ensured, through strict application of the competition rules, that consumers have freedom of choice between quality products at competitive prices".[33] The same view appears to have been held by all subsequent Competition Commissioners. Commissioner Neelie Kroes wrote that "improving the functioning of markets for the benefit of European consumers and businesses remains at the heart of the European project".[34]

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32 Commission of the European Economic Community (1972), quoted above, p. 12.

33 European Commission. *XXVth Report on Competition Policy 1995*. Luxembourg: Office for Official Publications of the European Communities, 1996, p. 7.

34 European Comission. *Report on Competition Policy 2007*. Luxembourg: Office for Official Publications of the European Communities, 2008, p. 5.

The more recent Annual Reports on Competition make use of the term "citizen" more often, but the term is still closely associated to the citizen as a consumer. The 2017 Annual Report on Competition highlighted that 2017 marked the 60th anniversary of the signing of the Treaty of Rome and of EU competition policy. The report noted that,

> in the past decades, competition policy has made a big difference in people's lives: European *citizens* may not always be familiar with competition rules, but they deal with the market every single day. Competition drives businesses to compete on the merits – on prices, quality and innovation – and to meet *consumers'* needs. By pushing companies to do better, competition puts power in the hands of *consumers*.[35] (emphasis added)

Is the difference in wording important in this context? If yes, in which ways? The Cambridge Dictionary defines a "citizen" as "a person who is a member of a particular country and who has rights because of being born there or because of being given rights".[36]

A "consumer" on the other hand is "a person who buys goods or services for their own use".[37] The word "citizen" has the notion of rights at its core, rights that come into being from a relationship with a country. This relationship implies continuity, loyalty and reciprocity. A "consumer", in contrast, is someone – a state, organization or person – that is defined by the act of purchasing and consumption. This relationship implies discontinuity, opportunism and money or other units that can be used as a measure for the exchange.

Shrubsole noted that the use of the word "consumer" has steadily grown during the 20th century, slowly replacing the word "citizen" in books, media and policy documents.[38] Another author found that "unlike the citizen, the consumer's means of expression is limited: while citizens can address every

35 European Commission. *Report on Competition Policy 2017*. Brussels: COM(2018) 482 final, p. 2. Available at http://ec.europa.eu/competition/publications/annual_report/2017/part1_en.pdf accessed on 23 February 2021.

36 Cambridge Online Dictionary, available at: https://dictionary.cambridge.org/dictionary/english/citizen

37 Cambridge Online Dictionary, available at:https://dictionary.cambridge.org/dictionary/english/citizen

38 Shrubsole, Guy. "Consumers Outstrip Citizens in British Media." *Open Democracy*. 5 Mar 2012. Available at https://www.opendemocracy.net/en/opendemocracyuk/consumers-outstrip-citizens-in-british-media/ accessed on 23 February 2021.

aspect of cultural, social and economic life (…), consumers find expression only in the marketplace".[39]

This shift in terminology can be considered an expression of what Berry called "tyrannese". He wrote: "My impression is that we have seen, for perhaps a hundred and fifty years, a gradual increase in language that is either meaningless or destructive of meaning. And I believe that this increasing unreliability of language parallels the increasing disintegration, over the same period, of persons and communities".[40] He goes on to say that

> in this degenerative accounting, language is almost without the power of designation, because it is used conscientiously to refer to nothing in particular. Attention rests upon percentages, categories, abstract functions. It is not language that the user will very likely be required to stand by or act on, for it does not define any personal ground for standing or acting. Its only practical utility is to support with "expert opinion" a vast, impersonal technological action already begun. (…) It is tyrannical language: tyrannese.[41]

The European Communities initially focused on constructing a Common Market to ensure the free movement of goods, services, persons and capital, and only later on a Union, whose citizens have rights and obligations. On the other hand, the fact that European Competition Policy has remained focused on consumers and has not updated its vocabulary to "citizenry" is surprising. This, however, can partially account for the reticence of competition officials to enlarge due process guarantees during competition law proceedings.

2.4 Accession of the EU to the ECHR

The Council of Europe and the European Union have developed in parallel, in largely the same geographic area and on the basis of similar principles. The concepts of human rights and fundamental rights have been key elements of institution-building, both for the Council of Europe and for the European Union. The proposed accession of the European Union to the ECHR highlights,

39 Lewis, Justin, Sanna Inthorn and Karin Wahl-Jorgensen. *Citizens or Consumers: What the Media Tell Us about Political Participation: The Media and the Decline of Political Participation*. Maidenhead: Open University Press, 2005.

40 Berry, Wendell. *Standing by Words*. San Francisco: North Point Press, 1983, p. 24.

41 Berry, *op. cit.*, p. 52.

however, the menial and procedural aspects that prevent the successful enforcement of human rights at the supranational level.

According to well-established case-law of the CJEU, fundamental rights form an integral part of the general principles of EU law. For that purpose, the Court of Justice draws inspiration from the constitutional traditions common to the member states and from the guidelines supplied by international treaties for the protection of human rights on which the member states have collaborated or of which they are signatories.[42]

In paragraphs 34 and 35 of the Opinion 2/94, the Court of Justice considered that the European Community had no competence to accede to the ECHR.[43] Such accession would have required a substantial change in the existing Community system for the protection of human rights in that it would have entailed the entry of the Community into a distinct international institutional system as well as integration of all the provisions of that Convention into the Community's legal order. Such a modification of the system for the protection of human rights in the Community would have been of constitutional significance both to the Community and to the member states and would therefore have gone beyond the scope of the EC Treaty.

On 7 December 2000, the European Parliament, the Council of the European Union and the Commission proclaimed the Charter of Fundamental Rights of the European Union in Nice.[44] The Charter, which at that time was not a legally binding instrument, has the principal aim, as is apparent from the preamble thereto, of reaffirming

> the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe and the case-law of the [Court of Justice] and of the [ECtHR].[45]

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42 C-11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECLI:EU:C:1970:114, paragraph 4.

C-4/73, *Nold KG v Commission*, ECLI:EU:C:1974:51, paragraph 13.

In that context, the Court of Justice has stated that the ECHR has special significance: see, in particular, C-260/89, *ERT v DEP*, ECLI:EU:C:1991:254, paragraph 41.

C-402/05 P, *Kadi and Al Barakaat International Foundation v Council and Commission*, ECLI:EU:C:2008:461.

C-415/05 P, *Al Barakaat International Foundation v Council and Commission*, ECLI:EU:C:2008:30, paragraph 283.

43 ECJ, Avis 2/94, *Adhésion de la Communauté à la CEDH*, ECLI:EU:C:1996:140.

44 Avis 2/94, *Adhésion de la Communauté à la CEDH*, quoted above.

45 See, to that effect, C-540/03, *Parliament* v *Council*, ECLI:EU:C:2006:429, paragraph 38.

The Treaty of Lisbon, which entered into force on 1 December 2009, amended Article 6 TEU which is worded as follows:

> 1. The Union recognises the rights, freedoms and principles set out in the [Charter], which shall have the same legal value as the Treaties.
> The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.
> The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.
> 2. The Union shall accede to the [ECHR]. Such accession shall not affect the Union's competences as defined in the Treaties.
> 3. Fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

In that regard, Article 218(6)(a)(ii) TFEU provided that the Council was to adopt the decision concluding the agreement on EU accession to the ECHR ('the accession agreement') after obtaining the consent of Parliament. In addition, Article 218(8) states that, for that purpose, the Council is to act unanimously and that its decision is to enter into force after it has been approved by the member states in accordance with their respective constitutional requirements.

The Declaration on Article 6(2) TEU, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, states as follows:

> The Conference agrees that the Union's accession to the [ECHR] should be arranged in such a way as to preserve the specific features of Union law. In this connection, the Conference notes the existence of a regular dialogue between the [Court of Justice] and the [ECtHR]; such dialogue could be reinforced when the Union accedes to that Convention.

Upon the recommendation of the Commission of 17 March 2010, the Council adopted a decision on 4 June 2010 authorizing the opening of negotiations in relation to the accession agreement, and designated the Commission as negotiator. On 5 April 2013, the negotiations resulted in agreement among the negotiators on the draft accession instruments. The negotiators agreed that all

those instruments constitute a package and that they are all equally necessary for the accession of the EU to the ECHR.

Later the same year, the European Commission requested the Court of Justice to issue an opinion concerning the compatibility of the proposed accession agreement with the Treaties. The Court of Justice issued its opinion on 18 December 2014 arguing that the envisaged agreement is not compatible with Article 6(2) TEU or with Protocol No 8 EU in that:

– it is liable to adversely affect the specific characteristics and the autonomy of EU law in so far as it does not ensure coordination between Article 53 of the ECHR and Article 53 of the Charter, does not avert the risk that the principle of Member States' mutual trust under EU law may be undermined, and makes no provision in respect of the relationship between the mechanism established by Protocol No 16 and the preliminary ruling procedure provided for in Article 267 TFEU;
– it is liable to affect Article 344 TFEU in so far as it does not preclude the possibility of disputes between Member States or between Member States and the EU concerning the application of the ECHR within the scope *ratione materiae* of EU law being brought before the ECtHR;
– it does not lay down arrangements for the operation of the co-respondent mechanism and the procedure for the prior involvement of the Court of Justice that enable the specific characteristics of the EU and EU law to be preserved; and
– it fails to have regard to the specific characteristics of EU law with regard to the judicial review of acts, actions or omissions on the part of the EU in Common Foreign and Security Policy matters in that it entrusts the judicial review of some of those acts, actions or omissions exclusively to a non-EU body.

The Court stressed in particular the fact that the EU had a new kind of legal order – the nature of which is peculiar to the EU its own constitutional framework and founding principles, a particularly sophisticated institutional structure and a full set of legal rules to ensure its operation, had consequences as regards the procedure for and conditions of accession to the ECHR. What is more, these essential characteristics of EU law have given rise to a structured network of principles, rules and mutually interdependent legal relations linking the EU and its member states, and its member states with each other, which were now engaged, as is recalled in the second paragraph of Article 1 TEU, in a process of creating an ever-closer union among the peoples of Europe.

A great deal of effort has been put into the protection of the specific characteristics and the autonomy of that legal order. For this purpose, the Treaties have established a judicial system intended to ensure consistency and uniformity

in the interpretation of EU law. The accession of the EU to the ECHR risked endangering this system.

For example, the EU, like any other contracting party, would be subject to external control to ensure the observance of the rights and freedoms the EU would undertake to respect in accordance with Article 1 ECHR. In that context, the EU and its institutions, including the Court of Justice, would be subject to the control mechanisms provided for by the ECHR and, in particular, to the decisions and the judgments of the ECtHR. It is implicit in the very concept of external control that the interpretation of the ECHR by the ECtHR would be binding on the EU and its institutions, including the CJEU.

On the other hand, the interpretation by the Court of Justice of a right recognized by the ECHR would not be binding on the control mechanisms provided for by the ECHR, the ECtHR in particular. The CJEU referred to its case-law that an international agreement providing for the creation of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, should not, in principle, be incompatible with EU law, especially when the conclusion of such an agreement is provided for by the Treaties themselves. The competence of the EU in the field of international relations, and its capacity to conclude international agreements, necessarily entails the power to submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions.[46] Nevertheless, the Court of Justice has also declared that an international agreement may affect its own powers only if the indispensable conditions for safeguarding the essential character of those powers were satisfied and, consequently, there were no adverse effect on the autonomy of the EU legal order.[47]

The CJEU also stressed that

> the approach adopted in the agreement envisaged, which is to treat the EU as a State and to give it a role identical in every respect to that of any other Contracting Party, specifically disregards the intrinsic nature of

46 See Opinions, ECJ, Avis 1/91, *Accord EEE – I*, ECLI:EU:C:1991:490, paragraphs 40 and 70. ECJ, Avis 1/09, *Accord sur la création d'un système unifié de règlement des litiges en matière de brevets*, ECLI:EU:C:2011:123, paragraph 74.

47 See Opinions ECJ, Avis 1/00, *Accord sur la création d'un espace aérien européen commun*, ECLI:EU:C:2002:231, paragraphs 21, 23 and 26.

Avis 1/09, *Accord sur la création d'un système unifié de règlement des litiges en matière de brevets*, quoted above, paragraph 76.

See also, to that effect, C-402/05 P, *Kadi and Al Barakaat International Foundation v Council and Commission* quoted above, paragraph 282.

> the EU and, in particular, fails to take into consideration the fact that the Member States have, by reason of their membership of the EU, accepted that relations between them as regards the matters covered by the transfer of powers from the Member States to the EU are governed by EU law to the exclusion, if EU law so requires, of any other law.[48]

The Court of Justice has also been keen to protect the preliminary ruling procedure that risked losing its importance due to the accession of the EU to the ECHR. In particular, the Court stressed that a request for an advisory opinion by a court or tribunal of a member state "could trigger the procedure for the prior involvement of the Court of Justice, thus creating a risk that the preliminary ruling procedure provided for in Article 267 TFEU might be circumvented, a procedure which is the keystone of the judicial system established by the Treaties".[49]

Lock had already suggested in 2011, in one of the first academic papers covering the accession of the EU to the ECHR, that "accession by the EU to the ECHR raises fundamental questions of constitutional significance".[50] He stressed that the accession agreement requires a difficult balancing between the task of preserving the autonomy of the EU legal order and practical and political demands, which might conflict with it. He concluded, that "all this makes the EU a difficult partner in negotiations".[51] Since then, the topic of the accession of the EU to the ECHR has been analysed both from the point of view of the technical challenges posed by the accession and from the point of view of the relationship between the ECtHR and the EU Courts, which has sometimes been characterized as contradictory.[52] The Court's opinion leaves

48 ECJ, Avis 2/94, *Adhésion de la Communauté à la CEDH*, ECLI:EU:C:1996:140, paragraph 193.

49 ECJ, Avis 2/94, *Adhésion de la Communauté à la CEDH*, ECLI:EU:C:1996:140. Paragraph 198.

50 Lock, Tobias. "Walking on a Tightrope: The Draft Accession Agreement and the Autonomy of the EU Legal Order." *Common Market Law Review* 48.4 (2011): pp. 1025–1054, p. 1053.

51 Lock, *op. cit.*, p. 1054.

52 Eckes, Christina. "EU Accession to the ECHR: Between Autonomy and Adaptation." *The Modern Law Review* 76.2 (2013): pp. 254–285.

Dzehtsiarou, Kanstantsin and Pavel Repyeuski. "European Consensus and the EU Accession to the ECHR." *The EU Accession to the ECHR*. Eds. Vicky Kosta, Nikos Skoutaris and Vassilis Tzevelekos. Oxford: Hart Publishing, 2014, pp. 309–324.

Lock, Tobias. "The ECJ and the ECtHR: The Future Relationship between the Two European Courts." *The Law and Practice of International Courts and Tribunals*, 8 (2009): pp. 375–398.

Pavone, Tommaso. "The Past and Future Relationship of the European Court of Justice and the European Court of Human Rights: A Functional Analysis." *SSRN Electronic Journal* 10.2139 (2012). Available at https://ssrn.com/abstract=2042867 accessed on 23 February 2021.

no doubts as to the fact that the EU accession to the ECHR will have a major impact on EU law.

2.5 The Charter of Fundamental Rights of the EU

The Charter of Fundamental Rights of the European Union has been proclaimed on 7 December 2000 and entered into force on 1 December 2009, as part of the Treaty of Lisbon. The growing importance of the Charter and its relationship with other fundamental rights instruments in Europe feeds into the subject of this book.

The Preamble of the Charter announces that the EU contributes to the preservation and to the development of the universal values of human dignity, freedom, equality and solidarity. To this end the EU must "strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible".

Furthermore, the Charter reaffirms the fundamental rights as they result from the constitutional traditions and international obligations common to the Member States, the ECHR, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the CJEU and of the ECtHR. Therefore, the Charter should be interpreted with due regard to the explanations.

According to Article 51 of the Charter, the terms of the Charter are addressed to the institutions, bodies, offices and agencies of the EU and to the national authorities when they are implementing EU law.

In order to provide the EU institutions and the EU Member States when implementing EU law with assistance and expertise relating to fundamental rights, the EU established the EU Agency for Fundamental Rights (the Agency).[53] The Agency does large-scale surveys, comparative legal or social research and handbooks for legal professionals. The Multi-Annual framework defined nine thematic areas for the Agency's work: (a) victims of crime and access to justice; (b) equality and discrimination; (c) information society and, in particular, respect for private life and protection of personal data; (d) judicial cooperation; (e) migration, borders, asylum and

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Gragl, Paul. *The Accession of the European Union to the European Convention on Human Rights*. Oxford: Hart Publishing, 2014, p. 263.

53 Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, OJ L 53, 22.2.2007, pp. 1–14.

integration of refugees and migrants; (f) racism, xenophobia and related intolerance; (g) rights of the child; (h) integration and social inclusion of Roma.[54]

In 2010, the Commission adopted a strategy to monitor and ensure the effective implementation of the rights and freedoms enshrined in the Charter.[55] There, the Commission highlighted that the Charter was an innovative instrument because it brought "together in one text all the fundamental rights protected in the Union, spelling them out in detail and making them visible and predictable".[56]

The adoption of the Charter has been hailed by the academia as a long-awaited text. Morano-Foadi and Andreadakis performed in 2010 interviews with 19 CJEU judges and Advocates General about the importance of the entry into force of the Charter. Despite the fact that interviewees highlighted the central role played by the Charter, the respondents split into two groups: "the majority of them, more optimistic, believing that a new era of integration, based on rights, was inaugurated with Lisbon; and those a little bit more cautious, who felt that that was not the case".[57] The second group of respondents underlined the fact that the CJEU has "recognised and protected rights for decades" and, not without importance, "questioned the balance of interests and rights".[58]

A major concern raised by the opponents of the Treaty of Lisbon was that "the new legally binding status of the Charter would lead to an American-style legal revolution whereby the Court of Justice would have the jurisdiction to review national measures for their conformity with EU fundamental rights regardless of the absence of any link with Union law".[59]

At the same time, many authors have placed the Charter within the "unsettled question of complexity inherent in talking about human rights within a

54 Council Decision (EU) 2017/2269 of 7 December 2017 establishing a Multiannual Framework for the European Union Agency for Fundamental Rights for 2018–2022, OJ L 326, 9.12.2017, pp. 1–4, article 2.

55 European Commission. Communication from the Commission. *Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union*. COM/2010/0573 final.

56 *Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union*, quoted above, p. 3.

57 Morano-Foadi, Sonia and Stelios Andreadakis. "Reflections of the Architecture of the EU after the Treaty of Lisbon: The European Judicial Approach to Fundamental Rights." *European Law Journal* 17.5 (2011): pp. 595–610, p. 599.

58 Morano-Foadi and Andreadakis, *op. cit.*

59 Groussot, Pech and Petursson, *op. cit.*, p. 15.

framework of autonomy and supremacy".[60] Thus, Alonso Garcia, commenting on Article 53 of the Charter noted that

> this clause, insofar as it entails the potential displacement of the instrument of which it forms part by others which offer a greater level of protection, poses in the case of the Charter a first complication in its interpretation: unlike the international treaties confined to human rights, which have the clear vocation of complementing the national system of protection, the Charter is part of a context, the Union context, which is constructed in conceptual terms as an autonomous legal order with an integrating vocation that tends to displace, by means of the principle of supremacy, the disparities between the Member States.[61]

Indeed, Articles 52 and 53 of the Charter raise important questions of interpretation concerning the relationship of the Charter with the ECHR and the ECtHR.

Article 52, titled Scope and interpretation of the rights and principles, states in paragraph 3 that insofar as the Charter contains rights which correspond to rights guaranteed by the ECHR, "the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection".

Paragraph 4 of Article 52, by contrast, stipulates that insofar as the Charter recognizes fundamental rights "as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions".

Article 53 of the Charter, titled Level of protection, states that nothing in the Charter "shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms, as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions".

Arold Lorenz, Groussot and Petursson have argued that Article 52 was "the most complex provision of the Charter and can be seen as akin to a Pandora's

60 Alonso Garcia, R. "The General Provisions of the Charter of Fundamental Rights of the European Union." *European Law Journal* 8.4 (2002): pp. 492–514, p. 510.

61 Alonso Garcia, *op. cit.*, pp. 507–508.

Box".[62] They call Article 52 the "limitation, homogeneity and clarification clause" which regulates "the functioning of the rights within the Charter (internal regulation) and its relationship with other sources of law related to the protection of human rights in Europe (external regulation)".[63] In addition, Morano-Foadi and Andreadakis observed that pursuant to Article 52 of the Charter, "the jurisprudence of the ECtHR constitutes the lowest minimum standard to be respected within the Union".[64] This, in turn, "leads the EU to be indirectly bound by the ECHR, as it must always be followed when restricting fundamental rights in the EU to ensure the EU maintains the same level of protection".[65]

Advocate General Bot discussed Article 53 of the Charter in *Melloni*. He highlighted that

> Article 53 of the Charter supplements the principles stated in Articles 51 and 52 thereof (…), by pointing out that, in a system in which the pluralism of sources of protection of fundamental rights prevails, the Charter is not intended to become the exclusive instrument for protecting those rights and, also, that it cannot have the effect, on its own, of adversely affecting or reducing the level of protection resulting from those different sources in their respective fields of application.[66]

The CJEU did not refer to the Charter as a source of inspiration until 2006. One month after the entry into force of the Treaty of Lisbon, the CJEU adopted the *Kücükdeveci* decision in which the Charter's status has been mentioned for the first time.[67] Since then, the Charter has been used by the EU Courts as

62 Arold Lorenz, Nina-Louisa, Xavier Groussot and Gunnar Thor Petursson. *The European Human Rights Culture – A Paradox of Human Rights Protection in Europe?* Leiden: Martinus Nijhoff Publishers, 2013, p. 192.

63 Arold Lorenz, Groussot and Petursson, *op. cit*.

64 Morano-Foadi and Andreadakis, *op. cit.*, p. 597.

65 Douglas-Scott, Sionaidh. "The European Union and Human Rights after the Treaty of Lisbon." *Human Rights Law Review* 11.4 (2011), pp. 645–682, p. 655.

66 Opinion of Advocate General, C-399/11, *Stefano Melloni v Ministerio Fiscal*, ECLI:EU:C:2012:600, paragraph 131.

67 C-555/07, *Kücükdeveci v Swedex GmbH & Co. KG*, ECLI:EU:C:2010:21. For a commentary, see Wiesbrock, Anja. "Case Note – Case C-555/07, Kucukdeveci v. Swedex, Judgment of the Court (Grand Chamber) of 19 January 2010." *German Law Journal* 11.5 (2010): pp. 539–550.

regular source of inspiration, including for the interpretation of the right to a fair trial, which is the subject of the current book. However, as I will show in the following chapters, the Charter cannot be deemed to have clarified the fair trial issues raised by this book.

CHAPTER 3

A Foot in the Past: Existing Literature

Scholars studying European competition law have focused both on its philosophical background and on its evolution.[12] These works have dealt with the substantive and procedural aspects of EU competition law in parallel, with little overall attention paid to due process.[3] More recent monographs adopted a different approach by placing due process at the centre of their discussions of European competition law.[4]

The study of fundamental rights in Europe has also been divided into two separate clusters as well: the first, following the development of human rights by the ECtHR in Strasbourg; the second, focusing on the work of the EU institutions, including the CJEU.[5] At the same time, scholars have always had a soft spot for topics that cover the dialogue between the two courts and the two legal systems.[85]

A recent trend in legal doctrine has been to bridge the gaps between different fields of law. It is in this context that "and human rights" writings have developed. Business and human rights, investment law and human rights and WTO law and human rights are fields of study that have created intimacies between areas of law which previously remained separated, and that have highlighted a generalized readiness to engage with the field of human rights.[6]

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1 Amato, Giuliano. *Antitrust and the Bounds of Power: The Dilemma of Liberal Democracy in the History of the Market*. Oxford: Hart Publishing, 1997.

2 Bellamy, C., and G. Child. *Common Market Law of Competition*. London: Sweet and Maxwell, 1987.

Amato, Giuliano, and C. Ehlermann, eds. *EC Competition Law: A Critical Assessment*. Oxford: Hart Publishing, 2007.

Townley, C. *Article 81 EC and Public Policy*. Oxford: Hart Publishing, 2009.

Ezrachi, A. *Article 82: Reflections on its Recent Evolution*. Oxford: Hart Publishing, 2009.

3 Vogel, L. *European Competition Law*. Bruxelles: Bruylant, 2015.

4 Van Bael, Ivo. *Due Process in European Competition Proceedings*. Bruxelles: Kluwer Law International, 2011.

5 Grabenwarter, C. *op. cit*.

Harris, D., M. O'Boyle, Ed Bates and C.M. Buckley. *op. cit*.

Keller, H., and A. Stone Sweet, eds. *op. cit*.

6 Cottier, Thomas. "Trade and Human Rights: A Relationship to Discover." *Journal of International Economic Law* 5.1 (2002): pp. 111–132.

Cottier, Thomas, Joost Pauwelyn and Elisabeth Bürgi, eds. *Human Rights and International Trade*. Oxford: Oxford University Press, 2005.

Bird, Robert C., Daniel R. Cahoy, Jamie Darin Prenkert, eds. *Law, Business and Human Rights: Bridging the Gap.* Cheltenham: Edward Elgar, 2014.

In this context, the increased intimacy between competition law and human rights law was inevitable. The perfect locus for creating this intimacy is the notion of procedural fairness, a tested human rights concept that challenged some of the ingrained procedural aspects of competition law. A few events have accelerated interest in the two fields.

First, a few cases such as *Microsoft v Commision* have spurred a new interest in the subject of procedural fairness due to the fines imposed by the Commission and the procedural issues raised.[7] Second, the accession of the European Union to the ECHR pushed the debate on procedural fairness in competition law to a new level.

The following sections provides a description of the discussions in the academic literature that are relevant to this book.

3.1 Legal Philosophy

The discourse on due process and fair trail is closely related to the discourse on the meaning of judicial review, which is then closely related to the discourse on law and the meaning of interpreting the law. It is therefore impossible to avoid a short incursion into legal philosophy which has provided very fertile soil for debating these issues.

Starting with Bentham, process and procedure, and the notion of fairness that accompanies them, constituted a core element of realizing the principles of morals and legislation. For Bentham, the process appears to be a corollary of the idea that judges are making the law; they do not simply discover it as defended by the natural law proponents.[8]

Modern philosophers, such as Ely and Dworkin, have written extensively about the meaning of law and the social basis for procedural justice. Both American scholars have widely argued in favour of judicial activism and against judicial restraint. Dworkin introduced the distinction between concepts and conceptions, arguing that constitutional texts contain concepts that are best revealed as conceptions through judicial review.[9]

In his seminal work, *Democracy and Distrust: A Theory of Judicial Review*, Ely proposed an interpretivist theory of judicial review that should distance itself

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Baumann-Pauly, Dorothée and Justine Nolan, eds. *Business and Human Rights: From Principles to Practice*. New York: Routledge, 2016.

7 T-167/08, *Microsoft v Commission*, ECLI:EU:T:2012:323.

8 Bentham, Jeremy. *The Principles of Morals and Legislation*. New York: Methuen, 1982.

9 Dworkin, R. *Taking Rights Seriously*. Cambridge: Harvard University Press, 1977.

from dealing with the constitutional provisions as separate, self-contained units and embrace a judicial review committed to the interpretation of each provision in light of the constitution as a whole document.[10] He then offered three reasons for a "participation-oriented, representation-reinforcing approach to judicial review".[11] The first is that examination of the nature of the US Constitution finds it to provide a guarantee of process, not a description of substantive values. The second is that judges should "confine themselves to policing the mechanisms by which the system seeks to ensure that (…) elected representatives will actually represent".[12] Lastly, noting that "the ins are choking off channels of political change" and that a majority is "systematically disadvantaging some minority" out of simple hostility or prejudice, Ely argues that judges, as "comparative outsiders", are in an objective position to assess claims that the system is malfunctioning. In other words, judges should assess whether the *process* is worthy of trust.[13]

More recently, Galligan provided a compelling analysis of the concept of procedural justice when applied to the field of administrative law.[14] For Galligan, procedural justice is an essential element for the attainment of law and the goals of politics, "for no matter how good and just the laws and political principles supporting them may be, without suitable procedures they would fail in their purposes".[15] Procedures on the one hand are deeply rooted in the social context that has created them, and on the other hand reflect the beliefs prevailing in the society that has created them.

Galligan proposes three constitutive elements to the notion of procedural justice:

> First, legal procedures are fair procedures to the extent that they lead to or constitute fair treatment of the person or persons affected. Second, within each type of legal process, there are authoritative standards based on the tiers of values relevant to that process which constitute the standards of fair treatment, so that a person treated in accordance with them is treated fairly. Thirdly, the basis of such treatment being fair treatment

10 Dworkin, *op. cit.,* pp. 12–14 and 41.

11 Ely, John Hart. *Democracy and Distrust: A Theory of Judicial Review*. Cambridge: Harvard University Press, 1980, p. 87.

12 Ely, *op. cit.,* p. 100–101.

13 Ely, *op. cit.,* p. 102–103.

14 Galligan, D. J. *Due Process and Fair Procedures: A Study of Administrative Procedures*. Oxford: Oxford University Press, 1996.

15 Galligan, *op. cit.,* p. 9.

> is the promise of society as a whole to each of its members that they will be treated in that way.[16]

He argues that the normative expectations of citizens in the field of procedural fairness both include and go beyond written legal principles.

Turning to the issue of procedural justice in administrative proceedings, Galligan suggests that in the administrative context, "the inadequacy of procedures is less dramatic but more pervasive".[17] He shows that the decisions of agencies, officials, and tribunals are seriously unreliable, with almost as much chance of being wrong as being right. To avoid moral harm "every effort should be made to devise the best procedures possible within the resources available".[18]

Somewhat reminiscent of Ely, Galligan proposes that participation – even if not automatically required in all legal and administrative processes – possesses a few virtues which allow it to prevent or lessen the moral harm that results from administrative processes. First, participation is a necessary instrument to seek for and reach fair outcomes. Second, administrative processes often fall between legal and political processes and incorporate elements of both. Participation can clarify these distinctions. A third reason why participation appears to be closely linked to procedural fairness

> derives from the idea that it enables a person to exert influence over the processes by which he or she is affected. This idea taps a deep spring in modern political theory: it conveys the idea that persons ought to be in charge of their lives and future, and that being involved in any process affecting them is one way of doing so.[19]

3.2 A Renewed Debate on Human Rights

To say that the founders of the Strasbourg system of human rights protection were visionaries is to pronounce the truth. When Teitgen proposed the creation of an international Court, he meant "to create a conscience in Europe

16 Galligan, *op. cit.*, p. 52.
17 Galligan, *op. cit.*, p. 116.
18 Galligan, *op. cit*.
19 Galligan, *op. cit.*, p. 129.

which will sound the alarm" and that it would be "a Court belonging to Europe itself".[20]

Also, as Bates wrote, the entry into force of the European Convention of Human Rights represented "a quantum leap in international law", because

> for the first time a treaty was in place by which sovereign States promised to secure to everyone within their jurisdiction a number of rights and freedoms. Each ratifying State would be under an international legal obligation to amend that law if necessary. For such reasons the Convention was revolutionary for its time, and the more so as the advances just mentioned were reinforced by the principle of collective enforcement.[21]

Despite the importance of the entry into force of the ECHR, the initial reactions of the legal profession and the press were weak. Bates quotes the works of Cedric Thornberry, a British barrister who has represented many applicants at the ECtHR, criticizing the fact that the leading law schools in the United Kingdom have either dismissed the idea of offering human rights course on the grounds that human rights has nothing to do with law, or have treated human rights as some sort of exotic field of study.[22]

Interest in human rights and in the Strasbourg system of human rights protection has increased over time, somewhat proportionally to the number of decisions adopted by the Court. However, and in spite of the growing number of judgments delivered by the ECtHR, human rights law has traditionally been studied by only a small number of scholars.

Freeman noted that the study and the practice of human rights have been dominated by lawyers and that the human rights movement owed a great debt to them. He stressed that "there is a danger, however, that excessive attention to human rights law distorts our understanding of human rights".[23] He proposes human rights as a concept that can help with understanding and organizing information about the world around us.[24] For him, human rights is an

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20 Teitgen, P.H. "The European Guarantee of Human Rights: A Political Assessment." *Proceedings of the Fourth International Colloqui about the European Convention on Human Rights, held in Rome in 1975*. Ed. Council of Europe. Strasbourg: Council of Europe, 1976, p. 29.

21 Bates, Ed. *The Evolution of the European Convention on Human Rights*. Oxford: Oxford University Press, 2010, p. 108.

22 Bates, *op. cit.*, pp. 13–15.

23 Freeman, Michael. *Human Rights: An Interdisciplinary Approach*. Cambridge: Polity Press, 2011, p. 13.

24 Freeman, *op. cit.*, p. 3.

interdisciplinary concept that can be comprehensively tackled only within an interdisciplinary framework. Freeman highlights the contributions which recent studies in sociology, anthropology, social psychology and economy have made to the human rights debate and concludes that "there are then signs that the social science of human rights is beginning to wake up".[25]

The writings of Freeman signal an important development in the field of study of human rights, specifically that human rights have become increasingly interdisciplinary, blending law with other social sciences.

Political scientists have contributed greatly to the human rights discourse in recent years, adding novel perspectives of analysis. Brysk and Jimenez-Bacardi propose that the globalisation of law is a process that "refers to a linked ensemble of changes in the scale, scope, mode, and juridical forms" and which includes: (1) the global diffusion of legal norms and processes; (2) multilayered pluralism including regional, indigenous and family law; (3) new global legal institutions like the International Criminal Court; (4) transnational law governing private cross-border activities; (5) new repertories of jurisprudence and practice, such as participation rights for noncitizens and (6) the growing salience of conventional interstate and comparative jurisprudence for domestic practice, such as universal jurisdiction for crimes against humanity.[26] They conclude that the globalization of law has shifted the focus of the human rights debate from the inter-state perspective towards state-society relations.

Other political scientists have concerned themselves with the impact of the human rights instruments. Sandholtz has shown that, on the one hand, the effects of treaties on human rights performance partly depend on how domestic legal institutions integrate with international law and, on the other hand, that human rights law is more effective when it creates a continuum between the national and international legal levels.[27]

Novel actors are identified within this renewed debate on human rights. Gaillet has shown that, starting with the 19th century, the *individual person* has been considered a secondary actor in the life of the state and a limit to the exercise of public power. At no point was the citizen seen as the foundation of legitimate power. She highlights that the political limits mitigating the recognition of the citizen have been enhanced by the legal limits created to prevent

25 Freeman, *op. cit.*, p. 10.

26 Brysk, A., and A. Jimenez-Bacardi. "The Politics of the Globalization of Law." *The Politics of the Globalization of Law: Getting from Rights to Justice.* Ed. Alison Brysk. New York: Routledge, 2013, p. 8.

27 Sandholtz, W. "Treaties, Constitutions and Courts." *The Politics of the Globalization of Law: Getting from Rights to Justice.* Ed. Alison Brysk. New York: Routledge, 2013, p. 29.

the individual person from having standing in legal disputes.[28] Gaillet then traces the entry into politics of the German nation and argues that the recognition of what we now call "fundamental rights" has also altered the nature of the relationship between the individual and the exercise of public power.[29] She concludes that the recognition of fundamental rights and the legal standing to defend them constitute the main channel for subordinating the state administration to the law.[30]

Other scholars also suggest that human rights law has contributed to the rise of the individual as an actor in international law. Focusing on the work of the ECtHR, Cichowski argues that widened access to international judicial organizations can increase the monitoring and enforcement of laws by individuals and by interest and advocacy groups both at the national and international levels.[31] She notes that "this gives courts a greater opportunity to engage in important political issues through the strategy of incremental development doctrine. Private parties, rather than states, may be more likely to utilize these courts for *strategic policy reform*".[32] (emphasis added)

3.3 A Renewed Imagining of the Trial

Hirschl started his paper on new constitutionalism by arguing that the world has witnessed "a profound transfer of power from representative institutions to judiciaries, whether domestic or supranational".[33] The growing power and importance of the judiciary has been studied from various angles.[34] Hirschl, in an earlier work, proposed that whereas the constitutionalisation of rights may promote procedural justice, it does little for advancing progressive notions of distributive justice. Hirschl calls this phenomenon *juristocracy* and shows that

28 Gaillet, Aurore. *L'individu contre l'Etat: Essaie sur l'évolution des recours de droit public dans l'Allemagne du XIX^e siècle*. Paris: Dalloz, 2012, p. 166.

29 Gaillet, *op. cit.*, p. 170.

30 Gaillet, *op. cit.*, p. 462.

31 Cichowski, Rachel. "Courts, Advocacy Groups, and Human Rights in Europe." *The Politics of the Globalization of Law: Getting from Rights to Justice.* Ed. Alison Brysk. New York: Routledge, 2013, p. 108.

32 Cichowski, *op. cit.,* p. 109.

33 Hirschl, Ran. "The New Constitutionalism and the Judicialization of Pure Politics Worldwide." *Fordham Law Review* 75.2 (2006), p. 721.

34 Shapiro, M., and A. Stone Sweet. *On Law, Politics, and Judicialization*. Oxford: Oxford University Press, 2002. Ferejohn, J. "Judicializing Politics, Politicizing Law." *Law and Contemporary Problems* 65.3 (2002): pp. 41–68.

this trend is part of a broader process whereby proponents of powerful social and economic interests profess support for democracy by attempting to insulate policy-making from the vicissitudes of democratic politics.[35]

In the same vein, Tate and Vallinder argued that the global expansion of the judicial power is accompanied by negotiation and decision-making using quasi-judicial procedures.[36]

New constitutionalism generated a heated debate around justice and the future of the trial. Allan, in his seminal work on constitutional justice, proposed that the rule of law and the separation of powers underlie the trial.[37] Due process plays a central role in his understanding of the trial and he argues in favour of a more robust definition of due process that can impose tangible limits on the power of government officials. In this conception, due process is a watchdog against partial political processes.[38]

Other scholars are committed to identifying new rules that can guide the trial in a world facing new challenges.[39] Guinchard proposes that three principles can be developed to answer them and the new expectations of the citizens: (1) the principle of loyalty, with its many implications for professional ethics; (2) the principle of dialogue, including the dialogue between jurisdictions and (3) the principle of speediness.[40]

3.4 Competition Policy

A few authors have captured the fate of competition policy in the EU with incredible acuity. Their works continue to inspire generations of curious lawyers and economists.

Amato proposed that the dilemma of liberal democracy is the dilemma of antitrust itself: "The first sets the boundary of public power as far ahead as

35 Hirschl, Ran. *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*. Cambridge: Harvard University Press, 2004.

36 Tate, C. N., and T. Vallinder, eds. *The Global Expansion of Judicial Power*. New York: New York University Press, 1995.

37 Allan, T.R.S. *Constitutional Justice: A Liberal Theory of the Rule of Law*. Oxford: Oxford University Press, 2001.

38 Allan, *op. cit.*, p. 161.

39 Flauss, J.-F. "Les nouvelles frontières du procès équitable." *Les nouveaux développments du procès équitable au sens de la Convention européenne des droits de l'homme*. Bruxelles: Bruylant, 1996, p. 81.

40 Guinchard, Serge. "Quels principes directeurs pour le procès de demain?" *Mélanges Jacques Van Compernolle*. Bruxelles: Bruylant, 2004.

possible, accepting the risk of private power; the second does not accept that risk and instead runs the risk of preventive intrusions by public order".[41] For Amato, the defining feature of European antitrust – a feature lacking to its American counterpart – is the attitude towards private power. Europeans were historically and culturally accustomed to private power and this explains why European antitrust is based on limiting private economic power, rather than negating it, as in the American example.

The more tolerant attitude of Europeans towards private economic power sheds new light on three defining features of European antitrust: (1) the coexistence of the classical, "surgical" nature of European antitrust with its regulatory nature; (2) the sensitivity of antitrust law to policies such as industrial, regional and social policies; and (3) the objective of market integration, which rigidified the case-law.[42]

Amato called for the "liberation of antitrust law from the multiple purposes it has served in the past", for the weakening of the regulatory propensity and for the creation of an independent European competition authority that would separate (political) regulatory powers from decision-making powers.[43]

Karagiannis suggested that there are four theoretical lenses concerning the origin of European competition policy.[44] *First*, liberal intergovernmentalism argues that European competition law has been "born out of German or French government's persistence in representing those organised interests which wished to see a policy institutionalised at the European level".[45]

Second, the hegemonic theory argued that competition policy was adopted because "(1) anti-trust was popular in the United States; and (2) post-World War II Europe was created in America's own image as projected by American policy makers".[46]

Third, the political transaction costs theory suggests that "parties that contemplate an otherwise efficient voluntary transaction may actually forego to transact by fear of being held-up".[47]

Gerber starts his seminal work on law and competition with a metaphor: "Competition has been both God and devil in Western civilizations. It

41 Amato (1997), *op. cit.*, p. 112.
42 Amato (1997), *op. cit.*, pp. 113–114.
43 Amato (1997), *op. cit.*, p. 120.
44 Karagiannis, Yanis. "The Causes and Consequences of the Collegial Implementation of European Competition Law." *European Law Journal* 19.5 (2013), pp. 682–704, p. 691.
45 Karagiannis, *op. cit.*, p. 691.
46 Karagiannis, *op. cit.*, p. 693.
47 Karagiannis, *op. cit.*, p. 693.

has promised and provided wealth and economic progress; it has also altered the distribution of wealth, undermined communities and challenged moral codes".[48] Gerber offers a comprehensive picture of the history of competition law and policy in Europe and traces many of its current features to early nineteenth century Austria.

Gerber notes that the idea of specialness of EU competition law explains why the traditional legal mechanisms have been considered inappropriate, while non-traditional methods and procedures have been embraced in the field of competition law.[49]

The non-traditional method that Gerber describes is the *administrative control model of competition law* – a constellation of ideas from the 1920s that were imported into the fabric of competition laws adopted by various Western countries and, later, by the European Union. Gerber writes that

> the pervasiveness of this orthodoxy is a key to understanding the competition law dynamics of the period and to interpreting later developments on both the national and regional levels. Yet, it is precisely this element of European experience that has been obscured by the failure to employ a Europe-wide lens in considering national competition law systems.[50]

Administrative control is an idea structured around the fact that government officials are authorized to take measures against powerful firms when their actions on the market were seen as harmful. The primary decision-makers in this type of system are administrators, whose decisions are often subject to review. The enforcement of such systems tends to be rather *soft*: "the guiding notion is that administrators should not interfere too much with business conduct. They are supposed to use publicity and pressure as the primary or exclusive means of achieving compliance".[51]

Gerber notes that the administrative model accommodates well many of the features of competition law: vague norms, high levels of discretion, and avoidance of criminalizing behaviours. It is also a system that has very clear advantages both for politicians and administrators. *First*, it allows administrators to directly influence the behaviour of large corporations rather than passing exhaustive pieces of legislation and leaving it to the courts to implement them. *Second*, those who manage competition laws can reap political gains by

48 Gerber, *op. cit.,* p. 1.
49 Gerber, *op. cit.*, p. 12.
50 Gerber, *op. cit.,* p. 173.
51 Gerber, *op. cit.,* p. 175.

going after the big businesses. Such systems can be operated with little cost and with few risks. *Last*, the opacity of the system makes it difficult for journalists – and therefore for the public – to assess companies' behaviours or the actions taken by administrators. In fact, "businesses may find such a system a useful 'cover': it tells the public that economically powerful firms are subject to controls, but it can be operated in such a way that the controls have little bearing on business conduct".[52]

Some authors have seen, in the special and privileged nature of competition law, the sign of a malefic presence for society. Pirovano proposed that the 'competition order' was a "totalitarian cultural phenomenon".[53] In the same vein, Boy has suggested that the competition order creates risks of domination and violence.[54] Catherine Prieto noted that the explanation for such views lies in the perception that European competition law is the highway for ultra-liberalism, "a faithless, lawless, purely liberal instrument".[55] She concludes that competition should have neither the caricatural nature, nor the privileged position in the hierarchy of values that is bestowed on it, but should merely be an instrument for the collective well-being.[56]

3.5 Competition Policy and Fundamental Rights

In light of the ideas discussed above, it becomes clearer why competition law and the human rights law have not yet had a deeper conversation. There might be first of all a fear of dilution. Competition law experts might fear that a more consistent approach to the fundamental rights issues arising in competition investigations would diminish their strength. Human rights law experts, on the other hand, might argue that the constant expansion of the realms that fundamental rights are called to defend can dilute the core meaning of those rights. Another question may be whether institution-building of the kind that

52 Gerber, *op. cit.,* p. 178.

53 Pirovano, Antoine. "L'expansion de l'ordre concurrentiel dans les pays de l'Union européenne." *L'Algérie en mutation: Les instruments juridiques de passage à l'économie de marché.* Eds. Robert Charvin and Ammar Guesmi. Paris: L'Harmattan, 2001, pp.129–142, p. 133.

54 Boy, Laurence. "L'ordre concurrentiel: Essai de définition d'un concept."*L'ordre concurrentiel: Mélanges en l'honneur d'Antoine Pirovano*. Paris: Editions Frison-Roche, 2003, pp. 38–40.

55 Prieto, Catherine. "Loyauté du commerce et droit européen de la concurrence." *Law and European Affairs* 18.2 (2011): pp. 299–312.

56 Prieto, *op. cit.,* p. 300.

the establishment of the EU involved is actually compatible with a parallel development of human rights.

There have been an increasing number of attempts to bridge the two fields in recent years. A telling example is offered by the work of Racine who argues that the relationship between competition law and human rights is in fact much deeper than is normally accepted. More precisely, competition could not exist or develop without the right to private property and freedom of speech.[57] He even asks whether the right to competition is not in fact a new human right.[58]

Except for such occasional innovative proposals, the European academic debate surrounding the topic of competition law and fundamental rights has mainly focused on due process. This debate overgrew its simplistic beginnings, but remains heavily polarized. The debate was simplistic because it pre-emptively defined the width and depth of due process in competition law proceedings by focusing on either the administrative or criminal nature of European competition law. As I will show later, this distinction is artificial.

The academic debate on the topic of competition policy and fundamental rights is polarized around two extremes: some authors argue in favour of the maintenance of the status quo justified by the sufficiency of fair trial guarantees and the need to protect the market integration process, whereas others propose that a reform of European competition law enforcement is needed.

Wills, a hearing officer with the DG COMP and one of the most quoted scholars in this field, has been an ardent supporter of the maintenance of the status quo and has continuously shown that the existing procedures fulfil the requirements of due process. In the same vein, Adreangeli concluded that in view of the far-reaching consequences of a new due process clause in competition enforcement, the right to good administration enshrined in Article 41 of the EU Charter of Fundamental Rights should be considered instead.[59]

On the other side of the debate, an increasing number of authors argued in favour of the reform of European competition enforcement to accommodate an enriched version of due process. Barristers involved in competition law proceedings, such as Forrester, and academics overtly raised complaints about

57 Racine, Jean-Baptiste. "L'ordre concurrentiel et les droits de l'homme." *L'ordre concurrentiel: Mélanges en l'honneur d'Antoine Pirovano*. Paris: Editions Frison-Roche, 2003, pp. 423–427.

58 Racine, *op. cit.*, pp. 429–438.

59 Andreangeli, A. *EU Competition Enforcement and Human Rights.* Cheltenham: Edward Elgar, 2008, pp. 244–245.

the Commission's lack of independence and the ineffectiveness of the judicial review of EU competition law.[60]

60 Forrester, Ian S. "Due Process in EC Competition Cases: A Distinguished Institution with Flawed Procedures." *European Law Review* 34.6 (2009): pp. 817–843.

Forrester, Ian S. "A Bush in Need of Pruning: The Luxuriant Growth of Light Judicial Review." *European Competition Law Annual 2009: Evaluation of Evidence and its Judicial Review in Competition Cases.* Eds. Claus-Dieter Ehlermann and Mel Marquis. Oxford: Hart Publishing, 2010, pp. 319–406.

PART 2

The Dynamic Evolution of the Right to a Fair Trial

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Introduction to Part 2

Part Two of this book endeavours to highlight that *due process and fair trial can be a force in the process of addressing corporate bigness*, not only by respecting the rights of defence of the defendants, but also by requiring a certain quality of the process of justice delivery. It starts by describing the numerous attempts to define due process and the on-going debate over the function of this provision in the United States. A careful look at the existing literature in Europe indicates a similar fascination for the subject. More specialized interests, such as due process and competition law, also exist and are currently flourishing.

Next, Chapters 4, 5 and 6 offer an in-depth analysis of the right to a fair trial enshrined in Article 6(1) ECHR. Chapter 4 fixes the subject within the Strasbourg system of human rights enforcement. Chapter 5 describes the case-law of the ECtHR on the applicability of Article 6(1) ECHR, with special attention paid to the applicability of the right to a fair trial to economic law disputes and competition law disputes in particular. Chapter 6 develops the theory that the ECtHR is a self-regulating international tribunal and that the interpretation of the right to a fair trial has greatly contributed to this.

This painstaking analysis is important for two reasons. First of all, it highlights that the ECtHR has applied the approach developed for the applicability of Article 6(1) ECHR for criminal disputes to economic disputes, including competition law. By doing so, this book shows that competition law disputes are by no means special as they are under EU law. Second, the in-depth analysis of the applicability of Article 6(1) ECHR dispels allegations that the ECtHR is "navigating tides".[1] This book finds that, on contrary, the ECtHR has been exemplarily steady in its forging and use of concepts.

One difficulty accompanies this effort: the more one endeavours to understand what due process is, the more this notion remains beyond definition. The reason for this is simple: due process is a legal principle and a doctrine with many names that is so ingrained in our culture, system of values and legal system that extracting its original meaning appears impossible.

Attempts to define due process have produced inspiring definitions. Justice Frankfurter in his concurring opinion in *Joint Anti-Fascist Refugee Committee v. McGrath* announced that

1 Clacke, Robert. *The 'Conscience of Europe'? Navigating Shifting Tides at the European Court of Human Rights*. Vienna: Kairos Publications, 2017.

> 'due process', unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, 'due process' cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, 'due process' is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess.[2]

For Pennock, due process is a mean of locomotion that "takes us deep into history, deep into philosophy, and, were it to be fully expounded – which is impossible – far into the future, for it is ever-growing. Its roots grow out of an intriguing blend of history and philosophy".[3]

Resnick compares due process to a scale: just as the use of a scale at the post office helps identify a maximum number of letters with correct postage, due process is not only a just or humane way of depriving people of life, liberty or property, it is also an instrument to minimize the number of unjust treatments.[4]

Lastly, Scanlon stated that the requirement of due process is "one of the conditions of the moral acceptability of those institutions that give some people power to control or intervene in the lives of others".[5] He noted that both substantive and procedural due process appeal to the conception of the institution in question, its rationale and purpose.[6]

The origin of due process is considered to be Clause 39 of the Magna Carta of 1215 that claimed that

> no free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except

2 *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951).

3 Pennock, James Roland, and John W. Chapman, eds. *Due Process.* New York: New York University Press, 1977, p. xv.

4 Resnick, David. "Due Process and Procedural Justice." *Due Process.* Eds. James Roland Pennock and John W. Chapman. New York: New York University Press, 1977, pp. 217–218.

5 Scanlon, T.M. "Due Process." *Due Process.* Eds. James Roland Pennock and John W. Chapman. New York: New York University Press, 1977, p. 94.

6 Scanlon, *op. cit.*, p. 104.

> by the lawful judgment of his equals or by the law of the land (*per legem terrae*).[7]

Despite its resemblance with contemporary texts, Clause 39 initially guaranteed immunities only for feudal magnates. Vogler argues that the concept 'due process of law' appeared only incidentally in the legal texts prior to the modern era and that "its historical importance is largely retrospective and an invention of nineteenth- and twentieth-century myth-makers. (…) On the contrary, its might is predominantly modern and predominantly North American".[8]

An important development was the insertion of the notion of due process into the Fifth Amendment of the US Constitution. Initially, due process was intended to cover only criminal proceedings. However, over time the principle of due process was developed to include not only procedural safeguards, but also substantive due process that is concerned with placing limits on government authority. Resnick argued that due process was an American phenomenon, "a legal principle which has been shaped and developed through the process of applying and interpreting a written constitution".[9]

Wolfe has tied the rise of modern judicial review by the US Supreme Court to the Due Process Clause. He describes the early 19th-century traditional era of constitutional interpretation and judicial review characterized "by its assumption that the Constitution was both intelligible – it had a real or true meaning that could be known if one read it properly – and substantive – it established principles that were definite and clear enough to be enforced as legal rules".[10] In this traditional era, "judicial review was simply giving preference to the rule of the Constitution over any legislative or executive act that conflicted with it".[11]

Wolfe then highlights that, at the end of the 19th century, a profound change in the practice of judicial review took place. In this new stage, judicial review was transformed into a defence, not of the constitution, but of natural law expressed as natural rights, especially property rights. Wolfe argues that it was during this stage that the Supreme Court adopted and promoted "a particular understanding of the property rights guaranteed by natural law, that

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7 Davis, G.R.C. *Magna Carta*. London: British Museum, 1963, pp. 23–33.

8 Vogler, Richard. "Due process." *The Oxford Handbook of Comparative Constitutional Law*. Eds. M. Rosenfeld and A. Sajó. Oxford: Oxford University Press, 2012, p. 930.

9 Resnick, *op. cit.*, pp. 206–207.

10 Wolfe, Christopher. *The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law.* Lanham: Rowman & Littlefield Publishers, 1994, p. 21.

11 Wolfe, *op. cit.*

of laissez-faire capitalism".[12] This was possible because "the development was nominally tied to the Constitution as a judicial interpretation of the due process clauses of the Fifth and Fourteenth Amendments".[13] This trend continued in the years preceding 1937 when the Supreme Court employed the due process clause and the commerce clause to strike down important pieces of state legislation and the New Deal. However, following measures taken by Franklin Roosevelt to limit the Supreme Court's powers, the Court abandoned its review of economic regulation. Wolfe argues that whereas the "initial backing off of the Court seemed to augur a new era of judicial deference, (…) in fact, the focus of judicial activism simply shifted from economic affairs to civil liberties".[14] Wolfe concludes that these events grounded the "victory of a distinctly modern understanding of judicial power as fundamentally legislative in character".[15]

This development of the due process doctrine in US constitutional law might account for the reticence to import the notion of due process into other domestic and international texts. In fact, none of the important human rights conventions – the Universal Declaration of Human Rights, the ECHR, the International Covenant on Civil and Political Rights, or the American Convention of Human Rights – speak of due process.

However, as Vogler claims, "constitutional abstention with regard to the terminology of due process of law does not mean that the concept itself has not been influential in many regions, particularly in the post-war period and particularly under the influence of US-led rule of law initiatives".[16] In contrast with the Anglo-American world where adversarial due process is increasingly under attack, the principle enjoys a "renaissance" elsewhere.[17] This is particularly true for countries leaving behind a totalitarian or colonial past and where due process inspired reforms are impressive to say the least. He concludes that the "shift towards adversarial due process in criminal procedure, which has been likened by some scholars to the reception of Roman law in the *jus commune* period, has become one of the most important and ubiquitous cultural developments of our generation".[18]

Speaking about the "due process explosion", Michelman ties this notion to the legalisation, formalisation and proceduralisation of relations and

12 Wolfe, *op. cit.*, p. 22.
13 Wolfe, *op. cit.*, p. 24.
14 Wolfe, *op. cit.*, p. 27.
15 Wolfe, *op. cit.*, p. 28.
16 Vogler, *op. cit.*, p. 933.
17 Vogler, *op. cit.*, p. 943.
18 Vogler, *op. cit.*, p. 946.

transactions. He notes that "this experience of rampant legalization seems to reflect an increasingly anomic world in which private entitlement backed by formal procedure apparently arises to fill a vacuum left by the withering of that certain spirit we may call community".[19]

The "blessed versatility" of due process described above is both a curse and benediction. Indeed, due process has been invoked on both sides of the Atlantic as a descriptive principle, a normative principle and a constitutional principle in civil law, criminal law, administrative law and constitutional law. Its omnipresence fuels it with a power that no other principle of law can claim. From being an arbiter in the affairs pitting the individual against the government, to being a principle of separation of powers within the state, due process is an unequalled regulatory tool, and a source of confusion.

Marshall has noted that "it is surprising that so fundamental an issue should remain one of the grey areas of constitutional law, though there are a number of firm conventions in existence".[20] He uses the example of a law enforcement agency that performs judicial functions. He argues that if due process is to be relevant to this situation, either the law enforcement function has to be a *sui generis* function standing outside the well-known realm of the legislative-executive-judiciary, or there must be a separation of powers within the law enforcement agency itself.[21]

In the same vein, Sullivan and Massaro highlighted that

> few Americans understand the common constitutional source of these rights, its ancient history, or the ornate set of rights that today fall within the due process embrace. (…) Instead they often cherry-pick issues within the doctrine to criticize or praise specific pieces of the law, and are unmindful of the implications of these critiques for other rights that flow from the same due process artery.[22]

They propose that due process comprises two main dimensions: one that is primarily concerned with balancing the interests of the individual and society,

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19 Michelman, Frank I. "Formal and Associational Aims in Procedural Due Process." *Due Process.* Eds. James Roland Pennock and John W. Chapman. New York: New York University Press, 1977, pp. 148–149.

20 Marshall, Geoffrey. "Due Process in England." *Due Process.* Eds. James Roland Pennock and John W. Chapman. New York: New York University Press, 1977, p. 73.

21 Marshall, *op.cit*.

22 Sullivan, E. Thomas, and Toni Marie Massaro. *The Arc of Due Process in American Constitutional Law*. Oxford: Oxford University Press, 2013, pp. 30–31.

and a second that is primarily concerned with judicial constraint, federalism and the separation of powers.[23]

Chapman and McConnell insisted on another misunderstanding relating to the Due Process Clause. They argue that, despite the continuing American tradition of due process as a rights-creating enterprise, the Clause was initially concerned only with ensuring the separation of powers. They argue that

> due process was not at all about judicial creation of fundamental rights outside the reach of legislative amendment, and only secondarily about notice and the opportunity to be heard. Fundamentally, it was about *securing the rule of law*. It ensured that the executive would not be able unilaterally to deprive persons within the nation of their rights of life, liberty, or property excerpt as provided by common law or statute and as adjudicated by independent judicial bodies, and that legislatures would not be able to step beyond their properly legislative roles of enacting general rules for governance of future behaviour.[24] (emphasis added)

Speaking about the elements of due process, Sullivan and Massaro proposed that government action that affects life, property or liberty shall be limited by the following core features:

- Fair procedures, especially notice and opportunity to be heard, but also political processes
- Respect for settled expectations and traditions
- Impartial decision makers
- Prospective, rather than retrospective, law-making
- Proportionality in terms of avoiding excessive government measures
- Transparency and accessibility of government processes
- Respect for individual autonomy and liberty in making fundamental life decisions
- Respect for individual equality
- Respect for separation of powers, geographical limits, and other structural and jurisdictional limits on government authority.[25]

When it comes to the *European tradition of due process*, Galligan has pointed out that much of what there is in terms of analysis in the field of due process clause "has come from or been generated by discussion of the American

23 Sullivan and Massaro, *op. cit.*, p. 91.

24 Chapman, Nathan S., and Michael W. McConnell. "Due Process as Separation of Powers." *Yale Law Journal* 121.7 (2012): pp. 1672–1807.

25 Sullivan and Massaro, *op. cit.*, p. 218.

doctrine of procedural due process, and although that is a rich and interesting literature, it is not easily loosened from its native soil to provide the seeds for a more general understanding".[26] However, the recent constitutional history of the old continent shows that the doctrine of due process has the same impact on legal development in Europe as it does in the US, even if it is framed in less dramatic terms. In this sense, Marshall equates due process with the rule of law and argues that it is a fundamental issue for English constitutional law.[27] The European tradition of due process is formed by the domestic traditions of the European states and the supranational traditions developed by the ECtHR and the EU courts. Damaska has shown that on the European continent two different approaches to due process exist. The *continental approach* is built starting with the premises of a centralized government, a rigorous hierarchy of agencies in the administration of justice, and a general style of bureaucratic administration which affects all parts of the legal process, including the courts. The *common law approach*, on the other hand, has sprung from a liberal tradition that distrusts concentrations of power and prefers a fragmentation of authority at all levels.[28]

This problem is further exacerbated in the European context where, unlike in the US where the constitution is the unique source of the doctrine of due process, a few treaties contain due process provisions.

At the *supranational level in Europe*, due process is called the "right to a fair trial", "right to a fair legal process", "right to be heard" or "rights of defence". This choice of denomination cannot be arbitrary. On the contrary, it might carry with it a desire to distance the European tradition of due process from the American one, to avoid the difficult constitutional debates sparked by the Due Process Clause and to prevent supranational courts – the European Court of Human Rights in Strasbourg and the European Courts in Luxembourg – from developing powers similar to those of the US Supreme Court while working with this concept.[29]

Under the ECHR, due process was framed as a human right that every citizen or resident of the contracting parties to the Convention had. The ECHR speaks in Article 6 about the right to a fair trial that is to be guaranteed in the determination of all disputes concerning civil rights or obligations and

26 Galligan, *op. cit.*, p. 9.

27 Marshall, *op. cit., p.*73.

28 Damaska, Mirian R. *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process*. New Haven: Yale University Press, 1986.

29 Sharpe, Jonathan, ed. *The Conscience of Europe: 50 Years of the European Court of Human Rights*. London: Third Millenium Publishing Ltd, 2011.

criminal charges. This choice of language has provided a fertile battlefield for member states to argue that administrative law and economic law disputes belonged to the public law sphere and were thus not covered by the safeguards provided in Article 6(1) ECHR.

The CJEU has adopted an *extractive approach to the interpretation of due process*, identifying some of the guarantees contained in the right to a fair trial with the right itself. The ECJ initially proposed that the rights of defence are fundamental principles of EU law. In later cases, the ECJ introduced the concept of a right to a fair hearing and a right to a fair legal process within a reasonable time. However, a defendant involved in EU law proceedings is only heard in writing.

The adoption of the Charter of Fundamental Rights by the European Union is an attempt to unify fundamental rights development in the Union, but also and, more importantly, is a step towards the constitutionalisation of the Union. Article 47 of the Charter guarantees the right to an effective remedy and to a fair trial.

Taking into account the centrality of due process to democracy itself, it is surprising that it has remained *marginal* to the construction of EU law in general and to EU competition law in particular. It is also surprising that the due process embraced by the European competition law officers has remained *minimal* despite great strides in the field of human rights on the European continent.

A few factors might explain the marginal and minimal position of due process in EU law and EU competition law. First, the main goal of the EU has been the establishment of a common market and, later, of an ever-closer union between the Member States. This has been accompanied by a parallel need to build strong institutions capable of creating and enforcing EU law. The European Commission has been entrusted with the mission of developing and implementing competition law, absent from many of the European jurisdictions at that time. Derenne suggested that in the 1970s, the Commission played a fundamental role in shaping competition law.[30] However, at that time, "the exemption contained in Article 81(3) EC had not been institutionalised and, by relying on it, the European Commission acted as a formal regulator and policy builder in specific sectors".[31] Since the exemption was not directly applicable to the national courts of the member states, the Commission "was involved in

30 Derenne, Jacques. "The Scope of Judicial Review in EU Economic Cases." *The Role of the Court of Justice of the European Union in Competition Law Cases.* Eds. Massimo Merola and Jacques Derennes. Bruxelles: Bruylant, 2012, p. 82.

31 Derenne, *op. cit.*, p. 82.

a part of the rule-making process, with which the Court was not permitted to interfere. When such policy-making is involved, the Court is only empowered to conduct a limited review, which is justified by the virtue of the category of the act".[32] In addition, in the 1980s, this analysis spread from the then Article 85/81(3) EEC/EC to Article 81(1) and this resulted in the policy of deference to the Commission to be "extended to cover more general situations where the Commission conducted complex economic analyses".[33]

The second reason for which EU competition law has remained staunchly attached to a minimal version of due process may be linked to the philosophy promoted by the NPM school. Concerned with "banishing" bureaucracy, NPM proponents argued that "in a world of rapid change, technological revolution, global economic competition, demassified markets, an educated workforce, demanding consumers, and severe fiscal constraints, centralized, top-down monopolies are simply too slow, too unresponsive, and too incapable of change and innovation".[34] The reform of the EU Commission and of EU competition policy focused on building responsive and, therefore, efficient EU institutions and policies. Efficiency, however, appears to sit uncomfortably within a structure like the EU Commission which combines political, bureaucratic and judicial functions. Cadiet has argued that "efficiency is an equivocal notion whose usage coincides with a contemporary tendency of allowing justice to be absorbed by the commercial sphere, a phenomenon (…) called commercialization and the privatization of justice".[35] He proposed that a competition model based on the search for efficiency has subtly colonized the judicial economy by "diffusing therein a management logic and preoccupation that determines not only the way in which an institution is managed – including its judicial branch – but also the method for defining the most efficient procedural rules".[36] He finds that the quality of the justice delivered and the quality of the trial or process are necessarily linked. If it is true that the duty to improve the process of reaching a decision does not cancel out the duty to improve the administration of justice, it is also true that the duty to improve the administration of justice does not dispense with the duty to improve the process of reaching a decision.[37]

32 Derenne, *op. cit.*, p. 83.

33 Derenne, *op. cit.* p 83.

34 Osborne, David and Peter Plastrick. *Banishing Bureaucracy: The Five Strategies for Reinventing Government*. New York: Addison-Wesley, 1992, p. 17.

35 Cadiet, Loic. "Efficience versus Equité?" *Mélanges Jacques Van Compernolle*. Bruxelles: Bruylant, 2004,p. 33.

36 Cadiet, *op. cit.*, p. 35.

37 Cadiet, *op. cit.*, p. 36.

CHAPTER 4

The Right to a Fair Trial

Galligan has noted how little is known about the practical operation and effect of the procedural principles of Article 6(1) ECHR. He argues that the dearth of empirical research and the absence of a comprehensive study of types of process covered by Article 6(1) ECHR make generalizations about its strength and weaknesses difficult to sustain.[1]

This chapter attempts to partially fill the gap identified by Galligan.

4.1 Formulation and Importance of Article 6(1) ECHR

Article 6 of the European Convention of Human Rights stipulates the following:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
   (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
   (b) to have adequate time and facilities for the preparation of his defence;

1 Galligan, *op. cit.*, p. 222.

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

The importance and impact of this provision are often misunderstood and ignored. I argue that the right to a fair trial is the most important provision of the ECHR both in terms of the number of decisions adopted and the impact on the enforcement system. The right to life and the prohibitions against torture, slavery or illegal detention are all important components of a democratic state and their enforcement is essential for the well-being and development of the individual. However, fair trial is the *transmission belt* that ensures the smooth functioning of power, by presenting the problems that the individual encounters to the authority that has the competence, the tools and, hopefully, the will to solve it. When the mechanism of state power has a functioning fair trial transmission belt, access to justice and effective judicial review ensure that all the other rights guaranteed by the Convention – and by the constitutions of the members states – become real. Indeed, if the right to a fair trial is guaranteed in a member state, an individual who alleges that his right to life – or another right – has been breached can have his claim heard and compensation awarded by the competent authority. In other words, justice will be restored. If, on the other hand, the member state lacks the capacity, tools or will to enforce due process rights and blocks the transmission of individual concerns, rights remain empty words and the victim will either give up the idea of state-provided justice altogether, by choosing a personal form of revenge, or will continue seeking to enforce it in an international forum.

This claim finds support both in numbers and in opinions. The yearly reports on the activity of the ECtHR show that *almost all applications lodged with the Court raised an Article 6 complaint*. Also, the majority of the cases delivered by the Court deal with the safeguards enshrined in the right to a fair trial. Thus, in 2018, the right to a fair trial was at issue in 24.1% of cases in which a violation was found.[2]

2 ECtHR. *Annual Report 2018.* Available athttps://www.echr.coe.int/Documents/Annual_report_2018_ENG.pdf accessed on 23 February 2021.

The opinions concur. The Court itself has held that "the right to a fair trial holds so prominent a place in a democratic society that there can be no justification for interpreting Article 6 § 1 of the Convention restrictively".[3]

"An omnibus provision", the right to a fair trial "is a basic element of the rule of law and part of the common heritage, according to the Preamble, of the Contracting States".[4]

Ashworth has rightly noted that the right to a fair trial is part of a group of rights situated between non-derogable rights, such as the right to life, and qualified rights. He calls these rights 'strong rights', "to demonstrate that they have a strength which is not qualified to the extent that the rights in Article 8–11 are qualified".[5] Ashworth notes that "although strong rights are less fundamental than the non-derogable rights, any arguments for curtailing a strong right must at least be more powerful than the kind of 'necessary in a democratic society' argument that is needed to establish the acceptability of interference with one of the qualified rights".[6]

Flauss has argued that the right to a fair trial is a procedural guarantee which has increasingly developed the relevance of the substantive rights enumerated in the Convention.[7]

Speaking about the variety of disputes brought by applicants to the ECtHR, some authors have shown that a majority of cases brought to the Court indeed concern civil and criminal cases. However, "they also involve, to an extent that could not have been predicted, proceedings before civil and administrative tribunals and administrative decisions determining civil rights and obligations".[8]

4.2 Influence of the Case-law of the ECtHR on Domestic Legislation

Bates describes that there was a generalized conviction in the 1950s that the Convention had no future and that it was going to have a minor influence, if any, on domestic law. He states that

3 ECtHR. *Perez v. France*, application no. 47287/99, judgement of 12 Feb 2014, paragraph 64.

4 Rainey, Bernadette, Elizabeth Wicks and Clare Ovey. *Jacobs, White & Ovey: The European Convention of Human Rights* (*6th Edition*). Oxford: Oxford University Press, 2014, p. 242.

5 Ashworth, Andrew. "Eroding the Structure of the European Convention." *Current Problems in the Protection of Human Rights: Perspectives from Germany and the UK*. Eds. K.S. Ziegler and P. M. Huber. Oxford: Hart Publishing, 2013, p. 33.

6 Ashworth, *op. cit.*, p. 33.

7 Flauss, *op. cit.*, p. 81.

8 Harris, D., M. O'Boyle, Ed Bates and C.M. Buckley. *Law of the European Convention on Human Rights*. Oxford: Oxford University Press, 2009, p. 202.

> there was a surprising lack of comment on the Convention from the most distinguished contemporary commentators in the international legal world at this stage. In fact, if one browses through the leading international law journals of the early 1950s one struggles to find references even to the fact that the ECHR had come into being, let alone any comment on the text itself and its significance.[9]

Even more, before the 1970s the few works that were published about the Convention came from a handful of authors that worked at the Council of Europe.[10]

The situation has changed since then. Although the ECtHR maintains a rather low profile, its case-law became increasingly known and respected. The ECtHR noted in *Guincho* that member states undertook the obligation of organising their legal systems so as to ensure compliance with the requirements of Article 6(1) ECHR, including that of trial within a reasonable time.[11] In addition, as Rainey, Wicks and Ovey noted, the case-law of the ECtHR has had a significant impact. For applicants bringing claims to Strasbourg, a favourable decision can lead to criminal proceedings being reopened or to the award of damages. Perhaps more importantly, "states all over Europe have amended and improved their legal procedures to comply with the Court's rulings".[12] They note that following the ECtHR's consistent approach to this matter, "the perennial problem of excessive length of proceedings is beginning to be addressed in a systematic fashion in a number of Contracting Parties".[13]

Bates offers a few examples of the law reforms instituted in the UK as a result of a violation found by the ECtHR. *The Sunday Times* prompted the introduction of the Contempt of Court Act 1981.[14] *Marckx* led to a 1987 Act which amended various legal provisions relating to affiliation.[15] *Young, James and Webster* prompted new employment law legislation.[16] And *Sporrong*

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9 Bates, *op. cit.*, pp. 9–10.

10 Bates, *op. cit.*, p 10.

11 ECtHR. *Guincho v. Portugal*, application no. 8990/80, judgement of 10 Jul 1984, paragraph 38.

12 Rainey, Wicks and Ovey, *op. cit.,* p. 276.

13 Rainey, Wicks and Ovey, *op. cit.,* p. 276.

14 ECtHR. *The Sunday Times v. the United Kingdom* [GC], application no. 6538/74, judgement of 26 Apr 1979.

15 ECtHR. *Marckx v. Belgium* [GC], application no. 6833/74, judgement of 13 Jun 1979.

16 ECtHR. *Young, James and Webster v. the United Kingdom* [GC], applications nos. 7601/76 and 7806/77, judgement of 13 Aug 1981.

and Lönroth prompted new legislation concerning town and country planning.[17]

Violations of the right to a fair trial triggered numerous other changes on the domestic level. In order to highlight the impact of the ECtHR's case-law on the domestic legal landscape, the Council of Europe offers a web-catalogue of the most important cases, in addition to the work performed by the Council of Europe's Committee of Ministers.[18]

Thus, *Airey* prompted the Irish government to set up an independently administered legal aid scheme.[19] Following a case of arbitrary detention in a psychiatric hospital, the Netherlands introduced new legislation instructing that, in all cases of involuntary admission to a psychiatric hospital, the patient has the right to be heard by a court.[20] The law was also changed so that patients who are involuntarily admitted to a psychiatric hospital do not automatically lose control over their property.[21]

In *Rumpf*, the ECtHR found a violation against Germany of the right to a fair trial on account of the fact that the applicant's administrative dispute lasted for 13 years and 5 months.[22] This judgment and others led to a new law in 2011 to tackle unreasonable legal delays. It gave applicants the opportunity to challenge the slow pace of proceedings and ask for a remedy. It also provided for a right to compensation. These reforms allowed Germany to overcome a long-standing structural problem concerning remedies for excessively long civil proceedings.[23]

In a case against Andorra, the ECtHR found a violation of the right to a fair trial due to the fact that the applicant could not lodge a complaint to the Constitutional Court without the prior approval of the State Council.[24] As a result of this case, the legislation of Andorra has changed to allow everyone the right to lodge complaints with the Constitutional Court.[25]

17 ECtHR. *Sporrong and Lönnroth v. Sweden*, applications nos. 7151/75 and 7152/75, judgement of 23 Sep 1982, pp. 151–152.

18 Web-catalogue available at https://www.coe.int/en/web/impact-convention-human-rights/right-to-a-fair-trial accessed on 23 February 2021.

19 ECtHR. *Airey v. Ireland*, application no. 6289/73, judgement of 9 Oct 1979.

20 ECtHR. *Winterwerp v. the Netherlands*, application no. 6301/73, judgement of 24 October 1979.

21 Council of Europe. *Resolution of the Council of Europe's Committee of Ministers* DH (82) 2.

22 ECtHR. *Rumpf v. Germany*, application no. 46344/06, judgement of 2 Sep 2010.

23 Council of Europe. *Resolution of the Council of Europe's Committee of Ministers* DH (2013) 244.

24 ECtHR. *Millan i Tornes v. Andorra*, application no. 35052/97, judgement of 6 July 1999.

25 Council of Europe. *Resolution of the Council of Europe's Committee of Ministers* DH (99) 721.

Another important development took place in France, where, following *Kress*, the French *Cour de cassation* broke an old continental tradition and excluded the Advocates General from the Court's preparatory debates and from the judicial deliberations.[26]

Lastly, following a few cases against Switzerland, a reform of panel procedures was triggered resulting in the separation of the investigating and ruling judges in the Canton of Berne.

4.3 External Influences on the Case-law of the ECtHR

The right to a fair trial is a provision whose interpretation and enforcement have been shaped by the same events that shaped the destiny of the Contracting Parties to the Convention. In many ways this provision has a European destiny and reflects important legal developments at the domestic level. The right to a fair trial is a mutable provision that has allowed historical events to inform its substance, offering every generation of lawyers the opportunity to show where the mechanism of governmental power is lacking speed or essential parts.

Accession of new member states to the ECHR and their changing constitutional landscapes, migration and modernization of life, as well as the military conflicts in which member states are involved are all factors which raise questions about the interpretation of the right to a fair trial. For the member states leaving behind dictatorial pasts, questions about how to organize and balance the branches of government have been essential and the ECtHR did not fail to provide answers. Recently, the process of European integration and the accession of the European Union to the ECHR raised concerns about the human rights protection system in Europe and the coexistence of the ECtHR and the CJEU.

A point worth serious mention is that the ECtHR has not always been on a quest for enhancing its jurisdiction, as it is sometimes proposed. A preconceived view of the ECtHR is that it is a rights-creating or rights-enhancing machine. The facts speak to the contrary. The Court follows a refined and careful approach to rights interpretation and this is especially true in relation to the right to a fair trial. On the one hand, the large number of applications originating from all member states concerning the right to a fair trial indicates a

26 ECtHR. *Kress v. France*, application no. 39594/98, judgement of 6 June 2001. See also, Andriantsimbazovina, Joël. " Savoir c'est rien, imaginer est tout: Libre conversation autour de l'arrêt Kress de la Cour européenne des droits de l'homme." *Recueil Dalloz, Chronique* (2001): pp. 2611.

general dissatisfaction with the manner in which justice is delivered on the domestic level. On the other hand, the Court is not in a hurry to translate this dissatisfaction into violations of the Convention and to therefore order the governments to change legislation or practice. Rather, the Court alternates between periods of expansion, stagnation and even contraction.

Thus, the evolution of the right to a fair trial is closely linked to the evolution of the Court itself. The ECtHR is a successful international tribunal: its decisions are being implemented by the member states and its case-law is quoted by other international tribunals and during human rights law classes offered at numerous universities. This success, however, did not come easy. Rather, the ECtHR has built its reputation slowly and carefully by choosing only a handful of cases for consideration on their merits during the first years of its existence. Many of the initial cases of the Court dealt with the right to a fair trial. Indeed, this provision offered the Court the opportunity to spell out some of the most important general principles concerning the interpretation of the Convention. This original case-law impresses through its maturity and its capacity to resist the moods and fashions of changing times.

Thus, the case *Golder* concerned a serious disturbance in the prison where the applicant was serving his term and in which he was suspected of having been involved.[197] The applicant decided to lodge a civil action for libel against the prison officer who accused him of having been involved in the disturbance. When the applicant's request to the Home Secretary for permission to consult a solicitor with a view to bringing the civil action for libel was refused, the applicant complained at the ECtHR about a breach of his right to have access to a court.

The Court held that

> it was not for the Home Secretary himself to appraise the prospects of the action contemplated; it was for an independent and impartial court to rule on any claim that might be brought. In declining to accord the leave which had been requested, the Home Secretary failed to respect, in the person of Golder, the right to go before a court as guaranteed by Article 6 para. 1 (art. 6–1).[27]

In *Airey*, the applicant complained about the impossibility to separate judicially from her husband. She maintained that, since the prohibitive cost of

27 ECtHR. *Golder v. the United Kingdom*, application no. 4451/70, judgement of 21 Feb 1975, paragraph 40.

litigation prevented her from bringing proceedings before the High Court for the purpose of petitioning for judicial separation, there has been a violation of the right to a fair trial.

The Court agreed with the applicant and found that

> the Convention must be interpreted in the light of present-day conditions and it is designed to safeguard the individual in a real and practical way as regards those areas with which it deals. Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers, like the Commission, that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention.[28]

In *Engel and Others*, the applicants were military conscripts.[29] They were punished for breach of discipline and were sentenced to a few days of light arrest. Their attempts to contest the disciplinary measure were unsuccessful. They complained at the Court about the unfairness of the disciplinary proceedings in which they were involved.

Thus, before the accession of the Eastern European members, the Court had considered a wide range of issues relating to civil and criminal justice in Western Europe.

The accession of the Eastern European states to the Council of Europe and the European Convention of Human Rights provided the ECtHR with a new impetus to consider the right to a fair trial. The exit from totalitarian regimes was marked by an upsurge of applications to the Court originating from Eastern European countries and by a generalized contestation of the power-exercising institutions. Also, if previously the Court was dealing with states that had a long record of democratic practices, after the 1990s, the case-law of the Court contributed to the creation and development of these practices in countries that were fully involved in the process of democracy-building for the first time in their history.

More and more cases were lodged at the Court starting in the 1990s to the point that the Court could not handle them all. At the beginning of 2012, there

28 *Airey v. Ireland*, quoted above, paragraph 26.

29 ECtHR. *Engel and others v. the Netherlands*, application no. 5100/71, judgement of 8 Jun 1976.

were 151,600 cases pending before the ECtHR.[30] Many of these cases were repetitive and concerned systemic problems, that is, they required the implementation, reformulation or cancellation of a domestic statute.

In the context of a generalized outcry against the state of justice in Europe and the Court's incapacity to deal with its increasing backlog, the Court put forward a strategy for dealing with systemic problems. More precisely, the Court launched a new procedure meant to address simultaneously all cases raising identical legal problems. This new procedure – called the pilot procedure – is often employed in relation to fair trial issues such as non-execution of judgments or lengthy proceedings.[31]

The process of European integration raises new questions concerning the interpretation of the right to a fair trial. All members of the European Union are parties to the Convention. At the same time, the European Union itself is not a party thereto, at least not until its accession to the Convention is concluded. This situation raises questions about the institutional position of the ECtHR within the Union, about the future of fundamental rights in the Union and about respect of the right to a fair trial by the Union's institutions.

30 ECtHR. *Annual Report 2012*, p. 149. Available at https://www.echr.coe.int/Documents/Annual_report_2012_ENG.pdf accessed on 23 February 2021.

31 ECtHR. *The Pilot-Judgement Procedure: Information Note Issued by the Registrar*. Available at https://www.echr.coe.int/Documents/Pilot_judgment_procedure_ENG.pdf accessed on 23 February 2021.

CHAPTER 5

Applicability of Article 6(1) ECHR

All provisions in the ECHR have a limited scope of application and Article 6(1) ECHR is not an exception to this rule. On contrary, the fair trial provision has long been the battlefield on which governments have claimed procedural immunity for disputes while applicants have argued that such immunities are incompatible with the principles of the rule of law. What was at stake in such cases was more than the outcome of any individual petition at the Strasbourg Court. It was the applicability of Article 6(1) ECHR to proceedings that, until that moment, were immune from international fair trial guarantees.

As a "pop-corn provision", Article 6(1) ECHR has continued to puff up and grow over time, expanding the applicability of the fair trial guarantees to a broader range of case types. As the case-law developed, the governments lost more and more battles and were ordered to enforce fair trial guarantees with respect to a large number of disputes. Looking back on more than 50 years of case-law of the ECtHR, it might be fair to argue that Article 6(1) ECHR is the provision that contributed the most to the advancement of the rule of law and individual justice in Europe.

According to the case-law, Article 6(1) ECHR may be relied on by individuals who consider that an interference with the exercise of their rights is unlawful and complain that they do not have the possibility to submit that claim to a court meeting the requirements of Article 6(1) ECHR. As the Court put it in *Golder*, the right to a fair trial embodies the "right to a court", of which the right of access, that is the right to institute proceedings, is one aspect.[1]

However, the right to a court is not absolute, as Article 6(1) ECHR applies solely for the purposes of determining civil rights and obligations or criminal charges. This apparently anodyne rule incentivized governments to argue that many of the domestic proceedings about which applicants complained fell outside the scope of Article 6(1) ECHR as they dealt neither with civil rights and obligations, nor with criminal charges. This was the case in numerous administrative proceedings challenged under Article 6(1) ECHR in Strasbourg, about which governments argued for a very long time that they did not concern neither civil rights nor criminal charges.

1 *Golder v. United Kingdom*, quoted above.

What is at stake in such situations is far more important than the legal solution to a case: if the Court concludes that the proceedings at issue concern civil rights or criminal charges, it will perform its analysis and will eventually order the defending government to ensure fair trial guarantees in future disputes. However, if the Court finds that the relevant proceedings do not concern civil rights and obligations or criminal charges, it will conclude that Article 6(1) ECHR is not applicable and it will reject the application for being incompatible *ratione materiae* with the Convention.

The right to fair trial has not only been used by the Court for the enhancement of the individual's position when opposing a government. On the contrary, the right to a fair trial is often relied on successfully by the governments as a barrier against the jurisdiction of the ECtHR.

The present chapter is organized as follows: Section 5.1. presents the case-law of the ECtHR concerning the disputes to which Article 6(1) ECHR is not applicable; Section 5.2. presents the case-law of the ECtHR concerning the applicability of Article 6(1) ECHR to disputes concerning "civil rights and obligation"; and Section 5.3. presents the case-law of the ECtHR concerning the applicability of Article 6(1) ECHR to disputes concerning a "criminal charge", including economic law disputes and competition law disputes.

5.1 Maintaining Pockets of State Sovereignty

Harris, O'Boyle, Bates and Buckley argue that "some of the more perplexing problems in the interpretation of the Convention concern the application of Article 6(1) to non-criminal cases".[2] They show that in its early jurisprudence, the Court interpreted the notion "in the determination of his civil rights and obligations" as imposing a distinction between the civil and public law spheres, a distinction that "has long been significant in civil law systems for jurisdictional and other purposes and has more recently become important in UK administrative law".[3] This distinction, however, is also at the origin of important difficulties for the Court because the dividing line between public and private law is more and more difficult to defend.

The claims that the Court considers as belonging to the sphere of public law, and that are therefore excluded from Article 6(1) ECHR protection are few. In *Pierre-Bloch,* the Court found that the right to stand for elections was

2 Harris, O'Boyle, Bates and Buckley, *op. cit.*, p. 210.

3 Harris, O'Boyle, Bates and Buckley, *op. cit.*, p. 211.

a political, not a civil right and therefore that the fair trial guarantees did not extend to the applicant's case.[4]

In *Maaouia,* the same conclusion was reached as regards the expulsion of aliens. The Court held that "decisions regarding the entry, stay and deportation of aliens do not concern the determination of the applicant's civil rights or obligations".[5]

In *Ferrazzini v Italy,* the Court found that the duty to pay tax did not concern a person's civil rights because it clearly held the nature of a public law. The Court explained that relations between the individual and the state have changed in many spheres during the 50 years which have elapsed since the convention system was put in place. One defining feature has been that state regulation increasingly intervenes in private law relations. This has led the Court to find that procedures deemed under national law as being parts of 'public law' could come within the purview of Article 6(1) ECHR if the outcomes were decisive for private rights and obligations. Moreover, the state's increasing intervention in the individual's day-to-day life, in terms of welfare protection for example, has required the Court to evaluate features of public law and private law before concluding that the asserted right could be classified as civil.[6] However, the Court concluded that certain rights and obligations, such as the duty to pay tax, remain excluded from the protection offered by Article 6(1) ECHR because "they form part of the hard core of public prerogatives".[7]

5.2 Applicability of Article 6(1) ECHR to "Civil Rights and Obligations"

The current section of the book describes the case-law of the ECtHR concerning the applicability of Article 6(1) ECHR to disputes concerning "civil rights and obligations". This section covers (1) contestations of public policy decisions, (2) disputes raising land issues, (3) disputes raising concerns in relation to the right to education, (4) disputes concerning social policy decisions, (5) constitutional disputes and (6) employment disputes which have long been considered as belonging to the sphere of public law.

4 ECtHR. *Pierre-Bloch v. France*, application no. 24194/94, judgement of 21 Oct 1997, p. 202.
5 ECtHR. *Maaouia v. France,* application no. 39652/98, judgement of 5 Oct 2000, paragraph 40.
6 ECtHR. *Ferrazzini v. Italy*, application no. 44759/98, judgement of 12 Jul 2001, paragraph 27.
7 *Ferrazzini v. Italy*, quoted above, paragraph 29.

5.2.1 *Public Policy Decisions and Individual Rights*

In the case of *Powell and Rayner* the applicants' access to the domestic courts in respect of aircraft noise nuisance was denied by Section 76(1) of the UK 1982 Civil Aviation Act which set a statutory bar to this end.[8] To the extent that no substantive right existed under domestic English law to obtain relief for exposure to aircraft noise, the Court held the view that there was no civil right recognized under domestic law to attract the applicability of Article 6(1) ECHR.

This idea was further developed in the case of *Roche* which concerned an applicant who took part in chemical weapons research after joining the British Army.[9] He found himself unable to apply for a service pension following health problems as Section 10 of the UK Crown Proceedings Act amounted to a procedural bar to the right of action against the Crown.

The applicant complained at the Court that his right of access to a court was violated by the English domestic authorities. The Court recognized that, while Article 6(1) ECHR secures for everyone the right to have a claim relating to his civil rights and obligations being heard before a court, it does not guarantee any particular content for those rights in the substantive law of the member states.[10]

The Court thus acknowledged that the basis for the qualification of a right as being "civil" should be the qualification of the right in the relevant domestic law. The Court noted in this sense that Section 10 did not remove a class of claim from the domestic courts' jurisdiction or confer immunity from liability which had been previously recognised. In fact, such a class of claims has never existed under English domestic law and it was not for an international tribunal to create it.

It is interesting to notice that even if the Court found that Article 6(1) ECHR was not applicable in the present case, it found a violation of Article 8 ECHR in respect of the inadequate access to information about the tests performed in Porton Down. The Court found that a "*positive obligation* arose to provide an effective and accessible procedure enabling the applicant to have access to all relevant and appropriate information which would allow him to assess any risk to which he had been exposed during his participation in the tests".[11] (emphasis added)

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8 ECtHR. *Powell and Rayner v. the United Kingdom*, application no. 9310/81, judgement of 21 Feb 1990, paragraphs 34–36, Series A no. 172.

9 ECtHR. *Roche v. the United Kingdom* [GC], application no. 32555/96, judgement of 19 Oct 2005.

10 *Roche v. the United Kingdom* [GC], quoted above, paragraph 116.

11 *Roche v. the United Kingdom* [GC], quoted above, paragraph 162.

In *Athanassoglu,* the applicants complained that they were denied effective access to a court in breach of Article 6(1) ECHR.[12] They complained in particular that it had not been open to them under Swiss law to seek judicial review contesting the lawfulness of a decision of the Federal Council granting a limited operating license for the Benzau II nuclear power plant.

The Court made a few important clarifications in this judgement. The Court noted that

> the applicants are seeking to drive from Article 6 § 1 of the Convention a remedy to contest the very principle of the use of nuclear energy or at least a means for transferring from the government to the courts the responsibility for taking, on the basis of technical evidence, the ultimate decision on the operation of individual nuclear power stations.[13]

The Court further observed that Swiss law empowered the applicants to partially contest the extension of the operating license of the power plant and to initiate ordinary civil proceedings for nuisance and *de facto* expropriation. However, "how best to regulate the use of nuclear power is a policy decision for each Contracting State to take according to its democratic processes. Article 6 § 1 cannot be read as dictating any one scheme over another".[14]

The Court concluded that the proceedings at issue were indeed important for the general question of extension of the operating license, but not for the determination of any of the applicants' civil rights and obligations. The case was thus declared inadmissible under Article 6(1) ECHR.

Domestic administrative proceedings have raised issues concerning the applicability of Article 6(1) ECHR. In fact, for many years Governments insisted that domestic administrative proceedings did not concern civil rights or obligations and that they fell outside the scope of application of Article 6(1) ECHR.

In a case against Turkey, the applicants successfully contested the granting of permits to operate a gold mine due to the environmental threats posed by the mining activity. Despite the existence of a final judicial decision prohibiting the mining activity, the company at issue managed to circumvent it and to continue its actions.[15]

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12 ECtHR. *Athanassoglou and Others v. Switzerland* [GC], application no. 27644/95, judgement of 6 Apr 2000.

13 *Athanassoglou and Others v. Switzerland* [GC], quoted above, paragraph 53.

14 *Athanassoglou and Others v. Switzerland* [GC], quoted above, paragraph 54.

15 ECtHR. *Taşkın and Others v. Turkey*, application no. 46117/99, judgement of 10 Oct 2004.

The Turkish Government defended itself, arguing that the risks relied on by the applicants were only probable and hypothetical and did not therefore concern civil rights and obligations.

The Court started its analysis noting that, in contesting the mining permit, the applicants attempted to obtain adequate protection of their physical integrity against the risk entailed by the operation of the gold mine under discussion.

The Court than noted that the risk presented by the gold mine had been clearly assessed by the domestic courts when cancelling the mining permit and that the proceedings instituted by the applicants were the single means under Turkish legislation to protect their right to live in healthy and balanced environment. The Court also noted that the outcome of the proceedings before the administrative courts, taken as a whole, were relevant for the applicants' civil rights.[16]

In the case of *Alatulkkila and Others v Finland*, the applicants were owners of water areas in Finland.[17] In 1996, the Finnish-Swedish Frontier Rivers Commission prohibited all fishing of salmon and sea trout in the relevant waters during 1996 and 1997. Some of the applicants received compensation for the economic losses suffered due to the imposed restrictions.

The applicants complained under Article 6(1) ECHR about the impossibility to review the decision of the Finnish-Swedish Frontier Rivers Commission by a tribunal.

The Finish Government contested the applicability of Article 6(1) ECHR to the proceedings involving the decision of the Finnish-Swedish Frontier Rivers Commission, arguing that the right to fish belonged to the state, not to the applicants.

The Court held that "although Article 6 cannot guarantee a right of access to a court with power to invalidate or override a law enacted by the legislature, it must examine the direct effect of the decisions of the Finnish-Swedish Frontier Rivers Commission which prohibited fishing under the powers bestowed on them by various decrees".[18]

In concluding that the right to fish was a civil right, the Court noted that prior to the ban, the applicants enjoyed an undisputed right to fish salmon and sea trout. Also, the Court attached a particular importance to the fact that

16 *Taşkın and Others v. Turkey*, quoted above, paragraphs 131–134.

17 ECtHR. *Alatulkkila and Others v. Finland*, application no. 33538/96, judgement of 28 Jul 2005.

18 *Alatulkkila and Others v. Finland*, quoted above, paragraph 50.

some of the applicants received compensation for loss of income as professional fishermen arising from their inability to continue to fish.

In the case of *X*, the applicant complained of state negligence in relation to blood transfusions that infected him with the HIV virus.[19] He complained at the Court about the length of the proceedings in which he was involved.

The French Government argued that the health policy contested by the applicant was covered by public law provisions and was not, therefore, covered by the Article 6(1) ECHR guarantees.

Holding that the outcome of the negligence proceedings initiated by the applicant were decisive for his private rights and obligations, the Court concluded that Article 6(1) ECHR was applicable and that, furthermore, the reasonable time of these proceedings had been exceeded.[20]

Further explanations concerning the issue of civil rights and obligations were offered by the Court in the case of *Wós*, in which the applicant was subjected to forced labour during the Second World War on the territory of occupied Poland.[21]

In 1991, an agreement was signed between the Federal Republic of Germany and the Republic of Poland addressing the issue of Polish nationals persecuted by the Nazi regime. The applicant applied to the Polish-German Reconciliation Foundation for compensation on account of his forced labour.

Upon the modification of the admissibility rules concerning the granting of compensations sponsored by the Government of the Federal Republic of Germany, the applicant applied for an increase of the amount initially received. When his application was declared inadmissible in law by the Polish Supreme Administrative Court, the applicant complained under Article 6(1) ECHR that he did not have access to a court in respect of his claim raised before the Polish-German Reconciliation Foundation.

The Polish Government argued that Article 6(1) ECHR was not applicable to the present case due to the fact that the compensation granted by the Foundation was incidental in nature, had a symbolic rather than real economic value and was in no way similar to welfare allowances.

The Court noted that

> there is no general obligation under the Convention for States to compensate wrongs inflicted in the past under the general cover of State authority. However, if such a compensation scheme were to be established,

19 ECtHR. *X v. France*, application no. 18020/91, judgement of 31 Mar 1992, Series A no. 234-C.

20 *X v. France*, quoted above, paragraph 49.

21 ECtHR. *Woś v. Poland*, application no. 22860/02, judgement of 8 Jun 2006.

> the Court observed that substantive regulations which determined the eligibility criteria for any compensation would in principle fall outside the Court's jurisdiction, unless the relevant criteria were manifestly arbitrary or blatantly inconsistent with the fundamental principles of the Convention. On the other hand, the Court noted that it could not be excluded that some procedural issues – related to the application of those eligibility criteria to the facts of individual cases – could arise. In other words, once a compensation scheme is put in place by a Government or with a Government's consent, and regardless of the nature of the respective benefits, issues of compliance with Article 6 § 1 or Article 1 of Protocol No. 1 may arise.[22]

To conclude, the case-law described in the section above concerns cases in which individuals were contesting public policies. The ECtHR drew attention to the fact that, whereas Article 6(1) ECHR can be relied when individuals have been personally affected by the contested policies, the situation is radically different when individuals are using Article 6(1) ECHR to contest policy *ipso facto*. In the latter case, Article 6(1) ECHR remains inapplicable.

5.2.2 *Land Issues*

In the case of *Ortenberg*, the applicant was a house owner.[23] Following the decision of the district council to adopt a land-use plan and a development plan that designated as building land an area adjoining the applicant's land, she challenged the lawfulness of these actions and complained about the nuisance that would be caused.

She complained that neither the Austrian Constitutional Court, nor the administrative court were "tribunals" for the purpose of Article 6(1) ECHR. The Austrian Government argued that the neighbours' right to object to building plans was a public law right, guaranteed by public law statutes and that, consequently, Article 6(1) ECHR did not apply to the present case.

The Court pointed out that Article 6 applies where the subject-matter of an action is pecuniary in nature and is founded on an alleged infringement of rights which are likewise pecuniary or where its outcome is decisive for private rights and obligations.

The Court noted that despite the fact that the applicant challenged a public law act, her motivation was to protect her pecuniary rights. More precisely, by

22 *Woś v. Poland*, quoted above, paragraph 72.

23 ECtHR. *Ortenberg v. Austria*, application no. 12884/87, judgement of 25 Nov 1994, Series A no. 295-B.

challenging the building plans, she intended to protect her private property and to avoid the decrease of its market value. Thus, the close link between the proceedings brought by the applicant and the consequences of their outcome for her property meant that the right under discussion was a "civil" right and that Article 6 was applicable.[24]

A similar issue arose in the case *De Geouffre de la Pradelle* whose property had been declared an area of outstanding beauty and public interest.[25] Mr de Geouffre de la Pradelle could not challenge the administrative decision at issue due to the fact that it was notified to him after the deadline for lodging complaints had expired. He complained under Article 6(1) ECHR that he has been deprived of his right of access to a court due to the uncertainty prevailing in French legislation as to the classification of decisions to designate places of interest.

Despite the fact that the French Government acknowledged that the decisions to designate places of outstanding beauty are *sui generis* administrative acts, it did not argue that Article 6(1) ECHR was inapplicable in such cases.

In the present case, the Court found a violation of Article 6(1) ECHR on the grounds that the system was not sufficiently coherent and clear and that the applicant did not have a practical, effective right of access to the *Conseil d'Etat*.[26]

In conclusion, land dispute generate many cases at the ECtHR. The right to a fair trial is often invoked in these cases together with the right to property. Such cases offered the ECtHR the opportunity to reason that pecuniary rights are linked to the "civil rights and obligations" as guaranteed by Article 6(1) ECHR. In addition, many land disputes brought at the ECtHR concerned lack of effective remedy at the domestic level.

5.2.3 *Right to Education and Detention Issues*

Interesting issues concerning the applicability of Article 6(1) ECHR have arisen in relation to the right to education. In the case of *André Simpson,* the Commission held that Article 6 was inapplicable to proceedings concerning the laws on education due to the fact that they fell within the public law domain, had no private law analogy and had no repercussions on private rights and obligations.[27]

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24 *Ortenberg v. Austria*, quoted above, paragraph 28.

25 ECtHR. *De Geouffre de la Pradelle v. France*, application no. 12964/87, judgement of 16 Dec 1992, Series A no. 253-B.

26 *De Geouffre de la Pradelle v. France*, quoted above, paragraph 35.

27 ECtHR. *Simpson v. the United Kingdom* (*dec.*), application no. 14688/89, judgement 4 Dec 1989.

Almost 20 years later, the ECtHR reached a different conclusion in a case in which the applicant could not be enrolled at a University due to the fact that she refused to provide identity pictures without wearing a headscarf.[28] At the Court, the applicant complained about the unfairness of the administrative proceedings before the Supreme Administrative Court.

The Court highlighted, first of all, that the public law aspect of a regulation did not suffice to exclude the right to education from the category of civil rights and obligations. The Court also stated that "where a State confers rights which can be enforced by means of a judicial remedy, these can, in principle, be regarded as civil rights within the meaning of Article 6 § 1".[29]

The Court has also noted that the applicant did not deal with the public authorities as holders of discretionary powers, but merely as providers of a public service. Lastly, the Court noted the importance of the applicant's right to continue her higher education.[30]

In a case against Italy, the applicant, who was convicted for mafia-related crimes, was assigned by the prison authorities to a detention regime with an increased surveillance level. He was unable to challenge this assignment due to the fact that the measure was a discretionary act of the prison authorities.

In deciding whether the limitations imposed on the applicant's freedom due to the special detention regime were civil rights, the Court relied on the argumentation of the Italian Constitutional Court that jurisdictional review was particularly important when administrative authorities are entitled to modify the detention regime of convicted persons.[31]

To conclude, access to education and the civil rights of detained persons are issues that have initially been considered belonging to public law. However, due to the developments at the domestic level – which allowed for judicial review of these matters – the ECtHR evolved its case-law to argue that access to education and the civil rights of detainee are covered by Article 6(1) ECHR.

5.2.4 *Social Policy and Individual Rights*

Important principles concerning the applicability of the right to a fair trial were established in the case of *Feldbrugge*, in which the applicant complained about the fact that she did not receive a fair hearing by a tribunal in the determination of her right to a sickness allowance.[32] The Court acknowledged that

28 ECtHR. *Emine Araç v. Turkey*, application no. 9907/02, judgement of 23 Sep 2008.

29 *Emine Araç v. Turkey*, quoted above, paragraph 21.

30 *Emine Araç v. Turkey*, quoted above, paragraph 24.

31 ECtHR. *Musumeci v. Italy*, application no. 33695/96, judgement of 11 Jan 2005.

32 ECtHR. *Feldbrugge v. the Netherlands* [GC], application no. 8562/79, judgement of 29 May 1986.

this was the first time it had dealt with the field of social security and more specifically, with the applicability of Article 6 to disputes concerning health insurance schemes.

The Court pointed out that under Dutch legislation, the right to health insurance was indeed a public law right. The Court highlighted that

> there exists great diversity in the legislation and case-law of the Member States of the Council of Europe as regards the juridical nature of the entitlement to health insurance benefits under social security schemes, that is to say as regards the category of law to which such entitlement belongs. Some States – including the Netherlands – treat it as a public-law right, whereas others, on the contrary, treat it as a private-law right; others still would appear to operate a mixed system. What is more, even within the same legal order differences of approach can be found in the case-law. Thus, in some States where the public-law aspect is predominant, some court decisions have nonetheless held Article 6 § 1 to be applicable to claims similar to the one in issue in the present case. Accordingly, there exists no common standard pointing to a uniform European notion in this regard.[33]

The Court then went on to analyse the public law features and the private law features of the health insurance scheme in the Netherlands and to compare them. The health insurance scheme in the Netherlands displayed three features that justified its qualification as public law and therefore its exclusion from the realm of civil rights: (1) the character of the legislation, (2) the compulsory nature of the insurance and (3) the assumption by the state of the responsibility for social protection.[34]

On the other hand, the Court also identified three private law features that defended the health insurance scheme as falling under the civil head of Article 6(1) ECHR: (1) the personal and economic nature of the asserted right, (2) the connection with the contract of employment and (3) the affinities with insurance under the ordinary law.[35]

Upon balancing the public law and private law features, the Court concluded the latter to be predominant: "none of these various features of private law is decisive on its own, but taken together and cumulatively they confer on

33 ECtHR. *Feldbrugge v. the Netherlands* [GC], quoted above, paragraph 29.
34 ECtHR. *Feldbrugge v. the Netherlands* [GC], quoted above, paragraphs 31–35.
35 ECtHR. *Feldbrugge v. the Netherlands* [GC], quoted above, paragraphs 36–39.

the asserted entitlement the character of a civil right within the meaning of Article 6 para. 1 (art. 6–1) of the Convention which was thus applicable".[36]

Almost ten years after the Court delivered its judgement in *Feldbrugge*, the issue concerning the applicability of Article 6(1) ECHR to welfare benefits was brought before the ECtHR again. In the case of *Salesi*, the applicant complained about the length of the proceedings concerning a disability allowance.[37]

The Italian Government maintained that, since the state financed the scheme and since the entitlement to the disability allowance was not dependent on the payment of contributions, the subject was exclusively a public law matter.

The Court held that welfare assistance was different from the issue treated in the *Feldbrugge* case, namely social insurance, but did not choose to perform the long and detailed analysis provided in *Feldbrugge*. Three issues seemed to be of importance for the Court in the present case. First, state intervention was not sufficient to establish that Article 6(1) ECHR was inapplicable. Second, the applicant was not affected by her relations with the administration's exercising of discretionary powers. On the contrary, Mrs Salesi was suffering an interference with her means of subsistence and was claiming an economic right guaranteed by the Italian Constitution. Last, the Court acknowledged that disputes similar to that of the applicant came within the jurisdiction of ordinary courts.

It is interesting to note that, while in *Feldbrugge* the applicability of Article 6(1) ECHR was decided by a vote of ten to seven, it was unanimously affirmed in *Salesi* that Article 6(1) ECHR was applicable to disputes concerning welfare benefits.

In another case against the Netherlands, the applicants – who were running a physiotherapy practice – failed to pay social contributions under the Health Insurance Act due to the fact that they were contributors to private funds.[38]

Since this was the first time the Court had to rule on the applicability of Article 6(1) ECHR to disputes concerning contributions to a social security scheme, the Government of the Netherlands insisted that the contributions in question were akin to taxation and therefore did not fall within the concept of civil rights and obligations.

On the substance of the case, the Court applied the *Feldbrugge* test and concluded that when balancing the public law features of social security schemes (the character of the legislation, the compulsory nature of the schemes and the

36 ECtHR. *Feldbrugge v. the Netherlands* [GC], quoted above, paragraph 40.

37 ECtHR. *Salesi v. Italy*, application no. 13023/87, judgement of 26 Feb 1993.

38 ECtHR. *Schouten and Meldrum v. the Netherlands*, application no. 19006/91, judgement of 09 Dec 1994.

assumption of the state) against their private law features (the personal and economic nature of the right, the link between the social insurance schemes and the contract of employment and the similarity between the social security schemes and the contract of employment), the latter features prevailed. The Court concluded that

> the relative cogency of the features of public and private law present in the instant cases leads the Court to find that the private-law features are of greater significance than those of public law. On balance, the disputes in issue are to be regarded as having involved "the determination of civil rights and obligations" and Article 6 § 1 is therefore applicable.[39]

In conclusion, as the case-law described above indicates, social policy has been defended for a long time by European governments as public law, falling outside Article 6(1) ECHR. Unlike the land issues described in Section 5.2.2. above, the ECtHR did not rely solely on the pecuniary interests involved. The Court provided in-depth analysis of the domestic legislation and progressively reached the conclusion that the private law features of social policy legislation were determinant for the applicability of Article 6(1) ECHR.

5.2.5 *Constitutional Disputes*

Constitutional disputes offered another opportunity to consider the breadth of the applicability of Article 6(1) ECHR. In the case of *Ruiz-Mateos* the applicants lost their property as a result of an expropriation law.[40] During the domestic proceedings contesting the expropriation, a preliminary question was referred to the Constitutional Court. As it appeared, the preliminary question proceedings lasted for two years, contributing thus to the unlawful extension of the proceedings. In addition, the applicants complained that the counsel for the state – their opponent in the expropriation proceedings – was able to submit written observations to the Constitutional Court, whereas they were not allowed to do so because they lacked *locus standi*.

The Spanish Government, joined by the German and the Portuguese Governments, insisted that Article 6(1) ECHR was not applicable to proceedings before the Constitutional Court by reason of their nature, structure and jurisdiction. They highlighted that the decision in the present case "would be

39 *Schouten and Meldrum v. the Netherlands*, quoted above, paragraph 60.

40 ECtHR. *Ruiz-Mateos v. Spain* [GC], application no. 12952/87, judgement of 23 Jun 1993.

of great significance to those other Member States of the Council of Europe which have a constitutional court".[41]

The Court disagreed and acknowledged by eighteen votes to six that – leaving aside the abstract question of the applicability of Article 6(1) ECHR to constitutional courts – in the case at issue, there was a close link between the subject matter of the expropriation proceedings and the constitutional proceedings. More precisely, only if the Constitutional Court had declared null and void the expropriation law on the basis of which the applicants' goods had been expropriated, should the civil courts have allowed the applicants' claims. The Court held that

> in the present case, the civil and constitutional proceedings even appeared so interrelated that to deal with them separately would be artificial and would considerably weaken the protection afforded in respect of the applicants' rights. The Court notes that by raising questions of constitutionality, the applicants raised were using the sole – and indirect – means available to them of complaining of an interference with their right to property.[42]

Aside from the novelty introduced by this judgement concerning the principle of the equality of arms in constitutional proceedings, the case is also known for the roiling dissenting opinions expressed in it.

Judge Thor Vilhjalmsson argued that the Court "cannot demand that access to the Constitutional Court in Spain be regulated in a specific way as is required by the majority of our Court".[43]

Judge Matscher wrote:

> While I deplore the clearly unsatisfactory legal position in the case before us, it is not for the Convention organs to "allow" the applicants' claims by having recourse to Article 6 in order to remedy the situation under domestic law, which is undoubtedly deficient from the point of view of the general principles of law, but not contrary to the Convention.[44]

Judge Matscher criticised the reference and use of such notions like "close link" and "so interrelated" for the purpose of extending excessively the applicability

41 *Ruiz-Mateos v. Spain* [GC], quoted above, paragraph 56.
42 *Ruiz-Mateos v. Spain* [GC], quoted above, paragraph 59.
43 Dissenting Opinion of Judge Thor Vilhjalmsson, *Ruiz-Mateos v. Spain* [GC], quoted above.
44 Dissenting Opinion of Judge Franz Matscher, *Ruiz-Mateos v. Spain* [GC], quoted above.

of Article 6(1) ECHR and concluded that such tendencies "result inevitably in the limitation of the substance of the procedural guarantees contained therein in a way which is scarcely compatible with the aim of the provision".[45]

Judge Pettiti, joined by Judges Lopes Rocha and Ruiz-Jarabo Colomer, insisted that raising objections of constitutionality should not confer upon individuals the status of "parties" to the proceedings because the constitutional procedure was an institutional debate that excluded individuals.

The *Ruiz-Mateos* judgement concerned constitutional referrals lodged in parallel to the main proceedings. Later cases have been brought to the Court concerning constitutional appeals lodged by applicants after the exhaustion of the ordinary proceedings.

In *Krcmar and Others*, the applicants complained that they did not have a fair hearing before the Constitutional Court as the Court based its decision on documents that were not presented during the public hearing and were not shown to or discussed with the parties.[46]

The Czech Government did not dispute the applicability of Article 6(1) ECHR to the merits of the case. The Court then unanimously concluded that the applicants' restitution claim was of a pecuniary nature and that Article 6 was applicable to proceedings before Constitutional Courts.

It can be thus concluded that, during a period of ten years, the Court's view as to the applicability of Article 6(1) ECHR to constitutional disputes has radically changed. After an initial period of deeming constitutional disputes incompatible with Article 6(1) ECHR, the Court accepted, against a vocal minority, that when a close link existed between the ordinary civil proceedings and the constitutional proceedings, the latter were "civilized" and Article 6(1) ECHR became thus applicable. Henceforth, the issue remained undisputed in Strasbourg. This is due to the force of the judicial precedent in the Court's case-law, but also to the fact that the minority judges were replaced with new judges holding new ideas about the applicability of Article 6(1) ECHR.

5.2.6 *Employment Disputes*

The case-law concerning employment of civil servants is a prime example of how the Court transitions from defining a field of law as falling outside the guarantees offered by Article 6(1) ECHR to acknowledging the contrary.

Initially, the Court considered that Article 6(1) ECHR was incompatible with disputes relating to the recruitment, careers and termination of service of civil

45 Dissenting Opinion of Judge Franz Matscher, *Ruiz-Mateos v. Spain* [GC], quoted above.

46 ECtHR. *Krcmar and Others v. the Czech Republic*, application no. 35376/97, judgement of 3 Mar 2000.

servants.[47] Slowly, however, the Court recognized the economic nature of the rights involved in an employment dispute and used this as an argument to extend the legal protection afforded by Article 6(1) ECHR to them.

To reach this conclusion, the Court first distinguished between the situations in which employment disputes involved the exercise of discretionary power of the state – such as selection or termination of contracts of civil servants – from the cases in which the applicants had claims of a purely pecuniary nature, such as disability entitlements related to the service performed.[48]

Later, the Court acknowledged that the absence of discretionary power and the economic nature of the dispute were difficult criteria to apply and left room for arbitrariness. Therefore, in *Pellegrin* the Court proposed a functional criterion, based on the nature of the employee's duties and responsibilities.[49] The Court noted that

> in each country's public-service sector certain posts involve responsibilities in the general interest or participation in the exercise of powers conferred by public law. The holders of such posts thus wield a portion of the State's sovereign power. The State therefore has a legitimate interest in requiring of these servants a special bond of trust and loyalty. On the other hand, in respect of other posts which do not have this "public administration" aspect, there is no such interest.[50]

The police and armed forces belong to the group of civil servants exercising public law powers and Article 6(1) ECHR does not apply to trials contesting their employment.

The post-*Pellegrin* case-law showed that the functional criterion was just as difficult to apply in practice as the previous criteria. In addition, it was a source of confusion and uncertainty. Consequently, the Court further developed its jurisprudence on the applicability of Article 6(1) ECHR to employment disputes.

In *Vilho Eskelinen and Others*, the applicants were policemen who lost their entitlement to a remote-area allowance following a collective agreement.[51]

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47 ECtHR. *Massa v. Italy*, application no. 14399/88, judgement of 24 Aug 1993, Series A no. 265-B, paragraph 26.

48 ECtHR. *Francesco Lombardo v. Italy*, application no. 11519/85, judgement of 26 Nov 1992, Series A no. 249-B.

49 ECtHR. *Pellegrin v. France*, application no. 28541/95, judgement of 8 Dec 1999.

50 *Pellegrin v. France*, quoted above, paragraph 65.

51 ECtHR. *Vilho Eskelinen and Others v. Finland* [GC], application no. 63235/00, judgement of 19 Apr 2007.

They contested this decision before the domestic authorities, but lost the case. Upon lodging their application with the Court, the applicants complained about the length of their domestic proceedings that lasted for more than seven years and about the lack of an oral hearing.

The Court, sitting as Grand Chamber, took the opportunity to introduce a new criterion for deciding whether Article 6(1) ECHR was applicable to the applicants' employment dispute. Cognizant of its previous case-law, the Court recognized the state's interest in controlling access to a court for a certain category of staff. However, it was

> primarily for the Contracting States, in particular the competent national legislature, not the Court, to identify expressly those areas of public service involving the exercise of the discretionary powers intrinsic to State sovereignty where the interests of the individual must give way. The Court exerts its supervisory role subject to the principle of subsidiarity. If a domestic system bars access to a court, the Court will verify that the dispute is indeed such as to justify the application of the exception to the guarantees of Article 6. If it does not, then there is no issue and Article 6 § 1 will apply.[52]

Vilho Eskelinen and Others established a presumption that Article 6(1) ECHR applied to all disputes involving civil servants. Therefore, it was for the government to prove that a civil servant is barred under domestic law from bringing an employment dispute before a domestic court and that the prohibition itself is justified.[53]

This jurisprudence was put to the test in a recent case concerning an employee of the Ministry of Internal Affairs of Bulgaria responsible for counter-intelligence and recruitment of secret agents.[54] In this case, the applicant's superior attempted unsuccessfully to dismiss him on disciplinary grounds. He then asked the applicant to sit a psychological examination which concluded that the applicant was not fit to work for the Ministry of Internal Affairs. The applicant was dismissed from his position due to the unfavourable results of the psychological test. He unsuccessfully challenged this decision before the domestic courts. The domestic courts rejected the applicant's action on the ground that the psychological test performed by the Ministry's Institute was incontrovertible proof of fitness to work for the Ministry and that they could

52 *Vilho Eskelinen and Others v. Finland* [GC], quoted above, paragraph 61.

53 *Vilho Eskelinen and Others v. Finland* [GC], quoted above, paragraph 62.

54 ECtHR. *Fazliyski v. Bulgaria*, application no. 40908/05, judgement of 16 Apr 2013.

not replace their findings with the conclusions of the assessment at issue. Due to the classified nature of the case, the applicant had no access to the conclusions of the psychological assessment and to the judicial decisions adopted in his case.

The Court considered that Article 6(1) ECHR was applicable, despite the fact that the applicant was an officer in the National Security Directorate of the Ministry of Internal Affairs and that the dispute he sought to resolve concerned his dismissal from that post. Bulgarian legislation allowed judicial review of the dismissal of officers employed by the Ministry of Internal Affairs and the applicant was able to challenge his dismissal at the Supreme Administrative Court despite the national security interests involved.[55]

To conclude, employment disputes involving civil servants have been considered belonging to public law for a long time. The consequence was that the parties to employment disputes did not benefit from fair trial guarantees, such as the right to be heard, equality of arms and the right to an effective remedy. The fact that the government was a party to an employment dispute was not sufficient to maintain the dispute in the realm of public law. It thus became established case-law that Article 6(1) ECHR was applicable to employment disputes.

5.3 Applicability of Article 6(1) ECHR to "Criminal Charges"

The current section of the book describes the case-law of the ECtHR concerning the applicability of Article 6(1) ECHR to disputes concerning "criminal charges". This section covers (1) disputes concerning disciplinary proceedings, (2) disputes concerning petty offences, (3) disputes concerning economic offences and (4) competition law disputes.

5.3.1 *Disciplinary Proceedings*

The Court analysed for the first time the issue of "criminal charge" in the case *Engel and others*.[56] The case concerned military disciplinary proceedings initiated against the applicants. The Dutch Government argued that the disciplinary proceedings brought against the applicants concerned neither their "civil rights and obligations" nor "a criminal charge". The Court acknowledged that

55 *Fazliyski v. Bulgaria*, quoted above, paragraphs 51–55.

56 *Engel and others v. the Netherlands*, quoted above.

> all the Contracting States make a distinction of long standing, albeit in different forms and degrees, between disciplinary proceedings and criminal proceedings. For the individuals affected, the former usually offer substantial advantages in comparison with the latter, for example as concerns the sentences passed. Disciplinary sentences, in general less severe, do not appear in the person's criminal record and entail more limited consequences. It may nevertheless be otherwise; moreover, criminal proceedings are ordinarily accompanied by fuller guarantees.[57]

Understanding the linguistic conundrum posed by proceedings that would be criminal in nature, but named to be disciplinary, the Court went on to define what has become one of the most important concepts in its case-law – the *autonomy of concepts*. The Court noted that the Convention allowed the member states, "in the performance of their function as guardians of the public interest, to maintain or establish a distinction between criminal law and disciplinary law, and to draw the dividing line, but only subject to certain conditions".[58]

The opposite choice, however, would be subject to stricter rules. The Court explained:

> If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a "mixed" offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Articles 6 and 7 would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the purpose and object of the Convention. The Court therefore has jurisdiction, under Article 6 (...) to satisfy itself that the disciplinary does not improperly encroach upon the criminal.[59]

The Court then moved to the three criteria for determining the content of the *autonomous* "criminal charge". The first element is the classification in the domestic legal system, which should serve only as a starting point and should have a formal and relative value. The second element is the nature of the offence, and the third element is the degree of severity of the penalty that the person concerned risks incurring.[60]

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57 *Engel and others v. the Netherlands*, quoted above, paragraph 80.
58 *Engel and others v. the Netherlands*, quoted above, paragraph 81.
59 *Engel and others v. the Netherlands*, quoted above, paragraph 81.
60 *Engel and others v. the Netherlands*, quoted above, paragraph 82.

On the facts of the *Engel and others* case, the Court noted that the maximum penalty that the applicants could have incurred was arrest lasting from two to four days and three- or four-months' committal to a disciplinary unit. The Court concluded that such "charges" attracted the applicability of Article 6 because their aim was the imposition of serious punishments involving deprivation of liberty.[61]

The case of *Ezeh and Connors* concerned the applicability of Article 6 to prison discipline proceedings and, more precisely, whether prison disciplinary proceedings can be deemed to constitute a "criminal charge".[62]

The Court analysed the three *Engel* criteria and concluded that the factors taken into consideration for the analysis "even if they were not to themselves sufficient to lead to the conclusion that the offence with which the applicants were charged are to be regarded criminal for Convention purposes, clearly give them a certain colouring which does not entirely coincide with that of a purely disciplinary matter".[63]

Relying on the principle defined in *Stafford* concerning the need "to look beyond the appearances and the language used and concentrate on the realities of the situation", the Court found that prisoners were detained beyond the release date as a consequence of the disputed disciplinary proceedings, which were legally unconnected to the original conviction and sentence.[64][65]

A long-standing tradition in Europe distinguished between criminal law and disciplinary law, whereas disciplinary law was deemed more efficient, having less serious consequences for the accused person and guaranteeing less fair trial safeguards. The ECtHR took a serious stance against this practice, reasoning that Article 6(1) ECHR should be applicable whenever individuals were affected by the proceedings at issue.

5.3.2 *Petty Offences*

Petty offences are another issue that produced a considerable amount case-law under Article 6(1) ECHR. In the case of *Adolf*, the Court further developed the *Engel* criteria.[66] The case concerned a criminal complaint lodged against

61 *Engel and others v. the Netherlands*, quoted above, paragraph 85.

62 ECtHR. *Ezeh and Connors v. the United Kingdom* [GC], application nos. 39665/98 and 40086/98, judgement of 9 Oct 2003.

63 *Ezeh and Connors v. the United Kingdom* [GC], quoted above, paragraph 106.

64 ECtHR. *Stafford v. the United Kingdom* [GC], application no. 46295/99, judgement 28 May 2002.

65 *Ezeh and Connors v. the United Kingdom* [GC], quoted above, paragraph 123.

66 ECtHR. *Adolf v. Austria*, application no. 8269/78, judgement of 26 Mar 1982.

the applicant for allegedly having thrown a bunch of keys at the victim. The proceedings initiated against Mr Adolf were terminated on the ground that both the injury allegedly caused by Mr Adolf and his fault were insignificant.

The Court focused on only one of the three criteria enounced in *Engel* – the classification under domestic legislation – and concluded that Article 6(1) ECHR was applicable because domestic legal rules should be examined in the light of the object and purpose of Article 6(1) ECHR, namely the protection of the rights of defence.[67]

The applicability of the right to a fair trial was also at issue in another early case in which the applicant was involved in a car accident that resulted in the damage of two vehicles.[68]

The German Government argued that Article 6(1) ECHR was not applicable in the case at issue because the applicant was not charged with a criminal offence due to the decriminalization of petty offences, including road offences.

The Court, relying on the position of the German Constitutional Court, noted that the member states were free to alleviate their criminal courts of the task of dealing with numerous petty offences. However, the Court also stressed that "conferring the prosecution and punishment of minor offences on administrative authorities is not inconsistent with the Convention, provided that the person concerned is able to bring any decision thus made against him before a tribunal that does afford the safeguards of Article 6".[69]

By a fourteen-to-three vote, the Court concluded that Article 6(1) ECHR was applicable to decriminalized road offences. Judge Thor Vilhjalmsson made a declaration explaining his change of views from non-applicability to applicability of Article 6(1) ECHR.[70]

In *Lauko,* the Court had occasion to consider if minor offences were covered by the protection granted by Article 6(1) ECHR.[71] There the applicant was accused of causing a nuisance and fined 300 Slovakian korunas.

When the applicant complained about the partiality of the criminal proceedings initiated against him, the Government disputed the applicability of Article 6 to the proceedings at issue. It argued that the present case should be distinguished from other cases decided by the Court since it involved an offence of a minor nature that could not lead to imprisonment.

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67 *Adolf v. Austria*, quoted above, paragraph 30.

68 ECtHR. *Lutz v. Germany* [GC], application no. 9912/82, judgement of 25 Aug 1987.

69 *Lutz v. Germany* [GC], quoted above, paragraph 57.

70 Dissenting opinion in ECtHR. *Öztürk v. Turkey*, application no. 22479/93, judgement of 28 Sep 1999.

71 ECtHR. *Lauko v. Slovakia*, application no. 26138/95, judgement of 2 Sep1998.

The Court argued however that the fact that an offence is not punishable by imprisonment is not decisive for the purpose of the applicability of Article 6(1) ECHR as "the lack of seriousness of the penalty at stake cannot deprive an offence of its inherently criminal nature".[72]

As with disciplinary proceedings, petty offences in Europe often concerned disputes that have previously been decriminalised. As the case-law described above indicates, the decriminalization process has been accompanied by a tendency to limit fair trial guarantees. In this context, the ECtHR invited the member states to look beyond the appearances and the names of procedures and to ensure that the right to a fair trial was guaranteed when individuals were affected by proceedings.

5.3.3 *Economic Offences*

In the early case of *Deweer,* the Court considered the meaning of the notion of a "criminal charge" within the context of a criminal investigation for an economic offence.[73] The applicant in this case was a retail butcher who was visited by an official of the Economic Inspectorate General who found that the meat the applicant was selling was overpriced. A few days later, the Louvain *Procureur du Roi* ordered the provisional closure of the applicant's shop within forty-eight hours from notification of the decision. The decision stipulated that the closure was to come into effect after the payment of 10,000 Belgian Franks by way of a friendly settlement, or on the date on which a judgement was passed on the offence.

The applicant lodged a complaint at the ECtHR complaining about the imposition of a fine by way of settlement, under constraint of provisional closure of his establishment.

The issue concerning the applicability of Article 6(1) ECHR to the present proceedings was not raised by the Belgian government. The Court raised this issue, however, out of its own motion because the applicant was not arrested, no official notification of impending prosecution was issued and no criminal proceedings had been initiated against the applicant. In fact, the criminal proceedings against the applicant have been barred by the payment of the 10,000 Belgian Franks fine as a friendly settlement. As such, no formal criminal charge had been formulated against the applicant.

However, "the prominent place held in a democratic society by the right to a fair trial" prompted the Court to prefer a "substantive", rather than a "formal",

72 *Lauko v. Slovakia*, quoted above, pargraphs 56–59.

73 ECtHR. *Deweer v. Belgium*, application no. 6903/75, judgement of 27 Feb 1980.

conception of the "charge" contemplated by Article 6(1) ECHR and "to look behind the appearances and investigate the realities of the procedure in question".[74] Thus, a detailed analysis of the wording used by the relevant Belgian legislation and in the documents issued in the applicant's case suggested that the terms employed were criminal in nature: "offence", "offender", "gravity", "heavy penalties", "confession", "flagrant offence" and "guilt".

The Court unanimously concluded that

> there accordingly exists a combination of concordant factors conclusively demonstrating that the case has a criminal character under the Convention. The "charge" could for the purposes of Article 6 § 1 be defined as the official notification given to an individual by a competent authority of an allegation that he has committed a criminal offence.[75]

A Swedish case concerned tax reports imposed on the applicant companies' taxes and additional tax surcharges.[76] Despite the fact that the applicants challenged the decisions and that the judicial review of the decision was on-going, they had to pay the taxes and the surcharges imposed on them.

Referring to the *Ferrazzini* case, the Swedish Government argued that tax disputes fell outside the scope of Article 6(1) ECHR, and the provision was thus not applicable to the proceedings at issue.

The Court agreed that, while Article 6(1) ECHR was not applicable to tax disputes, the situation was different in the case of tax surcharges. Tax surcharges were not criminal penalties, but rather administrative sanctions.

Concerning the nature of the conduct imputed to the applicant, the Court noted that the two companies were found guilty of supplying incorrect information on their tax returns. The tax returns were imposed in accordance with the tax legislation directed towards all persons liable to pay taxes in Sweden, not towards a limited group of people.

What distinguished tax surcharges in this case was the threat of a considerable financial penalty for non-compliance. It is true that the surcharges were imposed on objective grounds only. However, the Court concluded that "the lack of subjective elements does not necessarily deprive an offence of its criminal character".[77]

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74 *Deweer v. Belgium*, quoted above, paragraph 44.

75 *Deweer v. Belgium*, quoted above, paragraph 45–47.

76 ECtHR. *Västberga Taxi Aktiebolag and Vulic v. Sweden*, application no. 36985/97, judgement of 23 Jul 2002.

77 *Västberga Taxi Aktiebolag and Vulic v. Sweden*, quoted above, paragraph 79.

The same conclusion was reached by the Court in *Janosevic*, where the Court found that tax surcharges – which under Swedish law, had no upper limits – were not intended as pecuniary compensation incurred as the result of the taxpayer's fault, but rather "to exert pressure on taxpayers to comply with their legal obligations and to punish breaches of those obligations".[78]

In a follow-up case, the Court acknowledged the importance of tax to the well-being of the State. However, the Court was not convinced that "removing procedural safeguards in the imposition of punitive penalties in that sphere is necessary to maintain the efficacy of the fiscal system or indeed can be regarded as consonant with the spirit and purpose of the Convention".[79]

The Court further analysed the issue of the gravity of the criminal charge in the recent case of *Dubus S.A.*[80] In this case, the applicant company was subject to an inspection from the Banking Commission, as a result of which a disciplinary investigation was initiated against the applicant and an official warning (*blâme*) was issued.

The applicant complained about the lack of independence of the Banking Commission, alleging that the Commission assumed both the investigation and judgement functions. The French Government argued that the official warning inflicted on the applicant had no pecuniary consequences and should not be deemed a criminal charge.

The Court observed that even if the actual sanction imposed on the applicant was an official warning, the potential sanction that the applicant could have incurred was the striking off from the Companies' Register and/or a pecuniary sanction equal to its minimum capital. The Court considered that the "criminal pigmentation" of the sanction depended in the first place on the potential sanction, not on the sanction actually inflicted, and concluded that Article 6(1) ECHR was applicable to the proceedings at issue.

Economic law is a feature of modern law, covering *inter alia* the functioning of markets, banks and tax surcharges. Despite the member states' argument that such disputes concerned the exercise of sovereign power, the ECtHR refused to create a separate legal regime for them. The ECtHR acknowledged their importance for the economic development of a state, but argued that when economic law disputes arose, they should be covered by Article 6(1) ECHR.

78 ECtHR. *Janosevic v. Sweden* [GC], application no. 34619/97, judgement of 23 Jul 2002.

79 ECtHR. *Jussila v. Finland* [GC], application no. 73053/01, judgement of 23 Nov 2006, paragraph 36.

80 ECtHR. *Dubus S.A. v. France*, application no. 5242/04, judgement of 11 June 2009.

5.3.4 *Competition Law Proceedings*

The Court has had occasion to analyse the applicability of Article 6(1) ECHR to national competition proceedings.

In the case *Société Stenuit,* the applicant was accused by the Minister of the Economy and Finance of having entered agreements dividing markets with other competitors and was ordered to pay 50,000 French Francs.[81] The applicant lodged a request seeking to benefit from the amnesty law of 14 August 1981. This request was rejected by the Minister of the Economy and Finance on the grounds that the applicant was guilty of administrative, not criminal offences.

The applicant company complained under Article 6(1) ECHR about a breach of their right of access to a tribunal in that the French authorities refused to apply the amnesty provisions in their case.

Since the applicability of Article 6(1) ECHR to the present proceedings was disputed between the parties, an in-depth analysis of the issue was performed first by the Commission, then by the Court.

The Commission started its analysis by highlighting the findings of the *Conseil d'Etat* that the fine inflicted on the applicant company was administrative, not criminal in nature. The indications provided by the domestic legislation having a relative importance, the Commission then focused on the other two Engel criteria.

First, the terms used by the French authorities belonged to the field of criminal law more than they did to administrative law. "Crime" and "offender" were only a few examples used by the French competition authorities in a field they claimed to be "administrative".

Second, the fine imposed on the applicant company – 50,000 French Francs – but also the maximum potential fine of 5% from their annual turnover, undoubtedly had a dissuasive effect.

The Commission concluded that the criminal character of the fine can be undoubtedly deducted from the "body of concordant indications" and not from a unique criterion.

The Court did not have a chance to offer its insights in this case as the French Government and the applicant company reached a friendly settlement and the proceedings ceased.[82]

In a case against the Netherlands, the applicant company was subject to a search of its premises in 1982. The public authorities confiscated the applicant's

81 ECtHR. *Société Stenuit v. France* (*dec.*), application no. 11598/85, judgement of 11 Jul 1989.

82 ECtHR. *Société Stenuit v. France*, application no. 11598/85, judgement of 27 Feb 1992, Series A no. 232-A.

administration documents as there was a suspicion that the applicant was drawing false invoices. In 1985, the applicant was informed that the judicial proceedings initiated were to be terminated due to the time that had lapsed since the alleged offence was committed. However, despite the requests, the administration documents of the applicant's company were only returned to it in 1987.

In 1990, the applicant lodged a complaint against the state seeking compensation for the action of the police in 1982, when they were subjected to the search. The Dutch judicial authorities held that the state was indeed liable for damages, but refused to award them due to statements made by the applicant's managing directors that false invoices had indeed been drawn up.

The applicant company complained under Article 6(2) ECHR about the refusal of the Dutch authorities to award them damages, despite the fact that criminal charges had been dropped.

It is interesting to note that in the present case the Government of the Netherlands did not invoke the inapplicability of Article 6(1) ECHR to the proceedings at hand. The Court assumed that the right to a fair trial applied to legal persons in the same way as it did to natural persons, but found that the applicant's complaint was manifestly ill-founded.[83]

In the case of *Fortum Corporation,* the applicant company was the subject of proceedings initiated by the Competition Council with a view to cease the abuse of its dominant position on the market for motor engine fuel.[84] The Competition Council imposed on the applicant a fine of 336,000 EUR.

The applicant company complained that it had been denied a fair hearing in that the memoranda submitted by the Competition Council to the courts had not been communicated to it for possible comments.

The Finnish Government did not contest the applicability of Article 6(1) ECHR to the present competition law proceedings. The Court unanimously found that Article 6(1) ECHR was applicable under its criminal head and, on the merits of the case, found a violation of the right to a fair hearing. Also, the Court found that the finding of violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant company.

Another case in which the Government recognised that domestic competition law proceedings belonged to the criminal sphere of Article 6(1) ECHR was *Lilly France S.A.*[85] The Court found in this case that the lack of communication

83 ECtHR. *Aannemersbedrijf Gebroeders Van Leeuwen B.V. v. the Netherlands* (*dec.*), application no. 32602/96, judgement of 25 Jan 2000.

84 ECtHR. *Fortum Corporation v. Finland*, application no. 32559/96, judgement of 15 Jul 2003.

85 ECtHR. *Lilly France S.A. v. France*, application no. 53892/00, judgement of 14 Oct 2003.

of the report drafted by the adviser of the *Cour de Cassation* to the applicant, while the same report was communicated to the defence, infringed Article 6(1) ECHR.[86]

In a case against the Russian Federation, an investigation was initiated against the applicant companies by the officials of the Ministry for Anti-Monopoly Policy and Business Support ("TU MAP") for concerted practices aimed at increasing prices on the fuel market.[87] The applicant companies were ordered to pay back the profit obtained as a result of the breach.

The applicant companies complained that they had no access to the prosecution files during the investigation and the trial. The Government of the Russian Federation contended that Article 6(1) ECHR was not applicable under its criminal head in this case due to the fact that the applicants' case was decided by commercial courts, not by criminal courts.

The Court started its assessment by noting that the Convention case-law did not contain "explicit conclusions" that competition law offences should be regarded as criminal within the meaning of Article 6(1) ECHR. Invoking the Engel test, the Court found that, even if the individuals responsible for competition law breaches – such as the managers of the companies under investigation – could bear criminal responsibility, this did not render the investigation criminal in nature.

As to the nature of the offence, the Court noted that Russian competition law applied only to relations which influence competition in commodity markets and was of a restricted, not universal, application. Also, the Court held that the powers of the competition authorities were aimed at prevention and restoration of disturbances, not at punishment or deterrence.

Turning to the last of the Engel criteria – the severity of the potential sanction – the Court noted that Russian competition law did not provide for any specific sanctions as such. Offenders nevertheless had to comply with the orders of TU MAP. These orders could range from a simple warning to cease monopolistic activity to compulsory division of the company. In the Court's opinion, these powers of the TU MAP and the power to confiscate the unlawfully gained profit belonged to the regulatory field.

In light of the above, the Court, by majority, concluded that Article 6(1) ECHR was not applicable in the present case.

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86 *Lilly France S.A. v. France*, quoted above, paragraph 26.

87 ECtHR. *OOO Neste St. Petersburg, ZAO Kirishiavtoservice, OOO Nevskaya Toplivnaya, ZAO Transservice, OOO Faeton, OOO PTK-Service v. Russia* (*dec.*), application nos 69042/01, 69050/01, 69054/01, 69055/01, 69056/01 and 69058/01, judgement of 3 Jun 2004.

A few years later, the Court provided "explicit conclusions" as to the applicability of Article 6 to competition law proceedings. Thus, in the famous *Menarini* case, the Court applied the Engel criteria and found unanimously that Article 6 was applicable to competition law proceedings.[88]

Competition law cases receive more attention than other cases at the ECtHR. This might be due to the fact that the interpretation offered by the ECtHR to such cases is directly relevant for EU competition law. Indeed, the *Menarini* case has been cited by the CJEU and widely covered by academics. Despite this increased public scrutiny, the ECtHR applied the same standard of interpretation to competition law disputes as in other cases. Applying the *Engel* criteria, the ECtHR highlighted that Article 6(1) ECHR was applicable under its criminal head to competition law disputes, irrespective of the domestic qualification of the case.

88 ECtHR. *A. Menarini Diagnostics S.R.L. v. Italy*, application no. 43509/08, judgement of 27 Sep 2011.

CHAPTER 6

The Right to a Fair Trial – A Tool for Self-Regulation

> Order is not pressure which is imposed on society from without, but an equilibrium which is set up from within.
>
> ORTEGA Y GASSET

The analysis of the case-law on the applicability of Article 6(1) ECHR invites to the table a few conclusions about how the ECtHR has used this provision to enlarge the field of application of the ECHR and to strengthen its self-regulatory muscle.

A widely-shared misconception is that the ECtHR acts somewhat out of momentary caprice, opportunistically choosing when to enlarge its jurisdiction. Another misconception is that, when the ECtHR enlarges its jurisdiction, it acts unilaterally, almost in a despotic way. The analysis in this chapter however dispels these misunderstandings. *First*, the case-law that I have described above indicates that the ECtHR adopts a progressive approach to the interpretation of the rights enshrined in the ECHR. This approach involves a gradual "dragging" of disputes from non-applicability towards the applicability of Article 6(1) ECHR, and from non-justiciability towards justiciability.

Second, the ECtHR decides alone, but works collaboratively. The process of progressive enlargement of the Court's jurisdiction takes place with the cooperation offered by the member states, including their judiciary, the academic community and the zeitgeist. The Court's work is successful and its identity as a self-regulating tribunal is possible only because these elements are cooperative and cooperating. I provide a fuller description of these elements below.

6.1 The Process Towards Justiciability

The process of *progressive "dragging"* is accompanied by a simple, but consistent reasoning offered by the Court across the different fields of law analysed. *Autonomous concepts* are created at the meeting point between legal imagination and common sense. In addition, they are far from being scandalous or from provoking outcries from the member states or the general public. This

wise use of language and the capacity to predict that member states will not use their limited resources to fight, for example, against the idea that petty offences are justiciable at the ECtHR, contributed to the creation of little visible opposition to the Court's strides towards enlarged justiciability.

The tension between the exercise of legal imagination and the *consistent application of concepts* is solved by the ECtHR by prioritizing the latter. Thus, despite the Court renewing its judges every 9 years, the criteria used for arguing in favour of the applicability of Article 6(1) ECHR to new fields of law have stayed the same. Consistency, thus, has been a key ingredient to the successful progressive enlargement of justiciability at the ECtHR.

Cross-fertilization has also been successfully employed by the ECtHR in its work of enlarging the applicability of Article 6(1) ECHR. The use of terms developed by the Court while working on other provisions of the Convention and of the terms developed during admissibility reasoning led to the harmonization of the case-law and to the strengthening of the concepts used. In *Airey*, the applicant could not get a divorce from her abusive husband. When rendering the judgement, the ECtHR highlighted the prominent place held in a democratic society by the right to a fair trial. Later, the ECtHR referred to this principle in *Deweer* to flesh out its reasoning concerning the applicability of Article 6(1) ECHR to economic offences. In *Stafford*, a case that concerned Article 5, the ECtHR found that it was necessary to look beyond appearances and the language used and to focus on the reality of the situation. The same precept has been employed by the ECtHR to reason the applicability of the right to a fair trial to prison disciplinary proceedings. Conversely, the notion of *autonomous meaning* that the Court has developed in *Engel and Others* in relation to the concept of "criminal charge" has become one of the most important concepts used by the ECtHR to interpret the Convention.

The case-law analysed above indicates that there is *no way back from justiciability*: once the ECtHR adopts a decision of applicability of Article 6(1) ECHR to a new field of law, there is very little chance that the Court will step back and decide that Article 6(1) ECHR is not applicable to that field of law. Exceptions to this rule exist, but, surprisingly, they seem to actually strengthen the system that produced them, instead of weakening it.

Thus, in the case of competition law proceedings, the ECtHR indicated in its early cases, *Société Stenuit*, *Fortum Corporation* and *Lilly France S.A,* that Article 6(1) ECHR was applicable and that competition law proceedings are justiciable under the ECHR. In *OOO Neste St. Petersburg and Others*, however, the ECtHR, with a majority voting, found that there was no "explicit conclusion" in the ECtHR's case-law about the applicability of Article 6(1) ECHR to competition law proceedings. This lack of "explicit conclusion" about the applicability of

Article 6(1) ECHR has been remedied in *Menarini*, where the ECtHR unanimously explained at length that the right to a fair trial was applicable to competition law proceedings.

It thus appears that exceptions to the rule above do not shrink justiciability and do not weaken the system. Contrary to expectations, these exceptions actually strengthen the system of human rights protection enforced by the ECtHR because they feed the public debate outside the Court. This makes ECtHR more visible and enriches its image.

6.2 The Role Played by the Academic Community

Academia plays a role not only in systematizing the fields of law, but, more importantly, in their development as well.[1] In this sense, Arnull wrote that "important judgements are the subject of academic commentary which will be taken into account by the courts in the future" and that, especially in the civil law systems, "a critical academic consensus against a judgement may result in it being revisited by the courts".[2] Furthermore, some authors speak about "an integrated community between judges and the academic world".[3]

Walker argued that judges, legal academics and professional commentators are "centrally implicated in the setting and pursuit of the juristic agenda" resulting from the failing of the Keynesian-Westphalian frame. Walker acknowledged that "in some respects the juristic agenda setters have remained too much in thrall to an older regulatory culture (…) to be particularly effective in the task of either diagnosis or treatment". However, he also highlighted that, because of a lacking meta-principle of authority, it is the theorists and commentators who become in fact the "key and unusually privileged symbolic analysts" of the Keynesian-Westphalian, global frame.[4]

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1 Twining, William, Ward Farnsworth, Stefan Vogenauer and Fernando Tesón. "The Role of Academics in the Legal System." *The Oxford Handbook of Legal Studies*. Eds Mark Tushnet and Peter Cane. Oxford: Oxford University Press, 2005.

Vogenauer, Stefan. "An Empire of Light? II: Learning and Lawmaking in Germany Today." *Oxford Journal of Legal Studies* 26.4 (2006): pp. 627–663.

Braun, Alexandra. "Professors and Judges in Italy: It Takes Two to Tango." *Oxford Journal of Legal Studies* 26.4 (2006): pp. 665–681.

2 Arnull, *op. cit.*, p. 427.

3 Bell, John, Sophie Boyron and Simon Whittaker. *Principles of French Law*. Oxford: Oxford University Press, 1998.

4 Walker, Neil. "Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders." *International Journal of Constitutional Law* 6.3–4 (2008), pp. 373–396, p. 395.

The academic community has played an important role in the process by which the ECtHR became a self-regulatory body expanding the applicability of Article 6(1) ECHR to new areas of law. As idea-shapers, the members of academic circles commented and discussed the case-law of the ECtHR, making it, thus, more visible. Also, more and more universities in Europe offer human rights law courses, summer schools and conferences that have heralded the kind of intellectual freedom and stimulation that is sensitive to new ideas and to a progressive view of the legal zeitgeist. The academic community is therefore an important source for the legal zeitgeist because of the cross-generational input that it constantly brings, its innate hunger for new ideas and its incubating nature. Also, the academic community receives and exchanges members with the state governments, with the judiciary and with the ECtHR. Indeed, most judges at the ECtHR come from academia or join academia at the end of their terms, ensuring a necessary migration and healthy recycling of ideas.[5]

6.3 The Zeitgeist

The post-WWII period was a period of democratization in Europe, one that continued after the fall of the Berlin Wall and involved all the countries of the former Soviet bloc. Peace-building, democracy-strengthening, institutional re-imagination and community-building are all elements of the post-WWII Europe to which the ECtHR contributed. The unprecedented growth in importance and respect for international law and lawyers is another element of the zeitgeist. One can even argue that, in Europe, respect for the ECtHR's decisions became part of the zeitgeist.

To this, one can add elements of popular culture that involve a growing number of documentaries, movies and TV shows about trials that can influence the expectations that citizens have of the quality of the trials in which they are themselves involved.

6.4 Cooperation with the ECtHR – Four Possible Models

A decision of the ECtHR establishing that Article 6(1) ECHR is applicable to a dispute that was previously considered incompatible with this provision has

5 Arold Lorenz, Groussot and Petursson, *op. cit.*, pp. 21–26.

a few consequences for the member state concerned, for the other member states parties to the ECHR and for the ECtHR itself.

First of all, the member state against which the decision has been adopted must enforce this decision. When Article 6(1) ECHR becomes applicable to a dispute – for example, an employment dispute – it means that the defendant member state must ensure that the guarantees enshrined in Article 6(1) ECHR are respected during all subsequent domestic employment disputes. The ECtHR does not, however, prescribe how a dispute should be solved. This is left to the member state itself and can involve changes in the domestic procedural codes, amendments to other pieces of legislation or changes in domestic judicial practice.

At the same time, the other member states become concerned by the decision against the defendant member state because applicants from the other member states whose right to a fair trial has not been respected during employment disputes will be able to complain to the ECtHR. In order to prevent such disputes, the other member states are incentivized to ensure that their domestic employment laws are compatible with Article 6(1) ECHR.

Finally, when the ECtHR decides that employment disputes are justiciable, it can expect more applications concerning such disputes being lodged at its registry.

In other words, the applicability of Article 6(1) ECHR to new areas of law involves more work for all the member state parties to the ECHR and for the ECtHR itself. This has proved at times to be an unintended consequence for the ECtHR, one that became so serious that the Court had to question and revise its admissibility criteria. Having progressively enlarged its jurisdiction, the ECtHR started receiving an increased number of applications in the 1990s. With no intention to increase its staff, the ECtHR found itself suffocated by the growing number of applications, most of which were dismissed as manifestly ill-founded.

At the same time, the ECtHR could not ignore these applications – the majority of which invoked violations of Article 6(1) ECHR – because they indicated a general dissatisfaction with the judicial processes offered by the member states. In other words, these applications can be interpreted as the member state not fully cooperating or engaging with the ECtHR.

Table 1 below indicates the importance of the cooperation offered to the ECtHR and highlights four possible models of cooperation. The categories tested for cooperation are the following: the defending member state (defending MS), that is the member state against whom the ECtHR has found a violation; the other member states (other MS), that is all the other member states except the defending member state; and academic circles.

TABLE 1 Possible models of cooperation with the ECtHR

Cooperation Model	Defending MS	Other MS	Academic Circles	Further Applications to ECtHR	Self-Regulation
Full Cooperation	+	+	+	Gradually ceasing	Strengthened
Partial Cooperation	+	-	+/-	Originate from other MS s	Weakened
Partial Cooperation	-	+	+/-	Originate from the defending MS	Strengthened
Non-Cooperation	-	-	+/-	Originate from defending MS and the other MS s	Weakened

When the member states or the academic circles cooperate, this is marked with an "+". When there is no cooperation, this is marked with "-".

Finally, Table 1 assesses the impact of the offered cooperation on the number of further applications received by the ECtHR and its capacity to self-regulate.

I argue that a few models of cooperation can be distinguished. These models assume that neither cooperation, nor refusal to cooperate can be permanent choices. The ECtHR's self-regulatory wisdom has fully integrated this assumption and worked around and with the member states that occasionally have been non-cooperative.

Model 1 – Full Cooperation: Both the defending MS and the other MS s are being cooperative. They implement the ECtHR's decision by making legislative or practice changes. In addition, the academic circles cite and work with the ECtHR's case-law. As a result, both the legal principles enounced in the case-law and the cooperative attitude of the MS s and the academic circles become part of the zeitgeist. Since the issue that has generated the application at the ECtHR has been settled in the defending MS and the other MS s, this leads to no further applications being lodged with the ECtHR on the subject matter. If

lodged, such applications would be rejected as manifestly ill-founded by a single judge at the ECtHR, that is, with a minimal use of resources. In time, such applications would cease to be lodged. Finally, the self-regulatory muscle of the ECtHR is strengthened by the received cooperative feedback.

Model 2 – Partial Cooperation: The defending MS cooperates, but other MS s refuse to integrate the decision of the ECtHR. In this case, the academic establishment from the other MS s play a crucial role because they can either act as supporters or deniers of the ECtHR's case-law. In either case, by debating the issue, the problem raised at the ECtHR remains known and public. The fact that a legal dispute has been declared admissible at the ECtHR under Article 6(1) ECHR will mean that similar disputes from other MS s will be lodged at the ECtHR. This will allow the ECtHR the opportunity to repeat the principle formulated against the initial defending MS and to adapt it, depending on whether efficiency, stability or growth are to be satisfied first. Also, this will allow the ECtHR to reflect on and integrate into its newest cases the recent legal developments and the zeitgeist.

The self-regulation muscle of the ECtHR is weakened under this model because it sets a bad precedent of non-compliance. Also, if a large number of applications is received from the other MS s, the ECtHR risks being overwhelmed. This was the case, for example, when the ECtHR started receiving applications concerning restitution of expropriated property originating from Romania. Even though the first cases on the issue of restitution of expropriated property that the ECtHR decided concerned Poland, the number of applications from Romania greatly increased the ECtHR's backlog.

The other, non-cooperating MS s will have, however, at least one incentive to embrace the solution proposed by the ECtHR against the defending MS. If the issue settled against the defending MS is of concern to the other MS s – as was the case with the restitution of expropriated property or with the length of proceedings in many member states – it is likely that applications from the other MS s will eventually be lodged at the ECtHR. This creates additional work for the legal service of the government that must defend itself at the ECtHR and might attract unwanted public attention to certain domestic policies.

Model 3 – Partial Cooperation: The defending MS does not cooperate, but the other MS s do. This model of partial cooperation is similar to the previous one. However, under this model, the possibility that the ECtHR's self-regulatory muscle will be weakened by an untenable number of applications is statistically lower when compared to the previous model of partial cooperation. Also, the academic circles from the cooperating MS s can play a crucial role influencing the academic circles in the non-cooperating MS.

Model 4 – Non-Cooperation: Neither the defending MS, nor the other MS s are cooperative, that is, all the members of the Council of Europe and the signatories of the ECHR refuse to enforce the decision of the ECtHR. Of all the models proposed in this chapter, it is in this situation that the academic circles might play a decisive role. They can step into the debate as defendants of the principles proposed by the ECtHR, thus preparing future generations of lawyers to adopt them, or they can dismiss the proposed principles.

Due to the member states' refusal to cooperate, the ECtHR risks receiving an increased number of applications from all the MS s concerning the matter settled by the ECtHR against the defending MS. When the ECtHR is forced to act as a court of fourth instance, this weakens it internally because a large part of its resources will have to be allocated to dealing with the incoming cases. This situation also weakens the ECtHR externally because it shows the ECtHR as a tribunal whose decisions are not enforced and whose principles are heavily contested.

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The first two parts of this book worked with the premises that first, the human rights system developed by the ECtHR became highly influential due to the design of the system, with the ECtHR at its centre as a self-regulating tribunal and that, second, the design of the human rights system developed by the ECtHR allowed the ECtHR to interpret the right to a fair trial in a way that has progressively enlarged the ECtHR's jurisdiction.

As it was proposed in Section 1.3. above, a self-regulating tribunal is one that displays two powers:

(1) It has competence to decide its own jurisdiction and
(2) It is able to have an impact on the flow and quality of incoming applications.

The ECtHR operates between coexisting but opposing needs – growth, efficiency and stability. The possibility of alternatively satisfying these requirements in order to ensure the continuation of the system is a landmark of self-regulation. Self-regulation is marked by the ability to choose the strength of the Court's intervention, of its influence on the zeitgeist. Sometimes, this is a forceful act of imposing an idea. Other times, it is about planting a seed; it is about the discrete inception of an idea whose time has not fully come.

The source of the ECtHR's self-regulation is the last paragraph of Article 32 ECHR which empowers the Court to decide its own jurisdiction in case of doubt over this matter.

Chapter 6 argued that Article 6(1) ECHR has been the main engine for enlarging the ECtHR's jurisdiction and, therefore, for self-regulation. The

case-law concerning the applicability of Article 6(1) ECHR indicates that the ECtHR used this provision to offer its supervisory role to disputes that have originally been considered as belonging to the realm of public law and, therefore, excluded from the applicability of Article 6(1) ECHR such as constitutional disputes, employment disputes, disciplinary disputes and competition law disputes, among others.

At the same time, Chapter 6 concluded that the progressive enlargement of the ECtHR's jurisdiction and of its self-regulatory powers was possible only because of the cooperation offered by the member states, including their judiciary and academic circles, and the zeitgeist. A cooperating MS enforces the decisions of the ECtHR in a timely manner, by adapting the relevant legislation or judicial practice. A cooperating academic community follows the decisions of the ECtHR and includes its case-law in university curricula and conference agendas.

The analysis of the models of cooperation offered by the member states and by academic circles shows that four models of cooperation exist, ranging from full cooperation, beneficial both for the member states and for the ECtHR, to partial cooperation and non-cooperation which does not benefit any of the participants.

The work on the applicability of Article 6(1) ECHR is important for another reason. It indicates that the *ECtHR has placed fair trial at the core of the erosion of public law in Europe*. On the one hand, the growing importance of the state after the WWII has led to an increased regulation of life by the executive. On the other hand, both decriminalization and the development of administrative law in the member states of the Council of Europe has been accompanied by a tendency to ensure minimal fair trial guarantees in the new proceedings. The ECtHR has consistently defended due process as a democratic principle that must be ensured by the member states, irrespective of the name or formal nature of the chosen procedure.

I have placed great emphasis on the inner working of the ECtHR. It is, however, also important to understand the external factors relevant for the functioning of the Strasbourg system. One matter to consider is the collateral damage to the ECtHR's self-regulatory powers by forces outside the Court's mandate. Recent historical events provide a prime example of this. The conflict between the Russian Federation and Ukraine has resulted in sanctions imposed onto the former. As a result, the Russian Federation has ceased to pay its yearly contribution to the budget of the Council of Europe.[6] Soon after this,

6 Council of Europe. "Secretary General: Russia leaving the Council of Europe would be a "huge setback" for human rights." *Newsroom.* 11 Oct 2018. Available at https://www.coe.int/en/web/portal/-/secretary-general-russia-leaving-the-council-of-europe-would-be-a-huge-setback-for-human-rights accessed on 23 February 2021.

Turkey threatened to do the same.[7] Both the Russian Federation and Turkey are important members of the human rights system enforced by the ECtHR, both in terms of the number of applications received from these countries and the number of decisions adopted by the ECtHR against them. Their decision not to contribute to the budget of the Council of Europe weakens the system and, if prolonged or embraced by more member states, will become part of the zeitgeist and could threaten the existence of the whole system.

The same stands true for the relationship between the EU and the ECtHR. The process of accession of the EU to the ECtHR is currently blocked by the advisory opinion of the ECJ with no solution in view. This extended blockage hampers the ECtHR's self-regulatory powers because, first, the ECtHR has no influence over the process and, second, because the blocked accession becomes entrenched with the passage of time, preventing it from taking place.

7 Dermirtas, Serkan. "Turkey aims to exit from CoE monitoring process ASAP." *Hurriyet Daily News*. 5 Nov 2018. Available at http://www.hurriyetdailynews.com/opinion/serkan-demirtas/turkey-aims-to-exit-from-coe-monitoring-process-asap-138556 accessed on 23 February 2021.

PART 3

Fair Trial and the Independence of the Commission as the Competition Enforcement Agency of the EU

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Introduction to Part 3

Part 3 of the present book focuses on how the notion of independence interacts with the attempts by the EU Commission to control corporate bigness.

The topic of judicial independence – the classical locus of this notion – is fraught with the natural difficulty that accompanies all attempts to translate a moral value into a widely-applicable legal concept. Extracting independence from its natural location in order to apply it to administrative procedure adds another layer of difficulty. Finally, when these concepts are applied to a supranational bureaucracy like the European Commission, the task may appear insurmountable. However, it is often that which is the unbearable which requires urgent thought and action.

In the following chapters, I will attempt to answer the following questions:

- What is judicial independence and why is it important for a democracy?
- Who defines what judicial independence is?
- What is the role played by the case-law of the ECtHR in shaping the notion of judicial independence?
- What are the consequences of applying the notion of judicial independence to the procedures characterizing the administrative state?
- How is the EU Commission engaging with the concept of independence as an institution, as enforcer of competition law and as bureaucracy?

In Figure 8 below I offer a visual description of the proposed work.

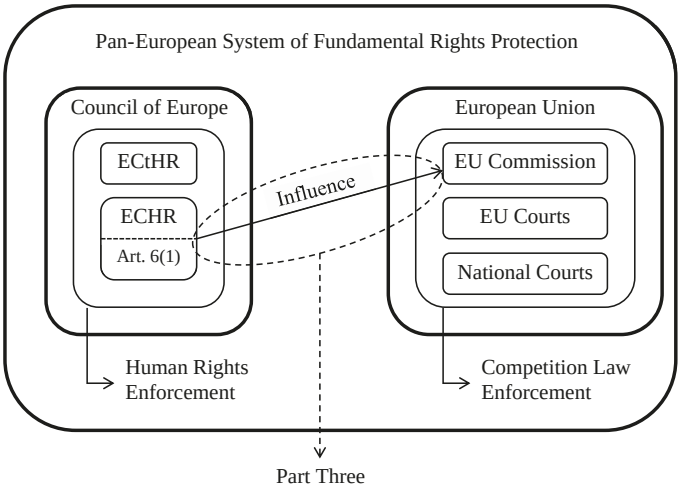

FIGURE 8 The influence of the case-law of the ECtHR on the independence of EU Commission

The right to a fair trial enshrined in Article 6(1) ECHR provides that "in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". As I have highlighted in the previous two chapters, this provision applies to disputes concerning economic law, including competition law. Also, the ECtHR developed a *functional and teleological interpretation* of the notion "independent and impartial tribunal established by law", equating the administrative agencies performing adjudicatory powers with the "tribunal established by law" required by Article 6(1) ECHR.

There are two immediately visible threats to the independence of the EU Commission as adjudicator in EU competition law disputes. The first is that the EU Commission cumulates investigative, prosecutorial and adjudicative functions when enforcing competition law. The second, as shown in Figure 5 above, the decisions adopted by the EU Commission in competition law cases are prepared by the bureaucratic branch of the Commission – DG COMP, assisted by other DG s – and are adopted by its political branch – the College of Commissioners. An argument regarding the Commission's independence in this area requires an analysis of both branches of the Commission.

To achieve this, I provide in Chapter 7 an in-depth analysis of the notion of judicial independence in the context of the *administrative state*. In Chapter 8 I review the case-law of the ECtHR on this subject. In Chapter 9 I describe the three constitutional functions that the EU Commission cumulates in the field of competition law – political, bureaucratic and enforcement. What is more, when the EU Commission acts as the enforcer of EU competition law, it cumulates the investigative, prosecutorial and adjudicative functions. For each of these functions, I identify the risks to independence and offer a description of the legal provisions to safeguard independence.

In Chapters 10, 11 and 12 I provide a description of the EU Commission's powers of investigation and the existing limits on its powers.

Finally, in Chapter 13 I describe the risks to independent adjudication identified in the enforcement procedure for Articles 101 and 102 TFEU and compare them to the existing safeguards provided in EU law. I conclude Chapter 13 with a risk-based framework for safeguarding the independence of the EU Commission as competition enforcement agency.

CHAPTER 7

The Debate on Independence at the Crossroads of the Administrative State, Delegation and IRAs

Judicial independence is a cornerstone of the rule of law and, therefore, of democratic states. In private disputes, judges must be and be seen independent in order to deliver impartial decisions. In public law disputes, judicial independence is an element of checks and balances that the cocktail called "democracy" offers: the judiciary is expected to control the excesses of the legislative and executive powers, while the legislative and the executive are expected to control the judiciary. Even more, "insofar as the state employs the judges, public law disputes might be thought to require an even greater degree of judicial distance, or structural capacity for independent evaluation of parties' claims".[1] These acts of mutual control are deemed necessary for a society in which there is trust in the state and its institutions. Two assumptions underlie this type of democratic system. *First*, checks and balances are necessary only if one presumes that the three branches of government would have the tendency to exercise their powers excessively or to the detriment of the other branches. If the presumption was that government power can be exercised without excess, checks and balances would not be necessary. Furthermore, power could be exercised in excess of its mandate only by imperfect beings. The source of the checks and balances existing in many democratic systems is, hence, the belief that human beings are imperfect.

Second, democratic systems aim to be trusted, embraced and validated during elections. A lack of trust may result in revolt, revolution, conflict and demise of the system. The citizen's trust grounds democracy and justifies its existence. Therefore, the ultimate beneficiary of the processes constituting the checks and balances should be the citizen.

Trust is achieved by observation, engagement and participation. The citizen most closely engages with the executive and the judiciary, sometimes on a daily basis. The image that the executive and the judiciary project plays a crucial role in maintaining the citizen's trust and in safeguarding democracy.

1 Jackson, Vicki C. "Judicial Independence: Structure, Context, Attitude." *Judicial Independence in Transition*. Ed. Anja Siebert-Fohr. Heidelberg: Springer, 2012, p. 20.

Independence is a notion that is intimately associated with the judiciary and the performance of justice. Russell has shown that it was in the "more well-established liberal democracies" that contemporary concerns about judicial independence have been triggered.[2] Judicial independence is considered "a fundamental instrument in order to establish and implement a system of impartial and fair rules".[3] Feld and Voigt introduced the distinction between *de jure* and *de facto* judicial independence and showed that there is a relation between judicial independence and economic growth and even between judicial accountability and higher income and less corruption.[4]

Classic works on judicial independence highlight the fact that this concept encompasses more than just freedom from blunt interventions by the other branches of the government or from within the hierarchy. In fact, judicial independence imposes system requirements that deal with recruitment patterns, allocation of cases and financial independence.[5] Such works pay generous attention to domestic law and less attention to international law. Also, these early efforts have led to the adoption of international standards for judicial independence.[6]

If the growth of judicial power and judicial activism has been accompanied by discussions about judicial independence, the growth of the *administrative state* has been supplemented by a debate about *administrative justice*.

Zellick has noted that all countries have a court system and most countries have a "parallel system of court-like bodies that adjudicate on a range

2 Russell, Peter H. "Judicial Independence in Comparative Perspective." *Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World*. Eds. Peter H. Russell and David M. O'Brien. Charlottesville: University of Virginia Press, 2001, p. 301.

3 Guarnieri, Carlo, and Daniela Piana. "Judicial Independence and the Rule of Law: Exploring the European Experience." *The Culture of Judicial Independence: New Conceptual Dimensions and Conceptual.* Eds. Shimon Shetreet and Christopher Forsyth. Leiden: Brill, 2011.

4 Feld, Lars, and Stefan Voigt. "Economic Growth and Judicial Independence." *European Journal of Political Economy* 19.3 (2003): pp. 497–527. A confirmation of the results of this initial study has also been published: Voigt, Stefan, Jerg Gutmann and Lars Feld. "Economic Growth and Judicial Independence, a Dozen Years On: Cross-Country Evidence Using an Updated Set of Indicators." *European Journal of Political Economy* 38 (2015).

Voigt, Stefan. "The Economic Effect of Judicial Accountability: Cross-Country Evidence." *European Journal of Law and Economics* 25.2 (2008): pp. 95–123.

5 Shetreet, Shimon, and Jules Deschenes, eds. *Judicial Independence: The Contemporary Debate*. Dordrecht: Martinus Nijhoff, 1985.

6 IBA, New Delhi Minimum Code of Judicial Independence, 1982. These standards have been reviewed a few times since the 1980s. The last set of standards has been adopted in 2008 and consolidated in 2015 under the name Mount Scopus International Standards of Judicial Independence.

of specialized disputes, usually between the citizens and the administration".[7] Zellick highlights the problematic nature of the term "administrative justice" which

> implies that administrative justice is materially different from the ordinary civil justice administered by the courts; that it is really a part of the State's administrative arrangements rather than an integral part of its judicial system; and that administrative tribunals are fundamentally and conceptually distinct, and different, from those bodies labelled courts.[8]

The purpose of administrative justice is to provide a speedy and simple alternative to the "mainstream legal system with its notorious delays, complex procedures and expense".[9] Zellick adds that a feature of administrative tribunals is that, "unlike courts, they can be multi-disciplinary and may include psychiatrists, economists, surveyors, valuers or other experts in addition to lawyers".[10] In this context, the notion of the independence of justice proposes new challenges to democracy because judicial independence is not easily applicable to administrative tribunals that form part of the executive and in which the executive may be the defendant.

In the following paragraphs I will highlight the growing importance attached to the notion of independence in international forums and the solutions offered to the conundrums posed by the application of judicial independence to the institutions which spring from the administrative state.

7.1 The Rise of the Administrative State, Delegation and IRAs

When Woodrow Wilson wrote in his essay on administration that, "it is getting harder to run a constitution than to frame one", he was probably not envisaging that one and a half century later the "the fourth branch" of the government was still growing.[11] Indeed, the growth of the administrative state has

7 Zellick, Graham. "Administrative Justice and the Independence of the Judiciary." *The Culture of Judicial Independence in a Globalised World.* Eds. Shimon Shetreet and Wayne McCormack. Leiden: Brill Nijhoff, 2016, p. 68.

8 Zellick, *op. cit.*, p. 68.

9 Zellick, *op. cit.*, p. 69.

10 Zellick, *op. cit.*

11 Wilson, Woodrow. "The Study of Administration." *Political Science Quarterly* 2.June (1887): pp. 197–222, p. 200.

been intensely criticized by scholars.[12] The administrative state can be defined simply as a constitutional order in which unelected bureaucrats, not elected representatives, are in charge of formulating policies, implementing them and adjudicating on them, sometimes using coercive powers. The term is used to describe both the growth of the government in general and the growth of the regulatory state.

Observing the phenomenon already in 1948, Waldo proposed in his seminal book on the administrative state that there was an intrinsic tension between democracy and bureaucracy that should invite public servants to protect democratic principles. Waldo argued that the dichotomy between politics and administration was false. However, he has championed the ideas that government should not be run like a business. Rather, he proposed that the public servants must impart to due process and access to government the efficiency found in scientific management.[13]

The notion of independence does not easily find its place in the conceptual framework presented above. However, recent works of political scientists, economists and lawyers stress independence as an important structural and procedural safeguard to be incorporated by government institutions.

The rise of the administrative power has been accompanied by the *process of delegation* of an increasing number of tasks in an increasing number of fields to *Independent Regulatory Agencies* (*IRAs*). Levi-Faur noted in 2005 that "such change is commonly captured in the notions of privatization and deregulation and understood as the outcome of the rise of neo-liberalism and the sweeping forces of economic globalization. Yet it has significant regulatory components that go largely unnoticed and that are incompatible with either neoliberalism or economic globalization".[14] He argues that the new order of regulatory capitalism, which has been in the making since the 1980s, differs from older forms of capitalist governance in its reliance on rules and rule enforcement. This in turn leads to (1) a new division of labour between state and society, (2) an increase in delegation that he defines as "remaking the boundaries between

12 Freedman, James. *Crisis and Legitimacy: The Administrative Process and American Government.* Cambridge: Cambridge University Press, 1978.

Lorch, Robert. *Democratic Process and Administrative Law* (*Revised Edition*). Detroit: Wayne State University Press, 1980.

Lowi, Theodore. *The End of Liberalism: The Second Republic of the United States. 2nd edition.* New York: W. W. Norton & Company, 1979.

13 Waldo, Dwight. *The Administrative State: A Study of the Political Theory of American Public Administration.* New York: The Ronald Press Company, 1948.

14 Levi-Faur, David. "The Global Diffusion of Regulatory Capitalism." *The ANNALS of the American Academy of Political and Social Science* 598.March (2005), p. 12.

the experts and the politicians", (3) proliferation of new technologies of regulation, (4) formalization of inter-institutional and intra-institutional relations and the proliferation of mechanisms of self-regulation in the shadow of the state, and (5) the growth in the influence of experts in general and of international networks of experts in particular.[15] Vogel showed that these developments have changed the relationship between governments and corporations and have led to a stronger state, the true driver of this development.[16]

IRAs are the foundation of regulatory capitalism and three factors can describe their expansion: bottom-up, top-down, and horizontal. First, the establishment of IRAs was an attempt to improve credible commitment capacity when liberalizing and privatizing utilities and to alleviate the political uncertainty problem, namely, the risk to a government that its policies will be changed when it loses power. Second, in Europe, the process of Europeanization favoured the creation of independent regulators. Third, individual decisions were interdependent, as governments were influenced by the decisions of others in an emulation process where the symbolic properties of independent regulators mattered more than the functions they performed.[17]

Guidi noted that despite the increasing interest in IRAs, the existing research is unsatisfactory, either because it lacks any comparative perspective, or because it focuses only on the process of establishment of IRAs, leaving aside important questions concerning the amount of *administrative discretion* delegated to them. He observed that interest in the independence of IRAs is topical and the results of the studies conducted so far cannot be generalized.[18] Guidi notes that especially in the field of regulatory authorities and competition policy, "scholars who study IRAs tend to analyse their institutional features without paying enough attention to the legislative and administrative framework in which agencies are embedded".[19]

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15 Levi-Faur, *op. cit.*, p. 27.

16 Vogel, Steven. *Freer Markets, More Rules: Regulatory Reform in Advanced Industrial Countries*. New York: Cornell University Press, 1996.

17 Levi-Faur, David and J. Jacint. "Preface: The Making of a New Regulatory Order." *The ANNALS of the American Academy of Political and Social Science* 598.March (2005): pp. 6–9.

Gilardi, F. "The Institutional Foundations of Regulatory Capitalism: The Diffusion of Independent Regulatory Agencies in Western Europe." *The ANNALS of the American Academy of Political and Social Science* 598.March (2005), p. 84.

18 Guidi, Mattia. "Delegation and Varieties of Capitalism: Explaining the Independence of National Competition Agencies in the European Union." *Comparative European Politics* 12.3 (2014): pp. 343–365.

19 Guidi (2014), *op. cit.*

Scholars of political science assume that politicians have very little incentive to delegate powers to independent authorities, such as in the field of competition law. They use the *principle-agent theory* to propose that the legislator – the principal – and the competition authority – the agent – pursue different goals and would prefer to remain separated.[20] Other scholars propose that delegation can help politicians to diminish their workload, to understand and regulate highly complex technical issues.[21] Also, delegation allows shifting the responsibility for the decisions adopted.[22]

Similarly, some authors argue that, as a general rule, the government should not delegate wide policy discretion to the agent because the exercise of discretion is difficult to control.[23] Other authors propose the contrary argument; for them the wide discretion of the agent justifies closer control by the government.[24]

In addition, Gilardi argues that delegation to independent authorities can be a means for politicians to increase the credibility of their policy commitments. In line with this view, regulators have been found to be formally more independent in utilities than in other economic regulation, and in economic regulation more than in social regulation. On the other hand, the political uncertainty argument states that delegation can be employed by a government fearing replacement to prevent policies from being changed by the next government. The analysis has shown that, consistent with this reasoning, the formal independence of regulators first increases as replacement risk increases, but then decreases when frequent changes in the partisan composition of governments implies that a party or coalition is likely to gain office at regular intervals. Finally, it has been shown that the institutional context matters: regulators tend to be less independent in countries with many veto players.[25]

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20 Miller, G.J. "The Political Evolution of Principal-Agent Models." *Annual Review of Political Science* 8.1 (2005): pp. 203–250.

Ross, S. A. "The Economic Theory of Agency: The Principal's Problem." *The American Economic Review* 63.2 (1973): pp. 134–139.

21 Franchino, Fabio. "Efficiency or credibility? Testing the Two Logics of Delegation to the European Commission." *Journal of European Public Policy* 9.5 (2002): pp. 677–694.

22 Fiorina, M. P. "Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?" *Public Choice* 39.1 (1982): pp. 33–66.

23 Ottow, A., and S. Lavrijssen. "The Legality of Independent Regulatory Authorities." *The Eclipse of the Legality Principle in the European Union.* Eds. Leonard Besselink, Frans Pennings and Sacha Prechal. Wolter Kluwer, 2011, pp. 73–95.

24 Kovacic, W.E. "Competition Agencies, Independence, and the Political Process." *Competition Policy and the Economic Approach*. Eds. J. Drexl, W. Kerber and R. Podszun. Cheltenham: Edward Elgar, 2011, p. 292.

25 Gilardi, F. "The Formal Independence of Regulators: A Comparison of 17 Countries and 7 Sectors." *Swiss Political Science Review* 11.4 (2005), p. 157.

Lastly, Gilardi proposed five dimensions to assess the formal independence of regulators: the status of the agency head (for example, term of office, appointment and dismissal procedure), status of the members of the management board, relationship with government and parliament, financial and organizational autonomy and regulatory competencies.[26] All these can act as safeguards towards a regulator's independence.

Independence is usually regarded as a positive characteristic for regulatory agencies and competition authorities.[27] First of all, the functions of these bodies are para-judicial and this places an expectation on them that they make decisions solely on the basis of law and that they judge facts impartially. Second, an independent competition authority is attractive for private investment and creates a healthy business environment that is insulated from political fluctuations. Third, in many countries, national governments still own important market players and it is crucial for the national and international competitors operating in those markets to have an executive which handles competition issues impartially.[28]

An important question concerning the justification for a competition authority's independence is its impact on the authority's performance and welfare effects.[29,30]

A few respected authors contest the relevance of the notion of independence to the work performed by competition authorities. Thus, Monti argues that, rather than speaking of independence from government or from business or consumer interests, the public debate would be better off speaking of an authority's appropriate degree of dependence.[31] Monti suggests that a more convincing justification for the independence of competition authorities is linked with the commitment that the state has made towards a particular economic order.[32]

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26 Gilardi, *op. cit.*, p. 146.

27 Jenny, F. "Competition Authorities: Independence and Advocacy." *The Global Limits of Competition Law*. Eds. I. Lianos and D.D. Sokol. Stanford: Stanford University Press, 2012, p.166.

Mateus, A. "Why Should National Competition Authorities Be Independent and How Should they Be Accountable?" *European Competition Journal* 3.1 (2007).

28 Guidi (2014), *op. cit*.

29 Guidi, Mattia. "The Impact of Independence on Regulatory Outcomes: the Case of EU Competition Policy." *Journal of Common Market Studies* April (2015).

30 Bergman, Mats. "Quis Custodiet Ipsos Custodes? Or Measuring and Evaluating the Effectiveness of Competition Enforcement." *De Economist* 156.4 (2008): pp. 387–409.

31 Monti, Giorgio. *Independence, Interdependence and Legitimacy: The EU Commission, National Competition Authorities, and the European Competition Network*. EUI Working Paper Law No. 2014/01, European University Institute.

32 Monti, *op. cit*.

7.2 The UNCTAD

In 2008, the United Nations Secretariat on Trade and Development (UNCTAD) published a note highlighting that most countries recognized that it was desirable to prevent the implementation of narrow interest group goals when enforcing competition law. To this end, countries have put in place various checks and balances to ensure the independence and accountability of competition authorities.[33]

The note acknowledged that there was widespread agreement that "independent regulators were at the core of regulatory governance in liberalized economies and a globalized world economy".[34]

Also, the note stressed that the UNCTAD Model Law on Competition was formulated on the assumption that the most efficient type of administrative authority for competition enforcement "is likely to be one that (a) is quasi-autonomous or independent of the Government, with strong judicial and administrative powers for conducting investigations and applying sanctions; and (b) provides the possibility of recourse to a higher judicial body".[35] In a more recent document, the UNCTAD proposed that independence of competition authorities was "variable and it is often more useful to speak in terms of degrees of independence rather than absolute independence" because "no competition authority can be completely independent from the Government structure of which it is an integral part".[36]

The UNCTAD acknowledged that the structure of a competition enforcement system has an important bearing on the authority's independence or perceived independence. The following elements are listed to influence the independence of the competition authorities: (1) separation of the investigatory arm from the adjudicating decision-making body; (2) physical location away from the supervising ministry building; (3) budget independence; (4) appointment procedure of officials of the competition authority and (5) qualifications of members of the competition authority.[37]

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33 UNCTAD. *Independence and Accountability of Competition Authorities*. Document TD/B/COM.2/CLP/67 of 14 May 2008. Available at https://unctad.org/meetings/en/SessionalDocuments/CCPB_IGE2014_UNCTADNOTE_EMCF_en.pdf accessed on 23 February 2021.

34 UNCTAD (2008), quoted above, p. 3.

35 UNCTAD. *The Model Law on Competition*. Available at https://unctad.org/en/Pages/DITC/CompetitionLaw/The-Model-Law-on-Competition.aspx accessed on 23 February 2021.

36 UNCTAD. *Good Governance Guidelines: Independence and Transparency*. Document UNCTAD/DITC/CLP/20016/2 of 22 June 2016, p. 1. Available at https://unctad.org/en/PublicationsLibrary/ditcclp2016d2_en.pdf accessed on 23 February 2021.

37 UNCTAD (2016), quoted above, pp. 6–13.

7.3 OECD Roundtable on Changes in Institutional Design of Competition Authorities

In December 2014, the Organisation for Economic Co-operation and Development (OECD) organized a roundtable meeting on recent changes in institutional design which focused on three major topics: (1) the combination of different functions in a single authority; (2) the notion of independence; and (3) the internal governance of the authority.[38]

In relation to the topic of multi-function authorities, Fels highlighted a recent trend of integrating competition enforcement, consumer protection and regulatory powers within the same authority.[39] He observed that "there is kind of a 'North Sea dumping' effect in the world of competition law, which means that governments often resolve a given problem by delegating it to the competition authority".[40]

In relation to the question of independence of competition authorities, Professor Kovacic presented a paper in which he pointed out that the insulation of competition authorities from political process is a highly desirable characteristic and a sign of institutional maturity. However, complete isolation from politics is both unattainable and undesirable.[41]

The representative of the OECD's Directorate for Public Governance and Territorial Development noted that, due to the rather "tricky" nature of the problem, the OECD could not come up with a set of normative criteria for independence. He stressed, however, that a survey carried out in 2013 indicated that a majority of the regulators receive strategic direction for their long-term strategy, but "most of them operate with a high degree of independence on individual cases and appeals".[42]

The Business and Industry Advisory Committee of the OECD (BIAC) argued in their submission that the institutional design of competition authorities is

38 OECD. *Summary Record of the Roundtable on Changes in Institutional Design*. DAF/COMP/M(2014)3/ANN4/FINAL. Available at http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/M(2014)3/ANN4/FINAL&doclanguage=en accessed on 23 February 2021.

39 Fels, A. and H. Ergas (2014). *Institutional Design of Competition Authorities*. DAF/COMP/WD(2014)85 Paper drafted as a Background Note for the Competition Commission's session on Changes in Institutional Design. Available at: http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2014)85&doclanguage=en accessed on 23 February 2021.

40 OECD (2014), quoted above, p.3.

41 Kovacic, *op. cit.*

42 OECD (2014), quoted above, p. 19.

critically important for the jurisdiction's effectiveness and should ensure the most pro-competitive outcomes possible. The BIAC stressed, however, that "it must do so in a manner that will maintain the confidence of businesses and citizens alike, without which the enforcement of competition laws will ultimately lack political, legal and economical legitimacy. A successful design must also reflect the increasing reality that government agencies operate with strict budgetary constraints".[43]

The BIAC showed that there is evidence to suggest that greater independence from the government was the factor most frequently identified as likely to lead to better promotion of competition law.[44]

Turning to the issue of the separation of the investigative and adjudicative functions of the competition authorities, the BIAC noted that

> housing both investigative and adjudicative functions 'under one roof' can lead to significant cost benefits. However, as with the lack of independence from government, the lack of separation between the investigative and adjudicative functions can raise significant concerns over the perception of fairness or bias, rising to the level of legal concern in certain jurisdictions.[45]

7.4 International Competition Network

The 2019 Conference of the International Competition Network (ICN) has been dedicated between others to practices for the investigative process during competition law proceedings. The published recommendations acknowledge that fair and effective agency investigative process is essential to sound competition law enforcement and that the credibility of competition agency is closely linked to both the agency's integrity of investigative process and the public's understanding of such process. At the same time, ICN highlighted that fairness can be achieved using different approaches. ICN proposed that fairness of

43 OECD. *Roundtable on Changes in Institutional Design of Competition Authorities, Note by BIAC*. DAF/COMP/WD(2014)126, p. 2. Available at http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2014)126&doclanguage=en accessed on 23 February 2021.

44 OECD. *Global Forum on Competition: The Objectives of Competition Law and Policy*. CCNM/GF/COMP(2003)3. Available at http://www.oecd.org/daf/competition/2486329.pdf accessed on 23 February 2021.

45 OECD (2003), quoted above, p. 10.

investigative process includes "availability and use of effective agency investigative tools, transparency and engagement with those subject to an investigation (investigated parties and third parties), internal checks and balances on enforcement process, and protection of confidential information".[46]

ICN proposed twelve recommendations for effective and fair investigative process:

(1) Competition authorities should have appropriate resources and investigative tools to enforce competition law;

(2) Investigative tools for competition law investigations should be based on an appropriate legal framework setting out criteria and procedural requirements for their use;

(3) Competition agencies' internal procedures should address the use of their investigative tools and the information gathered during an investigation. For example, before issuing a request for information, competition agencies should weigh the circumstances of the case against the principles of proportionality, relevance and burden;

(4) Competition law and policies that govern competition law enforcement should be transparent, reinforcing the values of accountability, predictability and fairness;

(5) Transparency to parties during a competition law investigation is a basic attribute to effective competition law enforcement. At the same time, the extent of the investigative transparency is subject to the agency's discretion and should not limit its discretion to pursue new or additional theories;

(6) Engagement between the agency and the parties under investigation on important factual, legal, economic and procedural matters is a basic attribute of sound and effective competition enforcement;

(7) Engagement with third parties also promotes more informed enforcement;

(8) Internal agency safeguards – such as internal procedures and practices to ensure consistent and impartial investigative processes – are a basic attribute of sound and effective competition enforcement;

(9) Investigative recommendations and findings should be thoroughly evaluated before being implemented. Personal bias, political interference, national protectionism or interests of the industry should not play a role in the enforcement process;

46 ICN. *ICN Recommended Practices for Investigative Process*. Available at: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/05/RPs-InvestigativeProcess.pdf accessed on 23 February 2021.

(10) Confidential information should be protected during competition enforcement;
(11) Competition agencies should have clear policies concerning the disclosure of information;
(12) Applicable legal privileges should be respected.[47]

7.5 Independence of European Regulators

Whereas the discussions concerning the independence of NCAs and the European Commission are relatively new, European law contains a plethora of legislative provisions and case-law concerning the independence of National Regulatory Authorities (NRAs).

In the field of telecommunications, member states have to guarantee the independence of NRAs by ensuring that they are legally distinct from and functionally independent of all organisations providing electronic communications networks, equipment or services.[48] Where member states retain ownership or control of undertakings, they have to ensure effective structural separation of the regulatory function from activities associated with ownership or control. Member states must also ensure that NRAs exercise their powers impartially and transparently.[49]

In addition to ensuring that the NRAs are independent, member states must ensure the right to appeal for any user or undertaking affected by a decision of the NRA. The appeal body must be independent of the parties involved, and must have the appropriate expertise available to carry out its functions and to ensure that the merits of each case are duly taken into account.[50]

In the field of energy, the preamble to Directive 2009/72 acknowledged that the effectiveness of regulation is frequently hampered by the lack of independence of regulators from government, as well as insufficient powers and discretion.[51] Energy regulators need to be fully independent from any public or

47 ICN, quoted above, pp. 2–10.
48 See Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, OJ L 108, 24.4.2002, p. 33 as amended by Directive 2009/140/EC of the European and of the Council of 25 November 2009, OJ L 337, 18.12.2009, p. 37.
49 Directive 2002/21/EC, quoted above, Article 3.
50 Directive 2002/21/EC, quoted above, Article 4.
51 Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, OJ L 211, 14.8.2009, p.55.

private interests and the independence requirement is fully compatible both with judicial review and parliamentary supervision in accordance with the constitutional laws of the member states.[52] To address this issue, the directive imposes minimum independence criteria for the transmission system owner, the transmission system operator, for their staff and management and, lastly, for the NRA. The NRA in particular must have independent decision-making powers, staff and budget to allow it to act impartially and transparently.[53]

In the field of railways, Directive 2012/34/EU imposes independence requirements on railway undertakings, on the essential functions of infrastructure manager, and on NRA s.[54] According to the directive, the NRA

> shall be a stand-alone authority which is, in organisational, functional, hierarchical and decision-making terms, legally distinct and independent from any other public or private entity. It shall also be independent in its organisation, funding decisions, legal structure and decision-making from any infrastructure manager, charging body, allocation body or applicant. It shall furthermore be functionally independent from any competent authority involved in the award of a public service contract.[55]

The directive requires member states to provide clear and transparent rules for the appointment of board members of NRA s, appointment which has to be based on merit, competence and relevant experience. In particular,

> Member States shall ensure that these persons act independently from any market interest related to the railway sector, and shall therefore not have any interest or business relationship with any of the regulated undertakings or entities. To this effect, these persons shall make annually a declaration of commitment and a declaration of interests, indicating any direct or indirect interests that may be considered prejudicial to their independence and which might influence their performance of any function. These persons shall withdraw from decision-making in cases which concern an undertaking with which they had a direct or indirect connection during the year before the launch of a procedure.[56]

52 Directive 2009/72/EC, quoted above, Article 33–34.
53 Directive 2009/72/EC, quoted above, Article 35.
54 Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area, OJ L 343, 14.12.2012, p. 32.
55 Directive 2012/34/EU, quoted above, Article 55.
56 Directive 2012/34/EU, quoted above.

Lastly, in the field of data protection, EU law acknowledges that "complete independence" of the supervisory authorities is an essential component of the protection of individuals in instances when their personal data is processed.[57] EU law requires that all institutions dedicated to the protection of data set up in the member states – the personal data protection official, the supervisory authority and the Working Party on the Protection of Individuals – must be independent and act independently.[58]

7.6 The European Competition Network

The economic crisis that started in 2008 and the budgetary cuts performed in some member states of the EU had a surprising consequence – the initiation of discussions concerning the independence of the national competition authorities. In 2010, the Meeting of Heads of the European competition authorities published a resolution showing the central role played by effective competition enforcement in the functioning of market economies.[59] The resolution also stressed that NCAs are "trusted advisors to governments and legislators, advocating pro-competitive approaches and promoting a culture of competition in their jurisdictions".[60] However, in order to fulfil the roles assigned to them, NCAs need appropriate infrastructure and expert resources to intervene and handle complex matters of law and economics.[61]

The Commission included the concerns raised by the Meeting of Heads of the European competition authorities in its communication *Ten Years of Antitrust Enforcement under Regulation 1/2003* and its accompanying documents.[62] The Commission noted that in the vast majority of member states, the NCAs benefit from a certain degree of independence but the extent of their

57 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.1995, p. 31.

58 Directive 95/46/EC, quoted above, Article 18(2) and Article 28 respectively.

59 European Competition Network. *Resolution of the Meeting of Heads of European Competition Authorities of 16 November 2010 on Competition Authorities in the European Union – the Continued Need for Effective Institutions*. Available at http://ec.europa.eu/competition/ecn/ncas.pdf accessed on 23 February 2021.

60 European Competition Network, quoted above, p. 1.

61 European Competition Network, quoted above, p. 2.

62 European Commission. Commission Staff Working Document. *Enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues*. SWD(2014) 231/2. Available at http://ec.europa.eu/competition/antitrust/legislation/swd_2014_231_en.pdf accessed on 23 February 2021.

independence and the degree of supervision exercised by other state bodies varies. The Commission also pointed out that some NCAs may be subject to general supervision or to general instructions by executive or the legislative powers. More importantly, the degree of supervision

> may range from guiding and coordinating the NCA's activities or outlining the NCA's activities without intervening or deciding on individual cases or on the actual application of the law, to giving instructions regarding the general application of the law or regarding budgetary issues or general policy matters which is also directed to other governmental institutions. In a number of Member States, the minister may instruct the NCA, for example, to carry out sector inquiries or competition studies or analyses, which the NCA cannot otherwise initiate itself, but without, however, directing the outcome.[63]

The Commission also addressed the issue of multi-function authorities, showing that while a minority of NCAs are exclusively responsible for competition enforcement, the majority of NCAs now have additional responsibilities in various areas such as consumer protection, public procurement and the supervision of liberalised sectors (energy, post, telecommunications and railways).[64]

The communication emphasized the Commission's achievements in the field of competition law and proposed a few fields for further consideration, the first being the institutional position of the NCAs. Despite the progress made by some member states in the field of independence and impartiality of NCAs, the achievements are "fragile and can be rolled back at any time".[65] A few elements can ensure that progress continues to be pursued in this field:

- minimum standards to ensure the independence of the NCAs, but also of their management or board members;
- sufficient financial and human resources;
- budgetary autonomy;

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63 European Commission. Commission Staff Working Document. *Enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues*, quoted above, p. 6.

64 European Commission. Commission Staff Working Document. *Enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues*, quoted above, p. 9.

65 European Commission. Commission Staff Working Document. *Enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues*, quoted above, p. 9.

– clear and transparent appointment procedures for the NCA s management or board members;
– objective dismissals;
– rules concerning conflicts of interests and incompatibilities of NCA s management board.[66]

Furthermore, in December 2014, the EU Director-General for Competition, Alexander Italianer, addressed the issue of the independence of National Competition Authorities in a speech delivered at a competition conference in Vienna. He highlighted the importance of the NCA s being "independent, properly funded and adequately staffed".[67]

Italianer noted that there are currently two models of institutional design in Europe: the administrative model, which is based on the cumulation – within the same institution – of enforcement and judicial control functions; and the judicial model, which has an administrative authority entrusted with the investigation of cases and a court entrusted with taking a decisions on substance, sanctions or both. A large majority of members of the EU have an administrative model. Italianer noted however that "independence is a key requirement regardless of institutional design".[68]

Second, Italianer stressed that the independence and impartiality of the NCA s are closely linked and affect their legitimacy, credibility and efficacy.[69] Practices such as the direct government influence over appointments, staff rotation of NCA s following elections, misuse of NCA budgets by government to gain leverage or as retaliation measures, and intrusive investigations into NCA s' decision-making by governments go against the principle of independence.[70]

66 European Commission. Commission Staff Working Document. *Enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues*, quoted above, p. 9.

67 European Commission. Commission Staff Working Document. *Enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues*, quoted above, p. 2.

68 European Commission. Commission Staff Working Document. *Enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues*, quoted above, p. 2.

69 European Commission. Commission Staff Working Document. *Enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues*, quoted above, p. 4.

70 European Commission. Commission Staff Working Document. *Enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues*, quoted above, p. 5.

Third, Italianer stressed that the independence of NCA s in the EU should be built on three elements: independently appointed staff, unfettered discretion to choose which cases to investigate and control over budgets.[71]

He concluded that "being able to function without the threat of interference from political authorities and vested interests is a cornerstone of the rule of law".[72]

7.7 Empowering NCA s – Directive 1/2019

At the beginning of 2019, the EU adopted a directive meant to empower the NCA s to be more effective enforcers of competition law in light of the direct applicability of Articles 101 and 102 TFEU.[73]

This document is relevant to the topic of this book for a few reasons. On the one hand, the first provision of the directive is dedicated to the need to respect fundamental rights by the NCA s and the member states while they are enforcing Articles 101 and 102 TFEU.[74] The second provision of the directive is dedicated to the need to guarantee the NCA s independence when enforcing Articles 101 and 102 TFEU.[75] This *textual prioritization of fundamental rights and independence* during EU competition law enforcement is in line with new constitutional design of the EU that has fundamental rights as one of its priorities.

On the other hand, Directive 1/2019 imposes *independence and impartiality standards that are very close to the standards formulated by the ECtHR* in this field. For example, the directive stipulates that member states must ensure

71 European Commission. Commission Staff Working Document. *Enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues*, quoted above, p. 6.

72 European Commission. Commission Staff Working Document. *Enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues*, quoted above, p. 3.

73 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, quoted above.

74 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, quoted above, article 3.

75 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, quoted above, article 4.

structural, operational and budgetary standards of independence and impartiality for the NCAs.[76]

7.8 The Difficult Case for the Independence of the European Commission

It was common practice in the 1990s and the 2000s for all the US presidents to personally intervene in EU competition proceedings in favour of anti-trust clearances of US firms.[77] A well-known case is the General Electric/Honeywell merger during which the Commissioner for Competition Mario Monti has complained about the alleged interference of the US president George Bush in the following terms: "I deplore attempts to misinform the public and to trigger political intervention".[78]

In addition, the press recounts multiple instances of political pressure exerted on national competition authorities in the European Union.[79] At the same time, the appointment of each new Commissioner for Competition is accompanied by a debate concerning the proposed candidate's involvement with business. In this respect, Neelie Kroes – who was nominated Commissioner for Competition in 2004 – had been an active politician in the Netherlands and served as minister of transport, public works and water management in the 1980s. She then took a number of corporate jobs and sat on the boards of Royal P&O Nedlloyd, New Skies Satellites, Thales Netherlands, MM02, and Volvo amongst others. Neelies Kroes listed 25 corporate jobs in her nomination CV. The press noted that "EU officials acknowledge that they have never dealt with a commission candidate with such extensive business ties – and potential conflicts" and that, in addition, Neelies Kroes

76 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, quoted above, article 4.

77 Karagiannis, *op. cit.*, p. 686.

78 "Monti Slams US Critics." *BBC*. 18 Jun 2001. Available at http://news.bbc.co.uk/2/hi/business/1395739.stm accessed on 23 February 2021. Reporting President G. W. Bush's intervention in favour of allowing the GE/Honeywell merger.

79 Brown, K. "Keeping Watchdogs on a Short Leash: The Government's Approach to Competition Has Increased Suspicions That It Will Not Tolerate Truly Independent Regulators." *Financial Times*. 10 Mar 2000, p. 23.

Hanretty, Chris and Christel Koop. "Shall the Law Set Them Free? The Formal and Actual Independence of Regulatory Agencies." *Regulation & Governance* 7.2 (2013): pp. 195–214.

has not actually disclosed all of her former employers, including the arms manufacturer Lockheed Martin.[8081] Lastly, at the end of her assignment as Commissioner for Competition, Neelies Kroes accepted two positions that raised further questions concerning conflict of interests: special government envoy for start-up companies in the Netherlands and special adviser to the Bank of America Merrill Lynch.[82]

Other commissioners have also been criticized for their involvement with various businesses.[83] Taking into account that the College of Commissioners adopts all decisions concerning competition on the European market, it becomes increasingly important to reflect on the impact of a commissioner's background on the adopted decisions.

Political scientists have long been concerned with hybrid executive power whose civil servants are concomitantly expected to act as impartial technocrats and as partial participants in the political process. Several institutional characteristics exacerbate this tension within the European Commission:

> In conjunction with the College of Commissioners, the officials of the European Commission have a constitutional obligation to set the legislative agenda because they have exclusive formal competence to draft EU legislation. (…) They promote the policies of their directorate to private interests, politicians, public, and, last but not least, reluctant Commission colleagues. They direct negotiations between the Commission, on the one hand, and the Council of Ministers' working groups, the European Parliament, and interest groups, on the other. They broker legislative negotiations between the Council of Ministers and the Executive Parliament. Yet, as career civil servants, they also execute and administer political decisions taken by elected leaders.[84]

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80 Barrionuevo, A. and D. Michaels. "EU Antitrust Nominee Did Not Disclose All Ties." *Wall Street Journal*. 21 Oct 2004.

81 Corporate Europe Observatory. *Neelies Kroes.* Revolving Door Report, 1 Mar 2015. Available at http://corporateeurope.org/revolvingdoorwatch/cases/neelie-kroes accessed on 23 February 2021.

82 Corporate Europe Observatory. *Neelies Kroes*, quoted above.

83 See for example, Flues, Fabien. "The many business dealings of Commissioner-designate Miguel Arias Canete." *Corporate Europe Observatory*. 23 Sep 2014. Available at http://corporateeurope.org/power-lobbies/2014/09/many-business-dealings-commissioner-designate-miguel-arias-canete accessed on 23 February 2021.

84 Hooghe, Liesbet. The European Commission and the Integration of Europe: Images of Governance. Cambridge: Cambridge University Press, 2001, p. 6.

However, despite growing general concerns about untamed administrative power and specific concerns about individuals nominated as commissioners, the case for the independence of the Commission is rather difficult to make.

The first difficulty stems from the fact that the issue of independence of the Commission is inevitably placed at the crossroads of notions that are themselves charged with multiple meanings. The separation of powers, the growing importance of executive power, the changing nature of modern bureaucracy, the delegation of powers, and the discretion and autonomy of the executive are concepts that carry all the contradictions of modern democracies and that inevitably affect attempts to define the notion of independence.

The second difficulty arises from the continuous tension between developments in the field of independence at the national and international levels. The development of national competition authorities, independent regulatory authorities and other national regulatory authorities has partially focused on independence as a core element of institution-building. The European Commission has been a champion and a supporter of this transition. However, this exercise of transformation has been accompanied only partially by an exercise in self-reflection on the same subject. To what extent achievements in legal thinking at the national level are to be reflected at the supranational level is an old debate that does not spare the issue of the independence of the Commission.

Lastly, the waves of critique directed at the European Commission and its resulting transformations have inadvertently been rooted in the idea that independence can strengthen the Commission's autonomy, thus sheltering it from its political masters' whims. However, this view favours a *politicized view of independence* as a tool in the counter-offensive against the hunt for runaway bureaucracies. Also, this view distances itself from the notion of independence as a binding legal requirement across the democratic world, a burden and a responsibility that ensures fair play during a legal process, but also a constant, unaffected *modus operandi*.

Those who oppose the case for a more independent EU Commission offer structural and procedural reasons. Thus, Karol von Miert has famously proclaimed that competition policy was not neutral, it was in fact "politics".[85] Focusing on enforcement procedures, Monti argues that, although the decisions in individual competition law cases are voted on by the College of Commissioners, the bulk of the work is carried out by the DG COMP.[86] On

85 Wilks, S., and L. McGowan. "Competition Policy in the European Union: Creating a Federal Agency?" *Comparative Competition Policy: National Institutions in a Global Market*. Eds. G.B. Doern and S. Wilks. Oxford: Clarendon Press, 1996, pp. 225–267.

86 Monti, *op. cit.*, p. 9.

the one hand, important decisions concerning procedural issues that precede the adoption of a final decision, such as decisions to initiate proceedings, to reject complaints or to issue statement of objections, are vested with the Commissioner for Competition or delegated to the Director General.[87] On the other hand, Monti notes that "in the vast majority of cases the College defers to the DG COMP's proposed course of action. This is evidenced by the fact that most competition decisions are agreed with written procedure, which reduces the scope for discussing the wider policy ramifications of a proposed decision".[88]

Monti concludes that the work of DG COMP is relatively well-insulated from the influence of politics and private interests both during the procedures by which the cases are screened for being placed on the agenda and during the investigation and adjudication stages. He accepts however that there is a risk of lobbying from parties seeking favourable treatment.[89]

More recently, Karagiannis has argued that "collegiality corresponded to an ingenious institutional solution to the problem of committing to a far-reaching, exclusive, open-ended, and, therefore, highly risky agreement" and that "the institution of collegiality in the EC is not aimed at securing commitment to specific policy options, but commitment to a negotiated implementation of the Treaty".[90]

87 The legal basis for this is Commission Decision of 24 February 2010 amending its Rules of Procedure 2010/138/EU, Euratom, OJ L 55, 5.3.2010, p. 60, Article 13. See also the European Commission. *Antitrust: Manual of Procedures: Internal DG Competition Working Documents on Procedures for the Application of Articles 101 and 102 TFEU*. March 2012, Sections 2.2 and 2.3. Available at http://ec.europa.eu/competition/antitrust/antitrust_manproc_3_2012_en.pdf accessed on 23 February 2021.

88 Monti, *op. cit.*, p. 9.

89 Monti, *op. cit.*, p. 9–10.

90 Karagiannis, *op. cit.*, p. 703.

CHAPTER 8

The Case-law of the ECtHR on the Right to an Independent and Impartial Tribunal

The case-law of the ECtHR on the right to a fair trial provides that a "tribunal" is compatible with the requirements of the ECHR when (1) it is established by law, (2) it is independent and (3) it is impartial. This section provides a detailed analysis of these concepts.

8.1 Established by Law

Article 6(1) ECHR requires that all disputes involving the determination of "civil rights and obligations" or of "criminal charges" be settled by a tribunal "established by law". This is a general requirement that deals both with issues of hierarchy in constitutional law and with the quality of the law. However, the ECtHR has consistently stated that it does not impose on the member states any constitutional arrangements.

First of all, the established-by-law procedure requires that tribunals be established by a Constitution or by a law. Thus, in the early case *Zand*, the applicant – who was involved in an employment dispute – argued that the labour court assigned to decide his case was not a tribunal fulfilling the conditions enshrined in Article 6(1) ECHR due to the fact that it was established by a governmental decree, not by a law. The applicant complained in particular about the fact that a labour court could be established and removed by an administrative decision based on temporary needs.

The Commission recalled that the object of the term "established by law" in Article 6(1) ECHR was to ensure "that the judicial organisation in a democratic society did not depend on the discretion of the executive, but that it was regulated by law emanating from Parliament".[1]

In a more recent case, *Savino and Others,* the Court was faced with the question of whether or not the internal judicial bodies operating employment-related

1 ECtHR. *Zand v. Austria*, application no. 7360/76, judgement on 16 May 1977, pp. 70 and 80.

disputes within the Italian Chamber of Deputies were established by law as required by Article 6(1) ECHR.[2]

The Court noted first of all that its goal is not "to impose upon the States a constitutional model concerning the relationship and interaction of different State powers. The choice of the Italian legislator to preserve the autonomy and independence of the Parliament from the ordinary jurisdiction does not raise as such an issue before the Court".[3]

The Court noted that as a matter of principle, *delegation of judicial power* is acceptable if it is provided for by the constitution of the state concerned.[4] The Court concluded that, since the judicial bodies within the Italian Chamber of Deputies were established on the basis of secondary legislation which had its source in the Italian Constitution, they were established by law as required by the right to a fair trial.

In relation to the establishment of specialized courts, such as the Constitutional Court or the Board of Visitors, the court found that they are compatible with Article 6(1) ECHR if they are established and are endowed by the law with the judicial function of adjudicating cases.[5][6] The Court emphasised that the word "tribunal" in Article 6(1) ECHR "is not necessarily to be understood as signifying a court of law of the classic kind, integrated within the standard judicial machinery of the country".[7] However, the specialized nature of a tribunal should not prevent it from displaying the following requirements: independence from the executive and the parties, guaranteed duration of its members' term of office, and guarantees afforded by its procedure.[8]

Thus, in a case concerning the right to periodic review of detention in mental health institutions, it was established that mental health review tribunals comply with the requirements of the right to a fair trial when they are independent and when sufficient procedural safeguards are in place. The Court stressed that an important feature of a tribunal "established by law" is jurisdiction to decide the lawfulness of a detention and to order release. In case

2 ECtHR. *Savino and Others v. Italy*, applications nos. 17214/05, 20329/05 and 42113/04, judgement of 28 Apr 2009.

3 *Savino and Others v. Italy*, quoted above, paragraph 92.

4 *Savino and Others v. Italy*, quoted above, paragraph 94.

5 ECtHR. *Crociani and Others v. Italy*, application nos. 8603/79, 8722/79, 8723/79, 8729/79, judgement 18 dec 1980.

6 ECtHR. *Campbell and Fell v. the United Kingdom*, application nos. 7819/77 and 7878/77, judgement of 28 Jun 1984.

7 *Campbell and Fell v. the United Kingdom*, quoted above, paragraph 76.

8 ECtHR. *Le Compte, Van Leuven and De Meyere v. Belgium*, application nos. 6878/75 and 7238/75, judgement of 23 Jun 1981, paragraph 55.

a tribunal has only advisory functions, it cannot be deemed to be a tribunal "established by law".[9]

At the same time, as one author noted, the established-by-law requirement has been interpreted by the Court in respect of other provisions "as imposing also a certain quality of the relevant law".[10] Thus, in a case that concerned the taking into care of the applicants' three children by social services, the Court held that "in accordance with the law" does not "merely refer back to domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law; it thus implies that there must be a measure of protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded".[11]

8.2 Independence

The ECtHR has a rich case-law on the issue of the independence of justice, dealing with the organisation of ordinary courts, specialised tribunals and administrative courts. The case-law concerning independence of tribunals described in this section deals with (1) the duty not to intervene with the functioning of the judicial branch; (2) the cumulation of functions; (3) the principle that justice should not only be done but should also appear to be done and (4) the safeguards that can compensate for a lack of independence.

8.2.1 *Interference*

The first and most obvious corollary concerning the independence of justice is that tribunals should be free from the interference of the other branches of the government. A second is that the tribunals should be free from internal interference, from within the judicial branch as well.

Thus, in a few cases against Ukraine, the applicants complained about the interference of state authorities with the applicants' proceedings. The ECtHR noted first of all that, indeed, various state bodies, including the Prime Minister and the President of Ukraine, intervened in an open, persistent and sometimes blatant manner in the applicants' proceedings. The Court established to be of

9 ECtHR. *X v. the United Kingdom*, application no. 7215/72, judgement of 5 November 1981, paragraph 61.

10 Loucaides, Loukis G. *The European Convention on Human Rights: Collected Essays*. Leiden: Martinus Nijhoff Publishers, 2007, p. 214.

11 ECtHR. *Olsson v. Sweden* (*no. 1*), application no. 10465/83, judgement of 24 Mar 1988, paragraph 61.

no importance "whether the impugned interventions actually affected the course of the proceedings. Coming from the executive and legislative branches of the State, they reveal a lack of respect for the judicial office itself and justify the applicant company's fears as to the independence and impartiality of the tribunals".[12]

The Court emphasized that the scope of the state's obligation to ensure a trial by an independent and impartial tribunal also

> implies obligations on the executive, the legislature and any other State authority, regardless of its level, to respect and abide by the judgments and decisions of the courts, even when they do not agree with them. Thus, the State's respecting the authority of the courts is an indispensable precondition for public confidence in the courts and, more broadly, for the rule of law.[13]

The ECtHR stressed, however, that in order to respect the above-mentioned principle, "the constitutional safeguards of the independence and impartiality of the judiciary do not suffice. They must be effectively incorporated into everyday administrative attitudes and practices".[14]

In the case *Khrykin* the applicant was involved in an employment dispute.[15] He complained that the first-instance court lacked independence because of the pressure exercised by the President of the Regional Court that resulted in the re-opening of his case and quashing of the final judgement in his favour.

The Court held that the independence of the judiciary is only possible when individual independence exists alongside the institutional independence, working together towards impartial decision making. Thus, independence of the judiciary "characterizes both a state of mind and a set of institutional and operational arrangements. The former is concerned with the judge's impartiality and the latter with defining relations with other bodies, in particular other state powers".[16] The Court also noted that judicial independence required that those judged "be free from instructions or pressures from the fellow judges and vis-à-vis their judicial superiors".[17]

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12 ECtHR. *Sovtransavto Holding v. Ukraine*, application no. 48553/99, judgement of 25 Jul 2002, paragraph 80.

13 ECtHR. *Sovtransavto Holding v. Ukraine*, quoted above.

14 ECtHR. *Agrokompleks v. Ukraine*, application no. 23465/03, judgement of 6 Oct 2011.

15 ECtHR. *Khrykin v. Russia*, application no. 33186/08, judgement of 19 Apr 2011.

16 *Khrykin v. Russia*, quoted above, paragraphs 28–29.

17 *Khrykin v. Russia*, quoted above, paragraphs 28–29.

In the case *Parlov-Tkalcic* the Court added that internal judicial independence required that judges "be free from directives or pressures from the fellow judges or those who have administrative responsibilities in the court such as the president of the court or the president of a division in the court".[18] The Court highlighted a few institutional characteristics to be taken into account when performing such analysis. First, it is important that the managerial functions are clearly separated from the judicial functions, so that the managers could not influence the composition of the panels, the way files were distributed between panels or their outcomes.[19] Also, it is important to limit the powers of the hierarchically superior judged over career advancement or discipline of their subordinates.[20]

8.2.2 *Cumulation of Functions*

Closely linked to the idea that justice is independent when it is free from external and internal pressure is the argument that the cumulation of functions is detrimental to the independence of justice. The increased amount of litigation in Europe and the omnipresence of the administration in the public life can produce conditions in which the government acts both as a party and as the decision-maker in a case. According to the ECtHR, such arrangements are not compatible with the independence of justice as required by Article 6(1) ECHR.

One of the early authorities on this subject is the *De Cubber* case in which the applicant was prosecuted and convicted for theft. He complained that the investigative and the trial judge in this case were one and the same person.[21]

The Court noted that, under the Belgian law, the investigating judge was subordinate to the prosecutor and had wide-ranging investigative powers. Also, the investigation was inquisitorial and secret, and not conducted in the presence of both parties. The Court also noted that one might understand the unease that an accused can feel when he observes that the person sitting on the bench to hear his case has intensely interrogated him during the investigation, ordered his detention on remand or taken other investigative measures in his/her case.

The Court argued that

> through the various means of inquiry which he will have utilised at the investigation stage, the judge in question, unlike his colleagues, will

18 ECtHR. *Parlov-Tkalcic v. Croatia*, application no. 24810/06, judgement of 22 Dec 2009, paragraph 86.

19 *Parlov-Tkalcic v. Croatia*, quoted above, paragraphs 88–90.

20 *Parlov-Tkalcic v. Croatia*, quoted above, paragraphs 91–93.

21 *De Cubber v. Belgium*, quoted above.

> already have acquired well before the hearing a particularly detailed knowledge of the – sometimes voluminous – file or files which he has assembled. Consequently, it is quite conceivable that he might, in the eyes of the accused appear, firstly, to be in a position to enable him to play a crucial role in the trial court and, secondly, even to have a pre-formed opinion which is liable to weigh heavily in the balance at the moment of the decision.[22]

The Court found such an arrangement to be incompatible with the right to a fair trial and concluded furthermore that such defects cannot be cured by subsequent appeal courts.[23]

In another case, this time against the United Kingdom, the applicant complained about the independence of the court martial that sat in the criminal case initiated against him.[24] Mr Findlay argued that all appointed officers were subordinate to the convening officer who acted as a prosecutor in his case. Furthermore, the applicant argued that the officers lacked the necessary legal background or experience that would support them in acting as an independent or impartial tribunal.

The Court noted that the convening officer performed important prosecutorial tasks before the beginning of the applicant's court proceedings. He had (1) decided which charges should be brought against the applicant, (2) decided which type of court martial was the most appropriate for the applicant's case, (3) convened the court martial, (4) appointed the members of the court martial, the prosecuting and the defending officers, (5) sent an abstract of the evidence to the prosecuting officer and the judge advocate, and (6) procured the attendance of witnesses for the prosecution. He was also involved in the establishment of the charge.

The Court found that the fact that all members of the court martial were subordinate in rank to the convening officer might have raised serious doubts as to the independence of the court. Even more, the Court found incompatible with fair trail principles the fact that the convening officer also acted as a confirming officer. Under the rules in place in the United Kingdom at the time, the decision reached by the court martial would only become binding if the convening officer confirmed it.[25]

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22 *De Cubber v. Belgium*, quoted above, paragraph 29.

23 *De Cubber v. Belgium*, quoted above, paragraph 33.

24 ECtHR. *Findlay v. the United Kingdom*, application no. 22107/93, judgement of 25 Feb 1997.

25 *Findlay v. the United Kingdom*, quoted above, paragraph 77.

Considering that none of the existing guarantees – including the involvement of the judge advocate and judicial review – could correct the defects concerning the independence of the court martial, the Court concluded that the court martial was not an independent tribunal and found a violation of Article 6(1) ECHR.

In *Benthem*, the applicant intended to open a gas station for motorcycles. He was initially granted a license by the municipal authorities.[26] However, upon appeal by the Health Inspector, the Administrative Litigation Division issued an opinion recommending that the license be refused; a draft of the decree to be adopted was attached thereto. By a decree in the same terms as the draft, the Crown quashed the municipal authorities' decision to issue a license for the applicant.

The applicant complained that his case has not been heard by an independent and impartial tribunal, but by administrative authorities that did not fulfil the criteria required by Article 6(1) ECHR. First, as to the Administrative Litigation Division, the Court noted that, despite its name and the appearances, the division was not a tribunal for the purposes of Article 6, as it lacked the power to adopt binding decisions.[27]

As for the Crown, the Court noted first that it was the head of the executive. Second, the Court stressed that the Crown operated by means of royal decrees that were – as form and substance – administrative acts that emanated from the government. Lastly, the Court noted that the royal decrees could not be challenged by means of judicial review as required by Article 6(1) ECHR.[28]

In *Beaumartin*, the applicants' shares of a Moroccan company had been expropriated.[29] France and Morocco concluded an international treaty that obliged Morocco to pay France compensation in a single lump sum and France to distribute it to the citizens who had lost their assets in Morocco. The applicants lodged a compensation request with the committee appointed for this purpose. The committee comprised representatives of the following ministries: Ministry of Foreign Affairs, Ministry of Justice, Ministry of Interior and Ministry of Economy. The committee issued a decision compensating the applicants only partially. They therefore challenged this decision before the *Conseil d'Etat*.

The *Conseil d'Etat* requested instructions from the Ministry of Foreign Affairs concerning the way in which the Franco-Moroccan treaty should be

26 ECtHR. *Benthem v. the Netherlands*, application no. 8848/80, judgement of 23 Oct 1985.
27 *Benthem v. the Netherlands*, quoted above, paragraph 40.
28 *Benthem v. the Netherlands*, quoted above, paragraphs 41–43.
29 ECtHR. *Beaumartin v. France*, application no. 15287/89, judgement of 24 Nov 1994.

interpreted in the applicants' case. The Ministry of Foreign Affairs replied that the applicants had correctly received only partial compensation for their assets and that the treaty at issue did not allow for a different interpretation. Consequently, the *Conseil d'Etat* dismissed the applicants' case on the grounds that the interpretation it received from the Ministry of Foreign Affairs was binding on it and could not be departed from. The Court noted that, despite the fact that in the meantime, France had changed its legislation, at the relevant time the domestic courts did not have jurisdiction to interpret international treaties. The Court noted that the nature of the proceedings was such that the applicants had as their opponent the Ministry of Foreign Affairs, which was also one of the issuing parties of the decision that the applicants were challenging. In addition, the applicants had no means of challenging the Ministry's involvement in the proceedings, nor the referral procedure by which the *Conseil d'Etat* asked for instructions the Ministry of Foreign Affairs.[30] The Court concluded that, in the view of the Ministry's involvement in the proceedings at issue, the *Conseil d'Etat* could not be deemed to be an independent tribunal.

In a case against Italy, the Court was called to decide if the Commission of the Chamber of Deputies was an independent and impartial tribunal.[31] In that case, the applicants held different administrative positions in the Chamber of Deputies. They sued their employer concerning a recruitment opportunity. They complained that the Human Resources Commission of the Chamber of Deputies that was called to decide their trial was not an independent and impartial tribunal established by law. The Court agreed with the applicants and stressed that independent and impartial tribunals played an important role in every democracy because they inspire confidence in the public.[32]

In a few French cases, the Court was faced with the question of independence of specialized courts. In *Didier*, the applicant had been sanctioned during disciplinary proceedings initiated by the Financial Markets Board (*Conseil des marchés financiers* – FMB). The FMB ordered the suspension of the applicant's trade license for six months and the payment of a fine of 5,000,000 French francs. The applicant complained about the fact that the rapporteur who investigated his case participated in the deliberations.[33] The Court stated that in order to assess if the concomitant exercise of investigative and decision-making functions by the same person respect the principle of impartiality, a

30 *Beaumartin v. France*, quoted above, paragraph 38.
31 *Savino and Others v. Italy*, quoted above.
32 *Savino and Others v. Italy*, quoted above, paragraph 105.
33 ECtHR. *Didier v. France*, application no. 58188/00, judgement of 27 Aug 2002.

detailed analysis of the tasks performed needs to be undertaken. The Court noted that in the case at issue, the rapporteur has been investigating the applicant's case upon appointment by the Financial Markets Board, but that he has not been involved in formulating the charges against the applicant. The Court noted that "bias is excluded when a judge does not bring charges despite his in-depth knowledge of the case".[34] The Court added that as the rapporteur was not involved in the formulation of the charges, he was not competent to close a case or to extend the object of the investigation. Instead, his duty was to check the facts and to report in writing on the results of his investigation. The Court concluded that the preliminary assessment performed by the rapporteur during the hearing did not endanger the principle of impartiality since the accused would have an opportunity to react and to have the last word.[35]

A different conclusion was reached by the Court in another case against France, where the applicant – an investment fund – complained about the dependence and the mpartiality of the French Banking Commission that had initiated disciplinary proceedings against the applicant and issued a blame for failing to respect the existing legal provisions.[36] The applicant complained in particular about the Banking Commission's concomitant exercise of administrative and adjudicatory functions.

The Court observed that the French Banking Commission exercised two types of functions: first, a control function that encompassed both administrative control and injunction power and on the basis of which the Banking Commission could issue preventive measures, recommendations or injunctions; and second, a disciplinary function that enabled the Banking Commission to issue sanctions and which, for this purpose, rendered it an administrative adjudicator (*jurisdiction administrative*).[37] The Court highlighted in particular the "lack of precision of the legal texts that describe the procedure before the Banking Commission, especially concerning the composition and the functions of the organs called to exercise the different functions entrusted to it".[38] More precisely, there was no internal regulation separating the prosecution, taking of evidence and adjudication of the case before the Banking Commission. On the contrary, the Banking Commission initiated the proceedings, performed the investigation, acted as the accusing party during the oral hearing and finally sanctioned the applicant. Under such circumstances, the

34 *Didier v. France*, quoted above, p. 7.
35 *Didier v. France*, quoted above, p. 8.
36 ECtHR. *Dubus s.a. v. France*, application no. 5242/04, judgement of 11 Jun 2009.
37 *Dubus s.a. v. France*, quoted above, paragraph 55.
38 *Dubus s.a. v. France*, quoted above, paragraph 56.

applicant's doubts as to the Banking Commission' impartiality were objectively justified.[39]

The Court raised an interesting point concerning the Banking Commission's power to initiate its own investigations (*faculté d'auto-saisine*). Without questioning its legality, the Court highlighted, however, that the power to initiate its own investigations must be subordinated to the principle of impartiality: "it is necessary to define with clarity the power to initiate investigations *ex officio*, in such a way that the impression that the guilt of the applicant had already been established from the opening of the proceedings themselves be erased".[40]

In *Sigma Radio Television*, the applicant complained about the cumulation of functions in prosecuting, investigating, trying and deciding cases and imposing sanctions of the Cyprus Radio and Television Authority (CRTA).[41] In addition, the applicant complained that the members and staff of the CRTA had a direct and personal interest in imposing fines as the amounts thus collected were deposited in the CRTA's Fund from which their salaries and remuneration were paid. The Court found that despite the existence of safeguards, the combination of different functions of the CRTA and, in particular, the fact that all fines are deposited in its own fund for its own use, gave rise to legitimate concerns that the CRTA lacked the necessary structural impartiality to comply with the requirements of Article 6.[42]

8.2.3 *Appearances*

One of the most important theories developed by the ECtHR to assess the independence and impartiality of courts is the theory of appearances. The theory of appearances – which is an application of the adage *justice must not only be done, but also seen to be done* – was first developed in relation to the principle of impartiality and later extended to the principle of independence.[43][44]

In *Delcourt*, the Court was faced with the question of whether or not the Belgian Court of Cassation was independent in light of the fact that a member of the *Procureur général*'s department participated in secret deliberations during the applicant's criminal proceedings.[45]

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39 *Dubus S.A. v. France*, quoted above, paragraphs 59–62.

40 *Dubus S.A. v. France*, quoted above, paragraph 60.

41 ECtHR. *Sigma Radio Television Ltd. v. Cyprus*, applications nos. 32181/04 and 35122/05, judgement of 21 Jul 2011.

42 *Sigma Radio Television Ltd. v. Cyprus*, quoted above, paragraph 150.

43 See ECtHR. *Hauschildt v. Denmark*, application no. 10486/83, judgement of 24 May 1989.

44 ECtHR. *Kleyn and others v. the Netherlands*, application nos. 39343/98, 39651/98, 43147/98, 46664/99, judgement of 6 May 2003, paragraph 192, in which the Court indicated that the notion of independence and objective impartiality are closely linked.

45 ECtHR. *Delcourt v. Belgium*, application no. 2689/65, judgement of 17 Jan 1970.

The Court first noted the unusual and unique – among the member states of the Council of Europe – character of the Belgian system. The Court also acknowledged that an accused who sees a member of the *Procureur général*'s department accusing them in open court and then leaving the courtroom with the judges for secret deliberations, might have serious doubts as to the independence of the court.[46] The Court stressed, however, that while appearances were important, they were not decisive.

The Court pointed out that the Belgian system was constructed in such a way as to exclude the influence of the Minister of Justice on the *Procureur général*'s department acting within the Court of Cassation. At the same time, the *Procureur général*'s department within the Court of Cassation could guide the public prosecutors from the lower courts only in matters of doctrine, excluding thus the possibility of giving guidance concerning case-handling. Second, the *Procureur général* was not an accusing party during criminal proceedings, its role being to safeguard the interests of the society. During the deliberations, the *Procureur général* "upholds a different interest, that which is concerned with the observance by the judges of the law and not with the establishment of the guilt or innocence of the accused".[47] Lastly, the Court highlighted that "the *Procureur général*'s department at the Court of Cassation is an adjunct and an adviser of the Court; it discharges a function of a quasi-judicial nature. By the opinions which it gives according to its legal conscience, it assists the Court to supervise the lawfulness of the decisions attacked and to ensure the uniformity of judicial precedent".[48]

The Court concluded its argument in favour of the Belgian system with an unusual argument. It stated that, despite it being unique among the Member States of the Council of Europe, it was a legitimate system. Its legitimacy stemmed from the fact that the system existed for more than one and a half century from the fact that the Belgian Parliament has twice considered but maintained it. The Court seemed furthermore impressed by the fact that neither the legal professions, nor the public opinion tried to challenge this judicial system.[49] The Court concluded that, despite the *Procureur général*'s participation in the deliberations during the applicant's case, the criminal proceedings against him were not biased.

In the *Campbell and Fell* case, the applicants were sanctioned disciplinarily for breaches of prison discipline in an incident that involved both them and

46 *Delcourt v. Belgium*, quoted above, paragraph 30.
47 *Delcourt v. Belgium*, quoted above, paragraph 33.
48 *Delcourt v. Belgium*, quoted above, paragraph 34.
49 *Delcourt v. Belgium*, quoted above, paragraph 36.

prison guards. The Board of Visitors punished them with a total of approximately 570 days' loss of remission. As a result, they were released from prison almost two years later than their initial prison sentence. The applicants claimed that the Board of Visitors was not an independent tribunal within the meaning of Article 6(1) ECHR in that it was appointed and guided by the Home Secretary and was under the control of the prison authorities who were involved in the incident.

The fact that the Board of Visitors was appointed and received guidelines from the Home Office was of little importance to the Court since the members were appointed for only three years, they were unpaid and did not receive guidelines concerning the performance of their adjudicatory functions. The Court remained unimpressed by the lack of any rules concerning the irremovability of the members of the Board or by the lack of separation between its supervisory and adjudicatory functions. The Court did not analyse the existing institutional overlap of these functions, but merely pointed that "the impression which prisoners may have that Boards are closely associated with the executive and the prison administration is a factor of greater weight".[50] However, the Court concluded by a majority that there has been no violation of Article 6(1) ECHR because "the existence of such sentiments on the part of inmates, which is probably unavoidable in a custodial setting", was not sufficient to establish a lack of independence.[51]

In another case, the applicant, Mrs Belilos, had taken part in an unauthorized street demonstration following which a police officer imposed a fine on her.[52] The applicant challenged the fine first before the Police Board. The Police Board found that the facts had been established correctly and that the legal qualification and the fine were correctly assessed. The applicant brought further proceedings seeking to declare void the fine and the criminal proceedings against her before the Criminal Cassation Division of the Vaud Cantonal Court. The latter, however, dismissed the applicant's action because it had only a limited jurisdiction over fines imposed by the Police Board. The same conclusion was reached by the Federal Court upon public law appeal proceedings.

The applicant complained that the Police Board was not an independent tribunal within the meaning of the Article 6(1) ECHR. The Police Board was an administrative body formed of one policeman that would be necessarily biased when called to review the sanctions imposed by his/her colleagues.

50 *Campbell and Fell v. the United Kingdom*, quoted above.

51 *Campbell and Fell v. the United Kingdom*, quoted above, paragraphs 79–82.

52 ECtHR. *Belilos v. Switzerland*, application no. 10328/83, judgement of 29 Apr 1988.

The Court first analysed the status of the Police Board in Swiss legislation and case-law. As it appeared, the relevant laws considered the Police Board a "municipal authority". Furthermore, the Federal Court described the Police Board in its judgments as an "administrative authority", term that has been employed by the Swiss Government in its submissions before the Court in Strasbourg.[53] Second, the Court emphasized the importance of appearances in cases such as that brought by the applicant. The Court pointed out that "the member of the Police Board is a senior civil servant who is liable to return to other departmental duties. The ordinary citizen will tend to see him as a member of the police force subordinate to his superiors and loyal to his colleagues. A situation of this kind may undermine the confidence which must be inspired by the courts in a democratic society".[54]

In a number of Turkish cases, the issue of the independence of military tribunals has been considered. In *Ergin*, the applicant published an article arguing against mandatory military service.[55] He was then prosecuted and convicted by the Turkish Military Court. The ECtHR found that only in exceptional cases can civilians be convicted by the military courts and only in the presence of serious guarantees.[56]

The Court noted that both in the Inter-American and the UN systems, change has occurred in the sense of excluding civilians from being tried by military courts.[57] The Court highlighted the apprehension that the applicant must have felt appearing before judges belonging to the army and concluded that military tribunals cannot be deemed independent or impartial in such instances.

In a few Austrian cases, the Court was faced with the question if the Regional Commission – an institution vested with approval powers concerning real estate transfers – was an independent tribunal for the purposes of Article 6(1) ECHR.

In *Ringeisen*, the applicant's sale concerning a plot of land was blocked by the Regional Commission on the grounds that the applicant intended to use the land for industrial purposes instead of agricultural purposes.[58] The applicant challenged, in particular, the fact that the Regional Commission was appointed by the local government and was therefore not independent.

53 *Belilos v. Switzerland*, quoted above, paragraph 66.
54 *Belilos v. Switzerland*, quoted above, paragraph 67.
55 ECtHR. *Ergin v. Turkey* (*no. 6*), application no. 47533/99, judgement of 4 May 2006.
56 *Ergin v. Turkey*, quoted above, paragraph 47.
57 *Ergin v. Turkey*, quoted above, paragraphs 21–25.
58 ECtHR. *Ringeisen v. Austria*, application no. 2614/65, judgement of 16 Jul 1971.

The Court rejected as a matter of principle the allegation that a body appointed by the executive is biased by the sole reason of its appointment.[59] Without going into a deeper analysis, the Court found that the Regional Commission was simply a tribunal independent from the executive and from the parties that had its members appointed for a five-year mandate and that it was operating on the basis of sufficient procedural guarantees.[60]

Almost a decade later however, the Court considered a similar case and reached a different conclusion. In *Sramek*, the applicant signed a sales contract concerning a plot of land and made an initial payment to the seller.[61] The Regional Commission comprised at the relevant time (1) a farmer, who was the mayor of a municipality in the Tyrol, as chairman, (2) a judge of the Innsbruck Court of Appeal, (3) another farmer, sitting as an agricultural expert, (4) a lawyer and (5) three civil servants from the Office of the Land Government, one of whom acted as rapporteur. The Court stated that, with the exception of the three civil servants, no issues concerning independence arose in relation to the other members of the Regional Commission. However, even if no normative incompatibility existed between the requirements of the Convention and the fact that Government nominees sit on tribunals, a problem might arise when the Governmental body becomes a party to the proceedings. Thus, in the applicant's case, the Land Government represented by the Transactions Officer acquired the status of a party when it appealed to the Regional Authority against the first-instance decision in the applicant's favour, and in that the Transactions Officer was the superior one of the three civil servants in question. What was decisive in this case was the fact that the civil servant at issue occupied a key position within the Regional Commission. As rapporteur, he had to set out and comment on the results of the investigation and then to present conclusions. Also, the secretariat for the Regional Commission's meetings was supplied by the department of the Transaction Officer.

The ECtHR noted that it could not

> confine itself to looking at the consequences which the subordinate status of the rapporteur vis-à-vis the Transactions Officer might have had as a matter of fact. In order to determine whether a tribunal can be considered to be independent as required by Article 6, appearances may also be of importance. Where, as in the present case, a tribunal's members include a person who is in a subordinate position, in terms of his duties

59 *Ringeisen v. Austria*, quoted above, paragraph 97.
60 *Ringeisen v. Austria*, quoted above, paragraph 95.
61 ECtHR. *Sramek v. Austria*, application no. 8790/79, judgement of 22 Oct 1984.

> and the organisation of his service, vis-à-vis one of the parties, litigants may entertain a legitimate doubt about that person's independence.[62]

In light of the above, the Court concluded that the Regional Commission was not an independent tribunal for the purposes of the Convention.

8.2.4 *Safeguards*

The ECtHR has considered a variety of safeguards developed by the Member States of the Council of Europe in order to ensure independence of justice.

In the case of *Le Compte, Van Leuven and De Meyere*, the Court considered that the Appeals Council – an adjudicatory body functioning within the Order of Medical Doctors – was independent due to the equal number of medical practitioners and members of the judiciary sitting on it and to the limited duration of their term of office (six years).[63]

In *Piersack*, the Court found that Belgian legislation provided for enough guarantees against possible pressure on the court of assize, the most important of which was the strict rules concerning the nomination of the jurors.[64]

In the case *Henryk Urban and Ryszard Urban*, the applicants were convicted by a single-judge court formed of an assessor for the administrative offense of refusing to disclose their identity to the police.[65] The Court noted that the assessor at issue could at all times during her mandate be removed by the Minister of Justice and that there were no guarantees against the abusive exercise of this power. The Court held that "it is not necessary to consider other aspects of the status of assessors since their removability by the executive is sufficient to vitiate the independence of the Lesko District Court which was composed of the assessor".[66] The Court also found that the shortcoming in question could not be rectified on appeal since the appeal court did not have the power to quash the judgment delivered by the assessor.[67] The Court relied on the findings of the Polish Constitutional Court, concluding that the way in which Poland had legislated the status of assessors was deficient.[68]

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62 *Sramek v. Austria*, quoted above, paragraph 42.

63 *Le Compte, Van Leuven and De Meyere v. Belgium*, quoted above, paragraph 57.

64 ECtHR. *Piersack v. Belgium*, application no. 8692/79, judgement of 1 Oct 1982, paragraph 27.

65 ECtHR. *Henryk Urban and Ryszard Urban v. Poland*, application no. 23614/08, judgement of 30 Nov 2010.

66 *Henryk Urban and Ryszard Urban v. Poland*, quoted above, paragraph 53.

67 *Henryk Urban and Ryszard Urban v. Poland*, quoted above, paragraph 54.

68 *Henryk Urban and Ryszard Urban v. Poland*, quoted above, paragraphs 50–52.

The situation of assessors has also been analysed in a few Austrian cases. In *Stechauner*, the applicant was a practitioner of general medicine. The dispute that arose between the applicant and the Regional Health Insurance Board was heard and decided by the Regional Appeals Commission.[69] The applicant complained that two assessors sitting for the Regional Appeals Commission were employees of the Regional Health Insurance Boards.

The Court noted that assessors, who have special knowledge and experience in the relevant field, "contribute to a court's understanding of the issue before it and appear in principle to be highly qualified in the adjudication of the disputes. Moreover, the inclusion of lay assessors is a common feature in many countries".[70] In the applicant's case, however, the Court noted that the assessors were not appointed by the Regional Health Insurance Board, but by the Federal Minister of Justice. In addition, the Austrian legislation forbade employees of the Regional Health Insurance Board to sit as assessors in cases where the defendant is their employer.[71] The Court found these two elements sufficient for concluding that, in the case at issue, the Regional Appeals Commission was an independent and impartial tribunal.[72]

In *Bryan*, an enforcement notice was served on the applicant to demolish two buildings that he had allegedly erected in breach of planning legislation.[73] Upon the applicant's appeal to the Secretary of State for the Environment, an inspector was appointed to perform an investigation and to decide the appeal. Mr Bryan contended that the proceedings which he had brought before a planning inspector to challenge the planning enforcement notice served on him did not comply with Article 6(1) ECHR in that the planning inspector was not independent.

While the Court agreed that the relevant statutory provisions in place required the planning inspector to decide on the applicant's appeal in a quasi-judicial, independent, impartial and fair manner, the same provisions gave the right to the Secretary of State to revoke the planning inspector at any stage of the proceedings. The Court held that

> in the context of planning appeals, the very existence of this power available to the Executive, whose own policies may be in issue, is enough to

69 ECtHR. *Stechauner v. Austria*, application no. 20087/06, judgement of 28 Jan 2010.

70 *Stechauner v. Austria*, quoted above, paragaph 55.

71 *Stechauner v. Austria*, quoted above, paragaph 58.

72 The same conclusion was reached by the Court in ECtHR. *Puchstein v. Austria*, application no. 20089/06, judgement of 28 Jan 2010.

73 ECtHR. *Bryan v. the United Kingdom*, application no. 19178/91, judgement of 22 Nov 1995.

> deprive the inspector of the requisite appearance of independence, notwithstanding the limited exercise of the power in practice as described by the Government and irrespective of whether its exercise was or could have been in issue in the present case. For this reason alone, the review by the inspector does not of itself satisfy the requirements of Article 6(1) ECHR, despite the existence of various safeguards customarily associated with an independent and impartial tribunal.[74]

8.3 Impartiality

Impartiality is freedom from bias. While it is indeed questionable if freedom from bias is possible at all, in the context of adjudication this is an essential piece of the right to a fair trial that seeks to ensure that the path between the adjudicator and the case is illuminated only by the facts, the evidence and the adjudicator's reasoning.[75] These three elements are all prone to manipulation during a trial; the facts and the evidence appear as they are presented by the parties and the adjudicator's reasoning will be influenced by his legal education, personal preferences and background. However, impartiality as a procedure of the fair trial principle accepts the facts, the evidence and the adjudicator's reasoning as the basis for delivering a justice system that creates confidence and social cohesion.

Despite its central role, impartiality is not an easy concept to measure as it requires the assessment of the adjudicator's behaviour in the courtroom, but also, of his moral preferences and of his inner life. This is both an intrusive and a difficult exercise that can sometimes lead to approximate results. This is, furthermore, a complicated test to perform for an international tribunal such as the ECtHR. The ECtHR recognizes this and cases concerning impartiality are rare and often linked to the related notion of independence. Also, when the ECtHR performs the impartiality test on its case-law, it borrows notions used to assess the independence of courts.

8.3.1 *Prior Involvement with the Case*

The question of impartiality is often raised before the ECtHR in cases where the adjudicator has been previously involved with the case.

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74 *Bryan v. the United Kingdom*, quoted above, paragraph 38.

75 Beignier, Bernard and Corinne Bléry. "L'impartialité du juge, entre apparence et réalité. " *Recueil Dalloz, Chronique* (2001): pp. 2427–2433.

Hauschildt was one of the earliest cases at the ECtHR in which the Court was faced with the question of the impartiality of a tribunal. The applicant criticized the Danish judiciary system whereby a judge was entrusted with a supervisory role in the investigation process and was later expected to conduct the trial "with a mind entirely free from prejudice".[76]

The Court noted that "this kind of situation may occasion misgivings on the part of the accused as to the impartiality of the judge, misgivings which are understandable, but which nevertheless cannot necessarily be treated as objectively justified. Whether they should be so treated depends on the circumstances of each particular case".[77]

In *Fey*, the applicant complained that the district court judge had both undertaken preliminary investigations and tried his case.[78] Further, the applicant complained that the regional court judges who had rejected his request for release were subsequently called upon to rule on his appeal.

The Court undertook a detailed analysis of the tasks performed by the case judge during the pre-trial investigation. These tasks included collecting information, transmitting the case-file to the Innsbruck District Court so that it could put further questions to the applicant and setting the case down for trial.

The Court stated that impartiality can be determined according to a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect.[79]

The Court noted that, as a matter of principle, the mere fact that a judge has made pre-trial decisions in a case is not sufficient to ground the fear of impartiality. What is decisive is the extent and the nature of those measures.

The Court concluded, however, that the various measures taken prior to the trial by the judge deciding the case were not such as could have led her to reach a preconceived view on the merits. The Court especially highlighted the fact that the judge under consideration acquitted the applicant on one of the two accounts.[80]

In *Fatullayev*, the applicant was a journalist who, after publishing two articles concerning the Khojaly massacre, was convicted of terrorism and ordered to pay civil damages.[81] He complained that the judge who had examined

76 *Hauschildt v. Denmark*, quoted above, paragraph 43.
77 *Hauschildt v. Denmark*, quoted above, paragraph 48.
78 ECtHR. *Fey v. Austria*, application no. 14396/88, judgement of 24 Feb 1993.
79 *Fey v. Austria*, quoted above, paragraph 28.
80 *Fey v. Austria*, quoted above, paragraphs 32–35.
81 ECtHR. *Fatullayev v. Azerbaijan*, application no. 40984/07, judgement of 22 Apr 2010.

allegations against him in the context of a civil action could not have an impartial position when examining the same allegations in the criminal context.

The Court noted that as a matter of principle, a situation where the same judge examines the questions of both civil liability and criminal liability arising from the same facts does not necessarily affect the judge's impartiality. However, on the facts of the case, the Court considered that having decided the civil case against the applicant, the judge had already given an assessment to the applicant's statements and, more importantly, had qualified those facts as false information that defamed the survivors of the Khojaly massacre. Under these circumstances, doubts could be legitimately raised as to the appearance of impartiality of the same judge who was later called to give his opinion about the same allegedly defamatory statements, but in a criminal context.[82]

In *Elezi*, the applicant complained about the impartiality of the lay judges because they were provided a copy of the bill of indictment that contained the prosecution's main findings.[83] The Court noted the findings of the domestic courts that the bill of indictment should not be disclosed to the lay judges as they risked mixing up the prosecution evidence with the matters from the main hearing.[84] The Court noted however that, after the bill of indictment was presented to the lay judges, twenty more hearings were held in the applicant's case and that the applicant did not raise an objection concerning the impartiality of the lay judges in the domestic proceedings. On the basis of this, the Court found that the applicant's fear as to the lay judges' impartiality could not be justified objectively.[85]

An interesting issue was raised in the case *Perus*, where the applicant was involved in a long-standing employment dispute.[86] He complained that one of the judges involved in the proceedings concerning his appeal on points of law could not be considered impartial because of his prior involvement in the case as a judge of the Higher Court. The Court noted that nine years had elapsed between the date of the judgement adopted by the Higher Court's panel presided over by judge L.F. and the judgement of the panel of the Supreme Court of which judge L.F. was a member. The Court drew attention to the fact that, despite the long period of time between the different parts of the proceedings, judge L.F. played very important roles at different levels of jurisdiction: he was

82 *Fatullayev v. Azerbaijan*, quoted above, paragraphs 138–140.
83 ECtHR. *Elezi v. Germany*, application no. 26771/03, judgement of 12 Jun 2008.
84 *Elezi v. Germany*, quoted above, paragraph 47.
85 *Elezi v. Germany*, quoted above, paragraphs 51–54.
86 ECtHR. *Perus v. Slovenia*, application no. 35016/05, judgement of 27 Sep 2012.

the presiding judge in the Higher Court's panel and he was the judge rapporteur during the proceedings before the Supreme Court.

The Court concluded that there was no indication in the case-file that judge L.F. was aware of or remembered her prior involvement in this particular case. It observed, however, that there was "a risk of problems arising in a system which lacks safeguards to ensure that the judges are reminded of their prior involvement in particular cases, above all where such matters rely on the judges' own assessment".[87]

8.3.2 *Expression of Views*

Impartiality can also be at issue when the adjudicator expresses publicly views about the outcome of the case before the case is settled.

In *Olujic*, the applicant was a judge and the former President of the Supreme Court.[88] Disciplinary proceedings were conducted against the applicant by the National Judicial Council (NJC) for having socialized in public places with two individuals who had criminal backgrounds. As a result of the disciplinary proceedings, the applicant was dismissed from the office of judge and from that of President of the Supreme Court. The applicant complained that the three members of the NJC were not impartial since they had expressed opinions against him in the national newspapers during the disciplinary proceedings.

The Court noted that all three members of the NJC, including its president, publicly used expressions that implied they had already formed an opinion about the applicant's guilt before the finalization of the proceedings. In addition, the statements were such as to justify the applicant's fears as to their impartiality.[89] The Court found therefore a breach of Article 6(1) ECHR.

In a case involving the gaming industry in the United Kingdom, the Court was called to decide if the Gaming Board was an independent and impartial tribunal.[90] In that case, the applicant was the sole executive director of a company managing six of the twenty casinos licenced to operate in London. Following a raid by the Gaming Board, the applicant's employment contract was terminated. In addition, the president of the Gaming Board had publicly stated during an industry lunch that the applicant was not a fit and proper person to exercise the function of an executive director. Later, the Gaming Board initiated special proceedings – called Section 19 proceedings – to deprive the

87 *Perus v. Slovenia*, quoted above, paragraph 39.
88 ECtHR. *Olujic v. Croatia*, application no. 22330/05, judgement of 5 Feb 2009.
89 *Olujic v. Croatia*, quoted above, paragraphs 62–67.
90 *Kingsley v. the United Kingdom*, quoted above.

applicant of the right to exercise managerial functions in the gaming industry in the UK and affiliated jurisdictions.

The Court noted that it appeared from the facts of the case that the Gaming Board had already formed the opinion that the applicant was not a fit and proper person before a hearing was held in this case. The three members who subsequently adjudicated the Section 19 proceedings against the applicant were all present and voted in favour of the decision of the Gaming Board that the applicant was not a fit and proper person to be a casino director. The Court concluded that for this reason the panel hearing this dispute did not present the necessary appearance of impartiality as required by Article 6(1) ECHR.[91]

8.4 The Relevance of the ECtHR's Case-Law on Independence and Impartiality

Two main questions should guide the modern debate about the independence and impartiality of justice. First, is independence an end in itself or should it be pursued in order to achieve other goals, and if so, which other goals? Second, should the approach to independence be holistic or atomistic? These questions are particularly important for the conversation surrounding the independence of administrative justice. Thus, for example, pursuing independence for the purpose of achieving efficiency is a different effort from pursuing independence for the purpose of trust-building or maintaining a healthy separation of powers. Also, an approach to independence wherein one safeguard can render an administrative tribunal independent is a different approach from conceiving an administrative process that ensures independence as a whole.

The case-law of the ECtHR on independence and impartiality appears to be well-equipped to answer these questions and to inform the modern constitutional debates outlined at the beginning of this chapter concerning the independence of administrative justice. The ECtHR initially formulated the principles concerning the interpretation of the notions of independence and impartiality in criminal cases. Over the years, however, the same principles have been successfully applied to administrative disputes covering various issues facing the citizen and the state. Irrespective of the disputed judicial formations – assessors, single-judge courts, Supreme Administrative Courts or even the Crown in the UK – and of the types of disputes – land planning disputes, medical disputes, banking disputes or disputes concerning the financial

91 *Kingsley v. the United Kingdom*, quoted above, paragraphs 49–50.

markets – the ECtHR maintained that Article 6(1) ECHR required tribunals to be independent and impartial.

Article 6(1) ECHR requires three conditions to be satisfied for a tribunal to be deemed compatible with the Convention: the tribunal must be established by law, it must be independent and it must be impartial. The ECtHR highlights that its goal is not to impose upon the states a constitutional model concerning the relationship and interaction of different state powers.[92] However, the ECtHR's case-law on independence and impartiality appears to achieve the opposite. In relation to the condition that a tribunal must be established by law, the ECtHR found that a tribunal compatible with Article 6(1) ECHR must be established respecting a constitutional chain of delegation: citizens choose the parliament or vote for the constitution, the parliament or the constitution establish tribunals and tribunals deliver justice to citizens. In addition, a tribunal established by law must also specifically be endowed with a judicial function.

Independence is a concept dealing with external features of the judiciary and it requires a constitutional setup whereas other branches of the government do not encroach on the performance of justice. From this point of view, independence acts like a fence. Impartiality, on the other hand, is a concept that deals with the internal and intimate features of the judiciary, describing both the peer relationships within the judiciary, and also the relationship that a judge has with his own beliefs. Impartiality thus describes what should take place inside the fence. Although the ECtHR maintains the distinction between independence and impartiality, sometimes it uses them interchangeably.

Based on the case-law described above, I suggest that, when assessing the independence and impartiality of an administrative tribunal, the ECtHR takes into account four elements: (1) cumulation of functions, (2) safeguards, (3) appearances and (4) availability of judicial review. These elements are often interlinked.

A salient feature of administrative tribunals is the concomitant exercise of investigative, prosecutorial and adjudicative functions. Since the ECtHR requires two fresh eyes and a fresh brain to perform decision-making tasks, tribunals that cumulate functions would *a priori* be contrary to Article 6(1) ECHR because of the pre-formed opinions that the decision-makers would have gathered. This is not an absolute rule, however, and the ECtHR elegantly qualifies it. On the one hand, cumulation of functions is starkly visible and can easily offend the sense of justice of a citizen involved in trial against the state. On the

92 *Savino and Others v. Italy*, quoted above, paragraph 92.

other hand, the ECtHR distinguished in *Didier* between simple case-handling functions such as checking the facts and reporting on them and more offensive forms of cumulation of functions that would combine the formulation of charges with the power to close cases or extend investigations.[93] In the same vein, the ECtHR showed in *Dubus S.A.* that both legal texts and internal regulations of the banking industry should clearly separate the tasks of prosecution from taking evidence and from adjudication.[94]

The case-law of the ECtHR on independence and impartiality pays close attention to the safeguards engrained in the analysed systems. The ECtHR has pointed out that clear rules concerning the appointment and removability of adjudicators by the executive, the presence of technical specialists alongside generalists on specialized tribunals, and internal rules concerning the separation of functions contribute to a tribunal's independence and can prevent abuses during the trial.

Three general ideas can be deduced from the case-law analysed above. First, *lack of individual independence can be compensated for by strong fair trial guarantees during the trial or corrected during judicial review*. Thus, if an adjudicator has been previously involved with a case, posing thus a threat to independent adjudication, rules of procedure concerning the disclosure of the previous involvement or the change in the bench, may suffice to compensate for the lack of independence. Also, the appeal court, may assess the alleged lack of independence, reconsider the case independently or re-send the case to the concerned adjudicator. In any case, what is important is that the procedure as a whole allows for the assessment and correction of the lack of independence.

The second idea deduced from the case-law of the ECtHR is that *structural lack of independence can neither be compensated, nor corrected by judicial review*. Indeed, judicial review can play a role as a safeguard for the independence of justice only when the lack of independence is personal, not structural. For example, as *Beaumartin* highlighted, there are instances when judicial review cannot remedy the lack of independence of an administrative procedure due to the deference shown during judicial review to the administrative authority at issue.[95] In other words, deference by a court to an administrative authority performing judicial functions that lacks independence is not compatible with the right to a fair trial.

Finally, it appears that the ECtHR proposes a relationship of direct proportionality between the consequences of the lack of independence and

93 *Didier v. France*, quoted above.
94 *Dubus S.A. v. France*, quoted above.
95 *Beaumartin v. France*, quoted above.

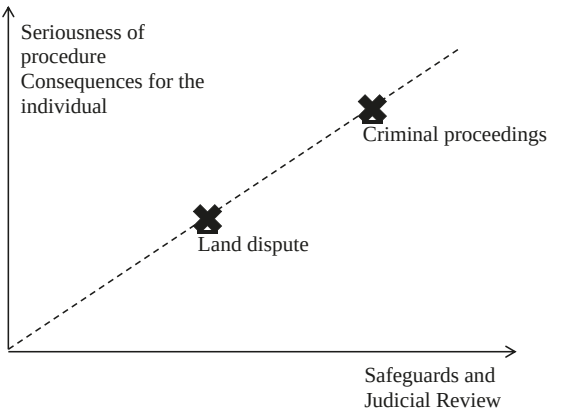

FIGURE 9 Relationship between seriousness of consequences of a given procedure and existing safeguards or judicial review

the existing safeguards, including the availability of judicial review. In *Sigma Radio*, the ECtHR found that the fines imposed by an administrative authority cumulating prosecutorial and adjudicative functions were used to pay the salaries of the administrative authority's employees.[96] In *Campbell and Fell*, the ECtHR took note of the fact that the disciplinary measures applied by the Board of Visitors – a body having overlapping supervisory and adjudicatory functions – delayed the defendants' release from prison by two years.[97]

As Figure 9 above suggests, when a procedure has serious consequences for the individuals affected, courts or tribunals should be able to perform effective judicial review.

Independence and impartiality are intimately linked to the design of the justice-imparting institutions and their procedures. The duty of independence is thus individual, behavioural and systemic. Individual adjudicators are required to act independently and impartially. However, this is not sufficient. The design of the justice system must be construed to support institutional, procedural and financial independence at all stages and to correct the lack of independence through judicial review.

To conclude, I suggest that the protective attitude of the ECtHR towards the judicial function in Europe – irrespective of the fact that this function is performed in a court or an administrative tribunal – indicates that the ECtHR embraces a holistic approach towards independence. Administrative justice

96 *Sigma Radio Television Ltd. v. Cyprus*, quoted above.

97 *Campbell and Fell v. the United Kingdom*, quoted above.

should be imparted independently, and the standards that the ECtHR uses for this purpose do not differ from the standards applied for classical court proceedings. However, procedural defects that affect the independence of administrative proceedings should be corrected during the process of effective judicial review.

In the following chapters, I endeavour to analyse how these precepts are reflected in the work of the EU Commission as enforcer of EU competition law.

CHAPTER 9

The Structure of the European Commission as Enforcer of Competition Law

The history of competition policy is closely linked to the history of the EU. The Treaty of Paris of 1951 establishing the European Coal and Steel Community (ECSC) dealt in Article 65 with agreements and concerted practices between firms and associations of firms which tend directly or indirectly to prevent, restrict or distort normal competition within the Common Market. Article 66 of the same treaty dealt with mergers and Article 67 with the abuse of dominant positions. These articles of the ECSC Treaty became the blueprint for the competition law provisions that were adopted in the treaties establishing the European Communities and the European Union.

The Treaty of Paris entrusted the High Authority with all issues concerning the enforcement of competition policy, a task that the Treaty of Rome later placed in the hands of the European Commission.

The first implementing regulation was adopted after the entry into force of the Treaty Establishing the European Economic Community (EEC). Regulation 17/1962 established the European Commission's mandate and investigative powers for the enforcement of Articles 85 and 86 of the Treaty (now Articles 101 and 102 TFEU).[1] This regulation remained in force from 1962 until 2002 when it was replaced by Regulation 1/2003 (Regulation on Procedure) with the purpose of meeting the challenges of an integrated market and a future enlargement.[2]

When the Commission acts as the enforcer of EU competition law, it combines investigative, prosecutorial and adjudicative functions. What is more, the adjudicative functions that the Commission performs are split, as shown in Figure 5 above, between DG COMP, which prepares decisions, and the College of Commissioners, which adopts the decisions. Therefore, the current analysis follows the European Commission first as a political institution, and second as a bureaucracy (Chapter 9). I then focus on enforcement procedure and the Commission's powers of investigation in the field of competition law

1 Regulation No 17 First Regulation Implementing Articles 85 and 86 of the Treaty, OJ P 013, 21.2.1962, pp. 204–211.

2 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 001, 04.01.2003, pp. 1–25.

(Chapters 10 and 11). Lastly, I highlight the due process elements present in the procedure and propose a framework for assessing the Commission's independence (Chapters 12, 13 and 14).

9.1 The European Commission as a Political Institution

The European Commission is described as the "core executive" of the European Union.[3] It is seen by some as displaying many of the characteristics of national governments.[4] However, as Curtin rightly noted, the European Commission is not only in the business of service delivery, but has also outstanding policy-making and regulation tasks, as well as limited enforcement tasks in the fields mandated by the Treaties.[5]

Article 17(1) TEU states that the European Commission

> shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of the measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union. It shall execute the budget and manage programs. It shall exercise coordinating, executive and management functions, as laid down in the Treaties. With the exception of the common foreign and security policy, and other cases provided for in the Treaties, it shall ensure the Union's external representation. It shall initiate the Union's annual and multiannual programming with a view to achieving interinstitutional agreements.

The European Commission has been the subject of a series of reforms in the last fifteen years, the most important of which led to the politicisation of the Commission's leadership. The politicisation of the Commission is an important phenomenon to take into account when assessing its independence. Three factors contributed to the politicisation of the Commission's leadership: (1) changing recruitment patterns; (2) changing role conceptions and (3) altering the interaction pattern between the Commissioners and the senior officials

3 Hix, S. *The Political System of the European Union.* Basingstoke: Palgrave Macmillan, 2005, p. 32.

4 Egeberg, M. "The European Commission." *European Union Politics*. Ed. M. Cini. Oxford: Oxford University Press, 2003, pp. 131–147.

5 Curtin, *op. cit.*, p. 91.

of the Commission.[6] This shift leaned toward controlling the influence that the Commission exerts over the design and execution of the policy making process. The motivation for this shift was "that the Commission's services were perceived as too powerful, and too unresponsive to political direction, and unable to ensure efficient performance".[7]

The Commissioners appointed nowadays tend to have serious political careers behind them, having had very often lead roles in, or even headed, ministries or large domestic agencies. In addition, the procedure for the appointment of the Commissioners has been politicised as well, since the European Parliament continues to play an increased role in the selection process. Lastly, the background of the Commissioners has changed towards a generalist education as opposed to the more specialized training of the senior officials. Wille concludes that "generalist political executives will be less able to contest issues on substantive grounds than executives with more specialized training".[8]

Another issue related to the Commission's independence is the posterior careers embraced by the Commissioners. Wille, in her insightful study of the subject, has noted that the politicisation of the Commission has led to a change of heart concerning the Commissioners' involvement with domestic politics. In the past, Commissioners were expected to remain above domestic politics while pursuing their European mandates in order to ensure independence in decision-making. However, this

> requirement has slowly been eroded as the institution has become more politicised. Commissioners no longer cut themselves off from national politics when they move to Brussels. Politics, at both national and international level, are important for political professionals, as they provide access to the accumulated resources for a career following their stint in the EU Commission.[9]

In this sense, Wille shows that Prodi and Monti became Prime Ministers of Italy, Grybauskaitė became president of Lithuania and Lamy was appointed Director-General of the WTO.

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6 Wille, Anchrit. "Senior Officials in a Reforming European Commission: Transforming the Top?" *Management Reforms in International Organizations*. Eds. M.W. Bauer and C. Knill. Baden-Baden: Nomos, 2007, pp. 37–50.

7 Wille (2007), *op. cit.*, p. 34.

8 Wille (2007), *op. cit.*, p. 18.

9 Wille, Anchrit. *The Normalization of the European Commission: Politics and Bureaucracy in the EU Executive*. Oxford: Oxford University Press, 2013, p. 76.

Lastly, ex-commissioners also move to business and commercial positions after leaving the Commission by joining lobbying groups or think-tanks. Eleven out of the fifteen outgoing commissioners of the first Barroso Commission were recruited for corporate positions within six months of leaving that commission.[10]

9.1.1 *Cumulating Constitutional Functions*

The European Commission cumulates three constitutional powers in the field of competition law enforcement: legislative power, executive power and judicial power. These functions can be shared with other EU institutions, or exercised individually by the Commission only.

The European Commission participates in the development of EU competition law by submitting proposals for legislative action to the Council and to the European Parliament. Most often, the Commission shares the legislative power with the Council of Ministers – the main legislative body of the union – and with the European Parliament. Other bodies that are involved with competition law-making are the Advisory Committee, which attends hearings and makes comments on the Commission's proposed decisions or legislation in the field of antitrust, and the Economic and Social Committee, which has an advisory role with regard to competition policy.

The Commission can also act as unique legislator when it adopts implementing regulations, the most recent of which is Commission Regulation 773/2004 that is binding in its entirety and directly applicable in all member states.[11]

Another instance in which the Commission acts as unique legislator in the field of competition law is when it adopts the so-called block exemption regulations, which are used to declare certain categories of state aid compatible with the TFEU. If certain categories of state aid fall under the ambit of the block exemption regulation, they are exempted from the otherwise regular duty of prior notification and Commission approval. Thus, the block exemption regulation concerning *de minimis* aid exempts aid amounts up to 200,000 euro per undertaking over a three-year period because they are deemed to have no impact on competition and trade in the internal market.[12] Measures that fulfil

10 Wille (2013), *op. cit.*, p. 77.

11 Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ L 123, 27.4.2004, pp. 18–24.

12 Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid, OJ L 352, 24.12.2013, pp. 1–8.

the criteria of the regulation do not constitute state aid according to the meaning of EU rules and therefore do not need to be notified to the Commission for approval before they are implemented. The General Block Exemption Regulation (GBER) has considerably extended the scope of exemptions from prior notification of state aid granted to companies.[13] Under the revised GBER, member states are able to grant more aid in higher amounts without having to notify them to the Commission for prior authorisation, because they are less likely to lead to undue distortions of competition.

In addition to implementing Council regulations and adopting its own regulations pursuant to powers delegated by the Council, the Commission can adopt non-legislative measures such as notices and guidelines, also called soft law. Although the legal status of these instruments is open to debate, what is certain is that they provide important information and clarification on the Commission's practice and can trigger legitimate expectations. The Commission's notice on immunity from fines (hereafter, Leniency Notice) clarified the information an applicant needs to provide to the Commission to benefit from immunity and introduced a procedure to protect corporate statements made by companies.[14] The Guidelines concerning the Method of Setting Fines provided that companies may be fined up to 10% of their total annual turnover.[15] Within this limit, the guidelines provided that fines may be based on up to 30% of the company's annual sales to which the infringement relates, multiplied by the number of years of participation in the infringement. Moreover, a part of the fine – the so-called "entry fee" – may be imposed irrespective of the duration of the infringement.

The European Commission is the main executive body of the EU ensuring that the provisions of the TFEU, the regulations, the directives and the decisions are implemented in accordance with the principles of EU law. In the field of competition law, Article 105 TFEU provides that the Commission shall ensure the application of Articles 101 and 102 TFEU, shall investigate any infringements and shall bring to an end those that are incompatible with the internal market.

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13 Commission Regulation (EU) 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, pp. 1–78.

14 Commission notice on immunity from fines and reduction of fines in cartel cases, OJ C 298, 8.12.2006, pp. 17–22.

15 Guidelines of method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ C 210, 1.9.2006, pp. 2–5.

Until 1st of May 2004, the Commission was composed of twenty members: two for each of the larger member states – Germany, France, the UK, Italy and Spain – and one for each of the smaller member states – Austria, Belgium, Denmark, Finland, Greece, Ireland, Luxembourg, the Netherlands, Portugal and Sweden. The waves of accession have, however, changed the Commission's structure and the College of Commissioners – the body ensuring the Commission's political leadership – is now composed of 28 Commissioners, one from each EU country. The Commissioners are elected for a term of five years and each Commissioner is entrusted with a specific policy area by the President of the Commission.

The Commission is also responsible for international cooperation in competition matters. For this purpose, the Commission cooperates on a regular basis with competition authorities from the countries with whom the EU has concluded agreements concerning cooperation in competition matters: the United States, Canada, Japan, South Korea and, more recently, Switzerland. The Commission also works with the ICN, the OECD, the UNCTAD and the WTO.

The Commission has a parallel competence with the NCAs and the national courts to enforce competition law whenever a breach of Article 101 or Article 102 TFEU has taken place. As Van Bael has noted, "in addition to its pivotal role in the allocation of cases, the Commission retains some further control over the proceedings taking place before NCAs and national courts".[16]

During enforcement procedures of Articles 101 and 102 TFEU, the Commission exercises judicial functions: the Commission decides which cases to investigate from those that are notified and which cases not to pursue, which investigative measures to use, which facts to support with evidence, which questions to ask about the relevant undertakings and what measures to employ to end the damaging behaviour.

Cases that end with a formal decision can be challenged before the GC, exercising jurisdiction at the first instance in actions brought against the Commission pursuant to Article 263 TFEU (action for annulment), Article 232 (failure to act) and Article 229 TFEU (review of penalties imposed by the Commission).

The decisions of the GC can be challenged before the CJEU that became a court of appeal insofar as competition decisions of the Commission are concerned. In addition, the Court of Justice has jurisdiction, pursuant to Article 267 TFEU, to give preliminary rulings at the request of domestic courts concerning

16 Van Bael, *op. cit.*, p. 85.

the interpretation or the validity of community law provisions, including in the field of competition law.

9.1.2 *The Reform and Independence of the Commissioners*

The Treaty attaches particular importance to the independence of the Commission and prescribes both substantive and procedural standards of independence. Substantively, Article 17(3) TFEU requires that the members of the Commission be selected from persons whose independence is beyond doubt. Procedurally, the Treaty provides that in carrying out its responsibilities, the Commission shall be independent. In addition, the members of the Commission shall neither seek nor take instructions from any government or other institution, body, office or entity. They shall also refrain from any action incompatible with their duties or the performance of their tasks. Lastly, Article 245(1) TFEU requires the member states to respect the Commission's independence and to refrain from influencing them in the performance of their tasks.

The TFEU empowers the President of the Commission to request the resignation of a Member of the Commission.[17] Also, Members of the Commission no longer fulfilling the conditions required for the performance of their duties or guilty of serious misconduct may be compulsorily retired or deprived of pension rights or other benefits.[18]

Important developments concerning the notion of independence have been introduced by the *Code of Conduct for the Commissioners*. The *1999 Code of Conduct for* Commissioners, adopted after the resignation of the Santer Commission, developed the obligations of independence and integrity imposed upon the members of the community by the treaties. Following several studies concerning the effectiveness of codes of conduct for the holders of public office worldwide and within the European Union, President Barroso announced his intention to review the Code of Conduct for Commissioners.[19]

The 2011 *Code of Conduct for Commissioners* strengthened the notion of independence by establishing clearer rules on political activities, on the activities

17 Article 17(6) of the Treaty on the Functioniong of the European Union.

18 Articles 245 and 247 of the Treaty on the Functioniong of the European Union.

19 Demmke, Christoph, Mark Bovens, Thomas Henökl and Timo Moilanen. *Regulating Conflicts of Interest for Holders of Public Office in the European Union*. Luxembourg: Office for Official Publications of the European Communities, 2008.

European Parliament. Directorate General For Internal Policies. *The Code of Conduct for Commissioners – improving effectiveness and efficiency: Study*. 2009. Available at http://www.europarl.europa.eu/document/activities/cont/200907/20090728ATT59122/20090728ATT59122EN.pdf accessed on 23 February 2021.

performed by the commissioners after leaving the Commission and by establishing a procedure for dealing with the conflicts of interest.[20]

The 2018 *Code of Conduct for Commissioners* replaced the previous one and has been adopted with the view of integrating the experience gained in its application and in order to be "up to the high ethical standards that are expected of the Members of the Commission".[21]

The 2018 *Code of Conduct for Commissioners* stresses the fact that the Members of the Commission have political responsibility and are collectively accountable to the European Parliament. In view of this, the code stresses that "members shall behave and perform their duties with complete independence, integrity, dignity, with loyalty and discretion" and "shall observe the highest standards of ethical conduct".[22] Also, interestingly, the code stipulates that members shall not act or express themselves "in a manner which adversely affects the *public perception of their independence*, their integrity or the dignity of their office" and shall avoid any situation which may give rise to a conflict of interest or which may "reasonably be perceived as such".[23] (emphasis added) In case of a conflict of interest, members must recuse themselves from any decision or instruction of the file and from the participation in any discussion, debate or vote in relation to the matter creating a conflict of interest.[24]

The code provides for the establishment of the Independent Ethical Committee in order to assist the Commission in the application of the Code of Conduct.[25]

9.2 The European Commission as an Autonomous Bureaucracy

The TFEU does not contain any provisions concerning the functioning of the European Commission as a bureaucracy. This is surprising, taking into account the size and the importance of this administration. The Commission accounts

20 European Commission. *Code of Conduct for Commissioners*. C(2011) 2904 final. 20 Apr 2011. Available at https://ec.europa.eu/info/sites/info/files/code-of-conduct-for-commissioners_april2011_en.pdf accessed on 23 February 2021.

21 European Commission. *Commission Decision of 31.1.2018 on a Code of Conduct for the Members of the European Commission*. C(2018) 700 final, p. 2. Available at https://ec.europa.eu/info/sites/info/files/code-of-conduct-for-commissioners-2018_en_0.pdf accessed on 23 February 2021.

22 European Commission. C(2018) 700 final, quoted above, Article 2.

23 European Commission. C(2018) 700 final, quoted above.

24 European Commission. C(2018) 700 final, quoted above, Article 4.

25 European Commission. C(2018) 700 final, quoted above, Article 12.

for 46.6% of the total EU budget for administration and has more than 32,000 posts of public servants.[26]

9.2.1 *The Autonomy of the European Commission*

Carpenter defines autonomy as the capacity of a bureaucracy to "take sustained patterns of action consistent with its own wishes, patterns that will not be checked or reversed by elected authorities, organized interests, or courts".[27]

The literature on the autonomy of bureaucracies focuses on how power is gained, distributed and redistributed in a state. Weber's model of ideal bureaucracy is an apolitical organization separated from the realm of politics. Even so, Weber recognized the "pure interest of the bureaucracy in power" and its "pure power instinct".[28] Ideal bureaucrats who limit themselves to administering policies put in place by politicians are rare, though. Most commonly, they are thought to be playing the power game alongside politicians. This tension between elected and appointed, representative and administrative institutions leads to the "distinctive puzzle of the contemporary state, reflecting as it does the clash between the dual and conflicting imperatives of technical effectiveness and democratic responsiveness".[29]

The political-bureaucratic interface of the Commission has been a subject of research, concern and debate. Günter Verheugen – a politician himself – presented in harsh terms the problematic relationship between the political and the administrative heads of the Commission. He has criticized Commission bureaucrats for the "permanent power struggle between the commissioners and their high-ranking bureaucrats", highlighting that "the whole development in the last ten years has brought the civil servants such power that in the meantime the most important political task of the 25 commissioners is controlling this apparatus".[30]

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26 European Commission. *European Commission Key HR Figures 2019*, available at: https://ec.europa.eu/info/about-european-commission/organisational-structure/commission-staff_en accessed on 23 February 2021.

27 Carpenter, D. *The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovations in Executive Agencies, 1862–1928*. Princeton: Princeton University Press, 2001, p. 14.

28 Weber, Max. "On Bureaucracy." *From Max Weber: Essays in Sociology*. Eds. Hans Gerth and C. Wright Mills. New York: Oxford University Press, 1946, p. 233.

29 Aberbach, J., R. Putnam and B. Rockman. *Bureaucrats and Politicians in Western Democracies*. Cambridge: Harvard University Press, 1981, p. 3.

30 Manhony, Honor. "Commission bureaucrats are getting too powerful, says Verheugen." *EU Observer*. 5 Oct 2006. Available at https://euobserver.com/political/22572 accessed on 23 February 2021.

Although surprising, the affirmation of Günter Verheugen, was not signalling a novel phenomenon. The relationship between politicians and civil servants is one of the most complicated relationships of many governance systems because while each has their role in running the public sector, "it is often assumed that both have their own goals, interests, resources and commitments".[31]

As a seminal study on the autonomy of the European Commission has shown, "even though the Commission is in many ways a typical Weberian bureaucracy, it is also a unique administration with features that set it apart from the most national and international public bureaucracies".[32] The autonomy of the European Commission stems from the following sources: (1) Formal authority granted by law; (2) Legitimacy derived from a combination of technical expertise and functional monopoly and (3) Organizational culture.[33] The authors argue that the waves of transformation that have affected the Commission have not diminished its autonomy. On the contrary, they have contributed to the Commission's increased autonomy vis-á-vis its political masters.

9.2.2 *The Reform and Independence of the EU Commission's Civil Service*

Curtin describes three categories of civil servants working in the Commission: (1) core Eurocrats – civil servants located predominantly in the Commission, working either in the Policy Directorates General or in the General Secretariat; (2) seconded national experts – national civil servants involved in EU policymaking and funded by the national governments; and (3) national civil servants and scientific experts – civil servants with technical backgrounds.[34]

The perception of the European civil service has rarely been positive. In fact, the perception of "Eurocrats" has been that they "had too much power, that they were poor managers, and that their recruitment was mainly the result of patronage".[35] Therefore, the 2001 Kinnock reforms described in Section 2.2. above, radically reformed the Commission's management. However, these reforms resulted in other, unforeseen consequences.

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31 Wille, Anchrit. "Bridging the Gap: Political and Administrative Leadership in a Reinvented Commission." *Institutional Dynamics and the Transformation of Executive Politics in Europe*. Ed. M. Egeberg. Mannheim: CONNEX Report Series 3, 2007, pp. 7–41.

32 Ellinas and Suleiman, *op. cit.*, p. 196.

33 Ellinas and Suleiman, *op. cit.*, pp. 18–35.

34 Curtin, *op. cit.*, pp. 106–113.

35 Wille (2013), *op. cit.*, p. 121.

Wille has criticised the de-professionalisation and, instead, "managerialisation" of the upper echelons of the Commission's civil service, as a result of which "policy-oriented professionalism is replaced by managerial skills, performance measurement and financial control. The focus for most senior officials is shifted from a professional policy advisory role with a clear focus on content to a role of process management".[36]

While the recruitment of senior civil servants in the Commission has been removed from the influence of the member states, political capital and previous experience working for a commissioner played an important role in securing a position as a Director-General.[37] Georgakakis showed that "the administrators of Europe tend to be involved in a long-term process of construction of European social positions, closely linked to European institutions, while those who embody their authority – Commissioners – are less and less involved".[38]

EU legislation contains significant provisions seeking to ensure that the members of the European civil service will act independently and impartially. Article 11 of the *EU Staff Regulations* provides that "an official shall carry out his duties and conduct himself solely with the interests of the Union in mind. He shall neither seek nor take instructions from any government, authority, organisation or person outside his institution. He shall carry out the duties assigned to him objectively, impartially and in keeping with his duty of loyalty to the Union".[39]

Before recruiting an official for an EU institution, the appointing authority must examine if the candidate has "any personal interest such as to impair his independence or any other conflict of interest".[40] Furthermore, "an official may neither keep nor acquire, directly or indirectly, in undertakings which are subject to the authority of the institution to which he belongs or which have dealings with that institution, any interest of such kind or magnitude as might impair his independence in the performance of his duties".[41]

Lastly, the *Code of Good Administrative Behaviour for Staff of the European Commission in their Relations with the Public* also calls for the staff "to be courteous, objective and impartial". This code also asks that "staff shall always act

36 Wille (2007), *op. cit.*, p. 23.

37 Georgakakis, Didier. "Tensions within Eurocracy?" *European Consortium of Political Research.* Aug 2009, Potsdam, Germany.

38 Georgakakis, *op. cit.*, p. 30.

39 Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community. OJ P 045, 14.6.1962, p. 1385.

40 Regulation No 31 (EEC), quoted above, article 11.

41 Regulation No 31 (EEC), quoted above, article 11a.

objectively and impartially, in the Community interest and for the public good. They shall act independently within the framework of the policy fixed by the Commission and their conduct shall never be guided by personal or national interest or political pressure".[42]

9.2.3 *The Directorate-General for Competition*

> "It is clear that the actual physical task of carrying out an organization's objectives falls to the persons at the lowest level of the administrative hierarchy. The automobile, as a physical object, is built not by the engineer or the executive, but by the mechanic on the assembly line. The fire is extinguished, not by the fire chief or the captain, but by the team of firemen who play a hose on the blaze".
>
> HERBERT. A. SIMON

The Commission is organised into thirty-three departments known as Directorates-General (DG s) and eleven services. Every DG is specialised in one area. The department specialized in the area of competition law is DG COMP, which comprises nine sector-based directorates:

Directorate A: Policy and Strategy
1) Antitrust Case Support and Policy
2) Mergers Case Support and Policy
3) State Aid Strategy
4) European Competition Network
5) International Relations
6) Private Enforcement

Directorate B – Markets and Cases I: Energy and Environment
1) Antitrust: Energy, Environment
2) State Aid I
3) State Aid II
4) Mergers

Directorate C – Markets and Cases II: Information, Communication and Media
1) Antitrust: Telecoms
2) Antitrust: Media

42 European Commission. *Code of Good Administrative Behaviour: Relations with the Public*. OJ L 267, 20.10.2000.

3) Antitrust: IT, Internet and Consumer Electronics
4) State Aid
5) Mergers
6) Antitrust: E-commerce and data economy

Directorate D – Markets and Cases III: Financial Services

1) Antitrust: Payment Services
2) Antitrust: Financial Services
3) Task Force Financial Crisis
4) State Aid: Financial institutions I
5) State Aid: Financial institutions II
6) State Aid: Financial institutions III
7) Mergers

Directorate E – Markets and Cases IV: Basic Industries, Manufacturing and Agriculture

1) Antitrust: Pharma and Health Services
2) Antitrust: Consumer Goods, Basic Industries, Agriculture and Manufacturing
3) State Aid: Industrial Restructuring
4) Mergers
5) Task Force Food

Directorate F – Markets and Cases V: Transport, Post and Other Services

1) Antitrust: Transport, Post and Other Services
2) State Aid: Transport
3) State Aid: Post and Other Services
4) Mergers

Directorate G – Cartels

1) Cartels I
2) Cartels II
3) Cartels III
4) Cartels IV
5) Cartels V

Directorate H – State Aids: General Scrutiny and Enforcement

1) Infrastructure and Regional Aid
2) R&D&I, IPCEI and environment
3) Fiscal Aid
4) Enforcement and Monitoring
5) Tax Planning Practices

Directorate R – Horizontal Management

1) Registry and Transparency

2) Finance and Internal Compliance
3) Information Technology[43]

DG COMP had – as of 31.12.2018 – 799 staff members, including managers, case-handlers and assistants.[44] DG COMP is led by a Director-General, who is assisted by three Deputy Director-Generals, one Chief Economist and one Principal Adviser. There are also two hearing officers who report directly to the Competition Commissioner. The mission of the hearing officers is to ensure due process, to safeguard the parties' procedural rights and to contribute to the quality of the decision-making. DG COMP stated in 2014 that its staff was committed to "adhere to the highest standards of professionalism, intellectual rigour and integrity so as to ensure the highest standards in the enforcement of competition law".[45]

The DG COMP highlighted that its mission was to

> enable the Commission to enhance consumer welfare in the EU and efficiently functioning markets by protecting competition and promoting a competition culture. This is done through the enforcement of competition rules and through actions aimed at ensuring that regulation takes competition duly into account among other public policy interests.[46]

DG COMP publishes Annual Reports on Competition Policy, Annual Management Plans and Annual Activity Reports that provide extensive yearly information on the work accomplished and the challenges encountered. DG COMP regularly evaluates its policies and samples of its case work. These evaluations represent

> constructive-critical, evidence-based judgement of how well an EU measure (for instance legislation or soft law) adopted a few years ago has achieved its stated objectives, by looking at positive and negative aspects

43 European Commission. Directorate-General for Competition. *Organigramme of DG COMP*. Available at http://ec.europa.eu/dgs/competition/directory/organi_en.pdf accessed on 23 February 2021.

44 European Commission. Directorate-General for Competition. *2018 Annual Activity Report.* Ares(2019)3820496 – 14/06/2019, p. 62. Available at https://ec.europa.eu/info/sites/info/files/comp_aar_2018_final.pdf accessed on 23 February 2021.

45 European Commission. Directorate-General for Competition. *Management Plan 2014*, p. 14. Available at http://ec.europa.eu/competition/publications/annual_management_plan/amp_2014_en.pdf accessed on 23 February 2021.

46 European Commission. Directorate-General for Competition. *Management Plan 2014*, quoted above, p. 4.

> and intended and unintended impacts. It goes beyond a description of what has happened and analyses *why* and *how* certain impacts occurred. It helps the Commission to learn lessons from the past and improve its policies and interventions in the future.[47]

Most evaluations will focus on the relevance, effectiveness, efficiency, EU-added value and coherence of the legislation or of the adopted measures.

The DG COMP officials also offer training courses upon request to government officials, especially in relation to newly-adopted legislation.

The European Commission became more image-aware over time and invested resources in building and maintaining the image of a European administration that is approachable, communicative and responsive. This is particularly true about the DG COMP that – due to the nature of its work – is in constant dialogue with the business and the legal communities in Europe.

In 2010, DG COMP commissioned a *Eurobarometer Stakeholder Report* in order to obtain feedback on perceptions of the quality of its activities from its most important professional stakeholders: law firms, economic consultancies, business associations, companies, national competition authorities and EU Member State governments. A separate report was produced for each group and a final, aggregate report, was published in July 2010. The study covered all of the DG COMP's enforcement, policy and advocacy activities, and feedback was sought in particular in relation to the soundness of its legal and economic analyses, its transparency and procedural fairness, its economic effectiveness, and finally, its communication and international advocacy.

The DG COMP argued that it would use the findings of the study to achieve "more targeted and dynamic communication and interaction with its professional stakeholders and with the general public" in order to detect "areas of possible improvement in its cooperation and interrelations with stakeholders" and prioritise "its projects to achieve a greater impact on the markets".[48] Finally the findings would serve to measure "its performance in a number of fields related to the quality and impact of its work".[49]

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47 European Commission. Directorate-General for Competition. *Evaluation.* Available at http://ec.europa.eu/dgs/competition/evaluation_en.htm accessed on 23 February 2021.

48 European Commission. Directorate-General for Competition. *DG Competition Stakeholder Study: Aggregate Report.* July 2010, p. 4. Available at http://ec.europa.eu/competition/publications/reports/aggregate_report_en.pdf accessed on 23 February 2021.

49 European Commission. Directorate-General for Competition. *DG Competition Stakeholder Study: Aggregate Report.* July 2010, p. 4.

The study enhances the Commission's image as a flexible, self-critical, communicative administration. In addition, its findings are interesting and beg closer analysis.

As a general rule, NCAs were the least critical of the DG COMP's activities; they often used words of praise for the Commission's work in the field of competition law. Member state governments, however, often expressed more reserved views and offered suggestions concerning possible ways of improving the directorate's work. The most critical stakeholders were, however, the law firms, economic consultancies, business associations and companies. These offered unique insights into their relationship with the DG COMP.

In the field of soundness of legal and economic analysis, the law firms praised the expertise of DG COMP's case handlers. However, a majority of respondents noted that the clarity of the legal analysis varied according to the area of competition policy involved. In cartels, for example, the legal analysis can be flawed by the Directorate's exclusive reliance on the information provided by leniency applicants.[50]

Predictability was perceived as a strong point in the Commission's work in the field of competition, with the exception of cartel decisions that seemed to be very difficult to predict.[51] Other exceptions included instances where DG COMP changed its views mid-case, thus raising suspicions about political influence.[52]

Predictability of fines was perceived as a strong point, but some stakeholders expressed the view that the current level of fines had increased uncertainty for companies and this, in turn, had a negative impact on their accounts, share value, image and relationships with creditors.[53]

The legal community welcomed the increased involvement of economists in competition cases, however they also indicated that this impacts the length of the case and the data requests placed on the companies.[54]

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50 European Commission. Directorate-General for Competition. *DG Competition Stakeholder Study: Stakeholder Report: Lawyers.* August 2010, p. 7. Available at http://ec.europa.eu/competition/publications/reports/lawyers_en.pdf accessed on 23 February 2021.

51 European Commission. Directorate-General for Competition. *DG Competition Stakeholder Study: Stakeholder Report: Lawyers*, quoted above, p. 10.

52 European Commission. Directorate-General for Competition. *DG Competition Stakeholder Study: Stakeholder Report: Lawyers*, quoted above, p. 9.

53 European Commission. Directorate-General for Competition. *DG Competition Stakeholder Study: Stakeholder Report: Lawyers*, quoted above, p. 12.

54 European Commission. Directorate-General for Competition. *DG Competition Stakeholder Study: Stakeholder Report: Lawyers*, quoted above, p. 13.

One of the most criticised aspects of the Commission's work was its market understanding. Law firms complained that the Directorate's rotation policy, an over-academic outlook and lack of business experience affect its understanding of the market. One respondent argued that "even more important than their lack of business experience is their lack of business understanding; how commercial developments take place, how contracts work. That makes them over-suspicious. More practical experience would help".[55] A few respondents argued that a way for DG COMP to improve its market and business understanding is a better communication with other DGs that possess in-depth knowledge about their respective fields.[56]

The DG COMP has also been criticised for the lack of transparency in its way of handling information before the adoption of the decisions, in particular requests for information that were sent out with extremely short deadlines or before holidays.[57] Respondents praised the Commission's practice of consulting the public on new proposed legislation. However, they also noted that, despite wide public participation, the Commission almost never took into account the views expressed during this process.

An interesting part of the report refers to the DG COMP's respect of procedural rules. Although the respondents were merely invited to state their views on the observance of procedural rules by the Commission, they offered extensive input on the content of these rules as well. The respondents argued that the Commission complies with the existing rules, but that the rules themselves are "flawed and unfair". In particular, the fact that no independent, external authority was involved in the decision-making process and in the establishment of fines undermined the fairness of the procedure.[58]

The role of the hearing officer came under fire in particular, with one respondent stating that "the hearing officer made sure that the coffee is served at the right time and that the interpreters aren't too tired. They have no real role".[59]

The respondents argued that the burden on business had increased in recent years with the DG COMP asking more questions. They noted that no

55 European Commission. Directorate-General for Competition. *DG Competition Stakeholder Study: Stakeholder Report: Lawyers*, quoted above, p. 16.

56 European Commission. Directorate-General for Competition. *DG Competition Stakeholder Study: Stakeholder Report: Lawyers*, quoted above, p. 18.

57 European Commission. Directorate-General for Competition. *DG Competition Stakeholder Study: Stakeholder Report: Lawyers*, quoted above, p. 22.

58 European Commission. Directorate-General for Competition. *DG Competition Stakeholder Study: Stakeholder Report: Lawyers*, quoted above, p. 23.

59 European Commission. Directorate-General for Competition. *DG Competition Stakeholder Study: Stakeholder Report: Lawyers*, quoted above, p. 23.

rules concerning the number and content of the questions existed and that the directorate's case handlers made large use of this instrument. As one respondent put it, "No official ever got sacked for asking questions".[60] They referred to the pharmaceutical sector inquiry during which questionnaires were sent out every Friday for six months and 200 people worked for five months to meet the DG COMP's request for information.[61]

In the field of economic effectiveness of the Commission's detection policy, the respondents criticised the over-reliance on leniency programmes and stated that the large fines were beginning to have some negative or counterproductive effects.[62]

The speed of decision-making was the most criticised aspect of the DG COMP's work, especially in the field of cartels where timing is of particular importance: "Some cartel cases take forever, creating huge commercial uncertainty for the companies concerned. That uncertainty, dragging on for five or six years, is a real problem".[63] The legal community also noted that their rights of defence "kick in" only after the DG COMP issues a statement of objections. Between the start of the case and the statement of objections though, the companies benefit from no procedural rights but have to answer all the Commission's questions.[64]

Another qualitative study was requested by DG COMP to focus on the perceived quality of the DG's enforcement work (antitrust and cartel, merger and state aid control) and policy and advocacy activities.[65] The new study targeted the "DG Competition's professional stakeholders who are knowledgeable about its work, either by concrete involvement in case work as part of DG Competition's enforcement activities or indirectly, by having influenced or benefited from policy work".[66]

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60 European Commission. Directorate-General for Competition. *DG Competition Stakeholder Study: Stakeholder Report: Lawyers*, quoted above, p. 25.

61 European Commission. Directorate-General for Competition. *DG Competition Stakeholder Study: Stakeholder Report: Lawyers*, quoted above, p. 25.

62 European Commission. Directorate-General for Competition. *DG Competition Stakeholder Study: Stakeholder Report: Lawyers*, quoted above, p. 30.

63 European Commission. Directorate-General for Competition. *DG Competition Stakeholder Study: Stakeholder Report: Lawyers*, quoted above, p. 30.

64 European Commission. Directorate-General for Competition. *DG Competition Stakeholder Study: Stakeholder Report: Lawyers*, quoted above, p. 30.

65 European Commission. Directorate-General for Competition. *DG Competition Stakeholder Survey: Aggregate Report*. December 2014. Available at http://ec.europa.eu/competition/publications/reports/survey2014/aggregate_report_en.pdf accessed on 23 February 2021.

66 European Commission. Directorate-General for Competition. *DG Competition Stakeholder Survey: Aggregate Report*, quoted above, p. 5.

On the subject of soundness of legal and economic arguments, some lawyers noted that the quality of decision-making was dependent on the members of the case team and on the personality of the Commissioner. Thus,

> prior to Neelie Kroes, Commissioners were considered by several participants to act more as administrators and they favoured sound decisions that took a long time to be produced. Neelie Kroes and Joaquin Almunia were seen by the same participants as politicians who regard competition law as a means of government and consequently put pressure on their staff to deliver faster decisions.[67]

In the same vein, some companies noted that where political motivations and influences were evident, the soundness of legal arguments tended to be less clear. Some companies also noted that the Commission occasionally seemed to decide the case up front and build legal argument opportunistically.[68]

The DG COMP's economic analyses were graded highly by the stakeholders and regarded as comprehensive, detailed, and data-driven and therefore trusted.[69] However, critiques were expressed in relation to staff turnover and its impact on market knowledge. Also, some participants proposed the appointment of an independent Chief Economist, outside the Commission, to provide a more objective view.[70]

Unlike other topics discussed with the stakeholders which generated harmonized or clearly polarized views, highly varied views were expressed regarding the transparency of the DG COMP's work at different stages of the process and in different types of cases.[71] Interestingly, transparency was also associated with the independence of data/information and judgement. The DG COMP was perceived as comparing and evaluating its own data which led to final decisions lacking independence. One participant noted that the

67 European Commission. Directorate-General for Competition. *DG Competition Stakeholder Survey: Aggregate Report*, quoted above, p. 12.

68 European Commission. Directorate-General for Competition. *DG Competition Stakeholder Survey: Aggregate Report*, quoted above, p. 13.

69 European Commission. Directorate-General for Competition. *DG Competition Stakeholder Survey: Aggregate Report*, quoted above, p. 19.

70 European Commission. Directorate-General for Competition. *DG Competition Stakeholder Survey: Aggregate Report*, quoted above, p. 20.

71 European Commission. Directorate-General for Competition. *DG Competition Stakeholder Survey: Aggregate Report*, quoted above, p. 22.

> DG Competition does not handle the materials they are receiving (like documentation and expert opinions) independently since at the same time they also produce their own material which supports their own views and there is not an independent party included like there usually is in the US [or other countries] – in the court of law there is always a court which evaluates independently the opinions of both participants and after that reaches its verdict.[72]

Observance of procedural rules and of fairness standards were criticized more than other aspects of the DG COMP's work. Stakeholders noted that, although hearings were an opportunity to present a case, very little was seen to change as a result. Also, the fact that oral hearings were held late in the process meant that their impact on the outcome of the procedure was fairly limited.[73] Although the hearing officer acted independently from the DG COMP during oral hearings, some stakeholders noted that in cartel cases, the process was not satisfactory, as they perceived the DG COMP to be acting simultaneously as "judge, jury and prosecutor".[74] In addition, certain participants suggested that there should be an independent decision-maker for cartel cases.[75]

Some participants were concerned about the reactive nature of detection policy which resulted from DG COMP relying heavily on complaints and its leniency policy.[76] In addition, investigations to detect infringements were perceived as inefficient, because they were too thorough in proportion to the suspected offence.[77]

Some business associations, companies, lawyers and economic consultancies suggested that sometimes political pressure influences the DG COMP in choosing which cases to pursue. They argued that "politicians, business lobbies or competitors (including other countries) with disruptive intentions can all exercise such pressure. For example, one lawyer mentioned that DG

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72 European Commission. Directorate-General for Competition. *DG Competition Stakeholder Survey: Aggregate Report*, quoted above, p. 23.

73 European Commission. Directorate-General for Competition. *DG Competition Stakeholder Survey: Aggregate Report*, quoted above, p. 29.

74 European Commission. Directorate-General for Competition. *DG Competition Stakeholder Survey: Aggregate Report*, quoted above, p. 30.

75 European Commission. Directorate-General for Competition. *DG Competition Stakeholder Survey: Aggregate Report*, quoted above, p. 25.

76 European Commission. Directorate-General for Competition. *DG Competition Stakeholder Survey: Aggregate Report*, quoted above, p. 34.

77 European Commission. Directorate-General for Competition. *DG Competition Stakeholder Survey: Aggregate Report*, quoted above, p. 35.

Competition focuses on the pharmaceutical sector because of political the influence, which has as purpose reducing the price of medicines".[78]

Settlement and commitment procedures were generally considered effective, but a few concerns were raised in relation to them. First, participants feared that the use of these procedures would lead to a lack of case-law and, consequently, a lack of clarity. Second, settlement and commitment procedures could be used by market actors in abusive ways and should be employed by the DG COMP judiciously. Lastly, these procedures may become arbitrary through their lack of precision and insight into how the DG COMP reasons.[79]

78 European Commission. Directorate-General for Competition. *DG Competition Stakeholder Survey: Aggregate Report*, quoted above, p. 40.

79 European Commission. Directorate-General for Competition. *DG Competition Stakeholder Survey: Aggregate Report*, quoted above, pp. 44–45.

CHAPTER 10

The Procedure for Enforcement of Article 101 and 102 TFEU

> Administration is ordinarily discussed as the art of getting things done. Emphasis is placed upon processes and methods for ensuring incisive action.
>
> HERBERT A. SIMON

In this part chapter, I set out to test whether the European Commission is an independent and impartial tribunal when it enforces European competition law. This question has been prompted by the fact that the European Commission appears to cumulate investigative, prosecutorial and adjudicative functions, and by the growing case-law of the ECtHR that suggests such institutional set-ups pose a threat to the independent delivery of administrative justice. Chapter 9 above was dedicated to understanding the political-bureaucratic interface that defines the Commission's work and the elements that seek to guarantee the Commission's independence at the macro level. The current chapter is dedicated to analysing the procedure for the enforcement of Articles 101 and 102 TFEU and the existing fair trial guarantees.

European competition law has known for a very long time only one enforcement procedure. Under this procedure, the European Commission collected evidence concerning an alleged breach of Articles 101 or 102 TFEU and adopted a prohibition decision against one or more undertakings, imposing fines or remedies.

The development of competition law and policy in Europe has led to the adoption of new enforcement procedures that, despite being intended for exceptional cases, are widely used by the Commission. These procedures include the commitment procedure, under which the Commission will reach an agreement with the undertakings involved and will adopt that agreement as binding, and the settlement procedure, which can take two forms, informal and formal. It is thought that the settlement procedure has eased the burden placed on the undertakings. As one author noted

> cartel investigations are comparatively frequent and procedural costs may be high because of the multiplicity of parties and languages involved and the fact that the average cartel file numbers tens of thousands of pages, all of which have to be screened for confidentiality issues, while only a few hundred of those pages, on average, are actually used in evidence.[1]

In the following section I describe the procedure used for the enforcement of Articles 101 and 102 TFEU and the Commission's powers of investigation. I conclude with the mapping of the due process guarantees accompanying the procedure. The purpose of this mapping exercise is to grasp whether the guarantees offered during this procedure are sufficient to conclude that, when enforcing EU competition law, the European Commission acts as an independent and impartial tribunal.

10.1 The Investigation Phase

10.1.1 *Complaints*

When the Commission believes that a breach of Articles 101 or 102 TFEU has taken place, it may decide to open an investigation. The case may originate from a formal complaint, from the Commission's own initiative (*ex officio*), or from leniency applications submitted by one or more participants in the cartel. In addition to this, the Notice on Best Practices points that information from citizens and undertakings is important in triggering investigations by the Commission and the Commission, therefore, encourages "citizens and undertakings to inform it about suspected infringements of the competition rules".[2] Recently, the Commission has created whistleblowing tools that allow individuals to share market information anonymously with the Commission.

Informal complaints – that is information voluntarily offered to the Commission outside the framework of a formal investigation – may reach the Commission from various sources and in various forms, without creating any rights for the person offering the information or duties for the Commission. The regulations contain very little guidance as to the legal status of informal complaints and the case-law has rarely considered this matter.

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1 Tierno Centella, Maria Luisa. "The New Settlement Procedure in Selected Cartel Cases." *Competition Policy Newsletter* 3 (2008), p. 31.

2 Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ C 308, 20.10.2011, pp. 6–32, p.10.

Very little is known about the number of informal complaints received by the Commission, about how this information is stored, accessed and used. The same is true about the information received via the whistleblowing tools, which are in fact simply an e-mail address and a telephone number.

Formal complaints are complaints that fulfil the formal and substantive conditions required by EU legislation. First, the complaint must be formulated by a legal or natural person who has a "legitimate interest" in the case, meaning "any person who could plausibly claim to have suffered as the result of an infringement".[3] The following categories of applicants are considered to have legitimate interest to lodge a complaint with the Commission: competitors, trade unions, trade associations, associations of undertakings, consumer associations and even individual consumers. Member states are privileged complainants; they are presumed to have legitimate interest in all cases for which they choose to lodge a complaint.

The rules concerning the content of a complaint are enumerated in Article 7(2) of Regulation 1/2003, Article 5(1) of the Implementing Regulation and Form C annexed to the latter. The complainant should provide copies of the documents that prove the allegations or otherwise indicate where the Commission can obtain them. The Commission can also dispense the complainant from the duty to provide information when it considers that such information does not serve the purpose of the case and is therefore irrelevant.

The complainant can request anonymity and provide explanations as to why the Commission has to protect its identity. In cases when the Commission considers the complainant's request for anonymity justified, it will not disclose the complainant's identity to the companies concerned. The complainant also bears the initial responsibility for identifying the confidential information in its complaint or any business secrets.

Complaints do not give rise to an automatic right to obtain a decision. The Commission alone has the *discretion* to decide when to initiate an investigation.

In *Automec*, the applicant argued that the Commission has the duty to investigate all complains. The Court of Justice disagreed with the applicant arguing first of all that European Community legislation indeed required the Commission to respect some procedural rights of applicants during its investigations. However, the Commission could not be compelled to carry out an investigation. The Court concluded that

3 European Commission. *Dealing with the Commission Notifications: complaints, inspections and fact-finding powers under Articles 85 and 86 of the EEC Treaty*. Luxembourg: Office for Official Publications of the European Communities, 1997, p. 18.

> in the case of an authority entrusted with a public service task, the power to take all the organizational measures necessary for the performance of that task, including setting priorities within the limits prescribed by the law – where those priorities have not been determined by the legislature – is an inherent feature of administrative activity. This must be the case in particular where an authority has been entrusted with a supervisory and regulatory task as extensive and general as that which has been assigned to the Commission in the field of competition. Consequently, the fact that the Commission applies different degrees of priority to the cases submitted to it in the field of competition is compatible with the obligations imposed on it by Community law.[4]

The Commission refers to the *community interest* in order to determine the degree of priority to be applied to the complaints it receives. In *Automec*, the Court of Justice made the distinction

> that, unlike the civil courts, whose task is to safeguard the individual rights of private persons in their relations *inter se*, an administrative authority must act in the public interest. Consequently, the Commission is entitled to refer to the Community interest in order to determine the degree of priority to be applied to the various cases brought to its notice. This does not amount to removing action by the Commission from the scope of judicial review, since, in view of the requirement to provide a statement of reasons laid down by Article 190 of the Treaty, the Commission cannot merely refer to the Community interest in the abstract. It must set out the legal and factual considerations which led it to conclude that there was insufficient Community interest to justify investigation of the case. It is therefore by reviewing the legality of those reasons that the Court can review the Commission's action.[5]

Community interest thus cannot be defined *in abstracto*; the Commission performs a factual and legal analysis of the particulars of each case. The Court indicated that the Commission should, in particular, balance the significance of the alleged infringement as regards the functioning of the common market, the probability of establishing the existence of the infringement and the scope

4 T-24/90, *Automec v Commission*, ECLI:EU:T:1992:97, paragraph 77.

5 T-24/90, *Automec v Commission*, quoted above, paragraph 85.

of the investigation required in order to fulfil, under the best possible conditions, its task of ensuring respect for competition law.[6]

In practice, the Commission has discretion to grant priority to cases which present a community interest and reject complaints that do not justify further investigation. This initial assessment is not public and very little is known about who handles these cases within DG COMP and who participates in the decision not to investigate.

The Notice on the Handling of Complaints indicates that the number of criteria for the assessment of the community interest to which the Commission may refer is not limited, nor is the Commission required to have recourse exclusively to certain criteria. As the factual and legal circumstances may differ considerably from case to case, it is permissible to apply new criteria which had not been considered before.[7]

10.1.2 *Allocation of Cases*

An important part of the initial assessment performed by the Commission is the allocation of cases within the ECN. Regulation 1/2003 introduced the general principle of *parallel competences* according to which all competition authorities have the power to apply Articles 101 and 102 TFEU. A corollary of this principle is the rule that a case could be re-allocated to another network member if the latter is better placed to deal with it.

Competence to deal with Article 101 and 102 TFEU complaints may belong to one NCA, a few NCA s in parallel or to the Commission. The Commission may not exercise enforcement activities in parallel with other NCA s. The Network Notice indicates that in most instances, the authority that receives a complaint will remain in charge of the case. Re-allocation of cases within the network should thus be exceptions and should be performed at the outset of the procedure.[8] The re-allocation procedure should be a quick and effective process and not hold up on-going investigations.[9] Case re-allocation issues should be resolved swiftly, within a maximum of two months from the date when the first information about the case is circulated.[10]

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6 T-24/90, *Automec v Commission*, quoted above, paragraph 86.

7 Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, OJ C 101, 27.4.2004, pp. 65–77, p. 70.

8 Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, quoted above, p. 65.

9 Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, quoted above, p. 65.

10 Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, quoted above, p. 67.

The rule on the basis of which the competent authority is chosen is the *well placed authority* to deal with the case. The Network Notice explains that a well-placed authority should fulfil the following three cumulative conditions:

– The agreement of practice has substantial direct actual or foreseeable effects on competition within its territory, is implemented within or originates from its territory;
– The authority is able to effectively bring to an end the entire infringement, i.e., it can adopt cease-and-desist order the effect of which will be sufficient to bring an end to the infringement and it can where appropriate, sanction the infringement adequately;
– The authority can gather, possibly with the help of other such authorities, the evidence required to prove such infringement.[11]

The notice indicates that the Commission is particularly well-placed if one or several agreements or practices have effects on competition in more than three member states (cross-border markets covering more than three member states or several national markets).[12]

The question of *forum shopping* was raised in *France Télécom* where the undertaking had been fined earlier by the Commission, but complaints against it kept being lodged at the Commission.[13] The case was investigated by the French NCA when the Commission requested to investigate its premises.

The Court noted that with regard, first of all, to the division of powers between the Commission and the NCAs, Regulation No 1/2003 put an end to the previous centralised regime and, in accordance with the principle of subsidiarity, established a wider association of NCAs, authorising them to implement European Community competition law for this purpose. However, the scheme of the regulation relies on the building-up of close cooperation between the Commission and the competition authorities of the member states organised as a network, the Commission being given responsibility for determining the detailed rules for such cooperation. Furthermore, the regulation does not call into question the general power that the Commission is acknowledged to enjoy by the case-law. The Court concluded that "the Commission in effect has very wide powers of investigation under Regulation No 1/2003 and is in any event entitled to decide to initiate proceedings relating to an infringement, which entails removing the case from the Member State's

11 Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, quoted above, p. 66.

12 Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, quoted above, p. 66.

13 T-339/04, *France Télécom v Commission*, ECLI:EU:T:2007:80.

competition authorities. The Commission thus retains a leading role in the investigation of infringements".[14] In fact, it may take over a case even when a national authority is investigating it, provided that the Commission explains to the national authority and to the other members of the network the reasons for the takeover.[15]

The Court has also considered the content of the obligation to cooperate in good faith within the ECN. The Court found that "the principle of cooperation means that the Commission and the national competition authorities may, at least in the preliminary stages of the cases with which they deal, work in parallel".[16]

Commenting on the *France Télécom* case, Monti argued that the ECJ had yet to pronounce itself about the operation of the re-allocation of cases system, but in its judgments, it has given strong indications that the Commission enjoys extensive powers over NCA s. He concluded that the competence to apply competition law in the EU is not parallel, but concurrent: "the NCA has the power to apply EU competition law only up to the point when the Commission decides to exercise its powers. At that moment the Member States' executive competence is suspended".[17]

10.1.3 *Initial Assessment and Duty of Vigilance*

Lodging a complaint with the European Commission alleging an infringement of EU competition law triggers what is called the *duty of vigilance*. Van Bael has written that the duty of vigilance means that the Commission "should examine the facts and legal arguments put forward carefully and impartially in order to decide whether the competition rules of the Treaty were infringed in a given case".[18]

The European Courts themselves do not use the term "duty of vigilance", but note that the Commission is obliged "to examine carefully the factual and legal particulars brought to its notice by the complainant in order to decide whether they disclose conduct of such a kind as to distort competition in the common market and affect trade between Member States".[19]

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14 T-339/04, *France Télécom v Commission*, quoted above, paragraph 79.
15 T-339/04, *France Télécom v Commission*, quoted above, paragraph 85.
16 T-339/04, *France Télécom v Commission*, quoted above, paragraph 86.
17 Monti, Giorgio. "Legislative and Executive Competences in Competition Law." *The Question of Competence in the European Union*. Ed. Loic Azoulai. Oxford: Oxford University Press, 2014, p. 116.
18 Van Bael, *op. cit.*, p. 122.
19 T-24/90, *Automec v Commission*, quoted above, paragraph 79.

Turning now to the assessment itself of complaints that the Commission has to perform, the GC identified three stages in *Automec I*. This practice was gradually consolidated into the legislation.

First, following the submission of a complaint, the Commission has to collect the information that will serve as the basis for the decision that it will later adopt. The Court explained that this "stage may include *inter alia* an informal exchange of views and information between the Commission and the complainant with a view to clarifying the factual and legal issues with which the complaint is concerned and to allowing the complainant an opportunity to expand on his allegations in the light of any initial reaction from the Commission".[20] At this stage, the Commission may give an initial reaction to the complainant allowing the latter an opportunity to understand the Commission's point of view and to expand on the allegations in light of that initial reaction.[21]

The Court notes that the preliminary observations made by Commission officials in the context of informal contacts cannot be regarded as measures open to challenge.[22]

During the second stage, the Commission may investigate the case further with a view to initiating proceedings. Where the Commission considers that there are insufficient grounds for acting on the complaint, it will inform the complainant of its reasons and offer the complainant the opportunity to submit any further comments within a time limit which it fixes.[23]

The Court of Justice ruled that this notification is similar to a statement of objections. However, whereas the statement of objections must guarantee the observance of the right to a fair hearing, the notification under discussion "is intended to defend the procedural rights of the complainants, which are, however, not as far-reaching as the right to a fair hearing of the companies which are the object of the Commission's investigation".[24] The Court added that it was clear from the judgment in *IBM* that the statement of objections was not a decision, but merely a procedural measure preparatory to the final decision. Thus, "if that is true of the statement of objections, the legal importance of

20 T-64/89, *Automec v Commission*, ECLI:EU:T:1990:42, paragraph 45.

21 Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, quoted above, p. 71.

22 T-64/89, *Automec v Commission*, quoted above, paragraph 45.

23 Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, quoted above, p. 71.

24 T-64/89, *Automec v Commission*, quoted above, paragraph 46.

which is greater than that of the notification (…), it follows that the latter cannot be treated as a decision either".[25]

The direct consequence of this is that such notifications cannot be challenged before the Courts because this might move the European judicature to arrive at a decision on questions upon which the Commission had not yet had an opportunity to state its position. This would not only anticipate the arguments on the substance of the case and confuse different administrative and judicial procedural stages, but would also

> be incompatible with the system of the division of powers between the Commission and the Courts of the European Communities, with the system of remedies laid down by the Treaty and also with the requirements of the sound administration of justice and the proper course of the administrative procedure to be followed by the Commission.[26]

If the complainant fails to make known its views within the time limit set by the Commission, the complaint is deemed to have been withdrawn. In all other cases, in the third stage of the procedure, the Commission takes cognisance of the observations submitted by the complainant and either initiates a procedure against the subject of the complaint or adopts a decision rejecting the complaint.[27] The Commission must reason its decision, but it is not obliged to respond to all arguments raised by the complainant. The decision adopted by the Commission at this stage of the procedure can be challenged under Article 263 TFEU before the European Courts.

Van Bael argues that a Commission's decision to reject a complaint does not have a *res judicata* value, as NCAs, national courts and even the Commission itself at a later stage might reopen the proceedings and find an infringement on the same facts.[28]

Finally, the Notice on the Handling of Complaints provides that throughout the procedure, complainants benefit from procedural rights. However, proceedings of the Commission in competition cases do not constitute adversarial proceedings between the complainant on the one hand and the companies which are the subject of the investigation on the other hand. Accordingly, the procedural rights of complainants are less far-reaching than the right

25 T-64/89, *Automec v Commission*, quoted above, paragraph 46.

26 T-64/89, *Automec v Commission*, quoted above, paragraph 46.

27 Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, quoted above, p 71.

28 Van Bael, *op. cit.*, p. 126.

to a fair hearing of the companies which are the subject of an infringement procedure.[29]

10.1.4 *Possible Outcomes of the Investigation Phase*

Once the Commission has reached a preliminary view of the main issues raised by a case, different procedural paths may be envisaged.

(1) Prohibition Procedure: The Commission may decide to proceed towards the adoption of a statement of objections with a view to adopting a prohibition decision relating to all or some of the issues identified at the opening of proceedings.

(2) Commitment Procedure: The parties subject to the investigation may consider offering commitments which address the competition concerns arising from the investigation, or at least show their willingness to discuss such a possibility; in that case, the Commission may decide to engage in a discussion with a view to reaching a commitment decision.

(3) Decision to Close the Case: The Commission may decide that there are no grounds to continue the proceedings with regard to all or some of the parties and close the proceedings accordingly. If the case originated from a complaint, the Commission shall, before closing the case, give the complainant the possibility to express their views.[30]

10.2 Prohibition Procedure

10.2.1 *Opening of Proceedings and Statement of Objections*

When an initial assessment performed by the Commission leads to a conclusion that there is a case that warrants further investigation, the Commission will open the proceedings. The opening of the proceedings is a formal procedural step provided for by Article 11(6) of the Regulation 1/2003.

Van Bael has argued that during the investigation phase, the parties are often in an "uncomfortable situation" as they usually have no precise knowledge of the reasons for or scope of the investigation. He writes that, "in the course of the investigation, the undertakings have many obligations but very few rights. They are the subject of the investigation, but not really actors in it".[31]

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29 Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, quoted above, p 71.

30 Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, quoted above, p. 20.

31 Van Bael, *op. cit.*, p. 166.

However, this changes with the formal opening of the proceedings, which in the case of cartel investigations coincides with the formulation of the statement of objections.[32] The opening of the proceedings signals the commitment on the part of the Commission to further investigate the case and to allocate resources for dealing with it in a timely manner.[33]

In addition, the opening of proceedings signals the allocation of the case within the ECN.[34]

The opening of the proceedings will also situate the case in time and identify the persons affected. It will describe the scope of the investigation, the territory and the sectors investigated and the behaviour that constitutes the alleged infringement.[35] On certain occasions, the Commission will issue a press release to inform the public about its decision to open an investigation. The opening of the proceedings does not limit the right of the Commission to extend the scope and/or the addressees of the investigation at a later point in time.[36]

The importance of the opening of the proceedings is further highlighted by the way in which the Commission communicates its decision to the public. First, the Commission will inform the parties to the investigation, sufficiently in advance, of its intention to make the opening of the investigation public. This communication can take place orally or in writing and is intended to allow the parties to prepare in advance for questions from the press or from the public.

Second, if the Commission decides to make the opening of the proceedings public, it can do so on the website of the Directorate-General for Competition and issue a press release. When such communications risk harming the investigation, the Commission has the discretion to keep the investigation away from the public eye.

Due to the important consequences of publishing such information in the press, the Commission emphasises that the opening of proceedings does not prejudge in any way the existence of an infringement. It merely indicates that

32 Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, quoted above, p. 12.

33 Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, quoted above, p. 11.

34 Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, quoted above, p. 11.

35 Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, quoted above, p. 11.

36 Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, quoted above, p. 12.

the Commission will pursue the case further. This important clarification will be mentioned in the decision opening the proceedings (notified to the parties), as well as in all public communications concerning the opening of the case.[37]

The statement of objections is signed by the Director-General of DG COMP. The Notice on Best Practices states, however, that the adoption of a statement of objections does not prejudge the final outcome of the investigation.[38]

It is interesting to note that the language used by the Notice on Best Practices clearly suggests that the purpose of the statement of objections is to protect the participants' rights of defence:

> Before adopting a decision adversely affecting the interests of an addressee, in particular, a decision finding an infringement of Article 101 and 102 TFEU and ordering its termination and/or imposing fines, the Commission will give the parties subject to the proceedings the opportunity to be heard on the matters to which the Commission has objected. The Commission will do this by adopting a statement of objections, which is notified to each of the parties subject to the proceedings.[39]

The statement of objections marks the passage towards a stage of the proceedings in which the undertakings that are being investigated have procedural rights. The dormant rights of defence are awakened from this point until the end of the proceedings.

When additional objections are issued or the intrinsic nature of the infringement with which an undertaking is charged is modified, the Commission shall notify this to the parties in a supplementary statement of objections and fix a new time limit for the reply to it.[40]

The procedural rights which are triggered by the adoption of the statement of objections apply *mutatis mutandis* where a supplementary statement of objections is issued, including the right of the parties to request an oral hearing.

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37 Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, quoted above, p. 11.

38 Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, quoted above, p. 20.

39 Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, quoted above, p. 21.

40 Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, quoted above, p. 25.

Access to all evidence gathered between the initial statement of objections and the supplementary statement of objections will also be provided.[41]

The statement of objections should inform the addressee not only about the Commission's conclusions and the evidence gathered during the investigation, but also about the consequences of being identified as a party to the proceedings.

First, if the Commission intends to impose remedies on the parties, in accordance with Article 7(1) of Regulation 1/2003, the statement of objections will indicate the remedies envisaged that may be necessary to bring the suspected infringement to an end. The information provided to the parties should be sufficiently detailed to allow them to defend themselves as to the necessity and proportionality of the remedies envisaged. When the Commission intends to impose structural remedies, the statement of objections will explain the reasons for which structural remedies are preferred over behavioural remedies.[42]

Second, the statement of objections should clearly indicate whether the Commission intends to impose fines on the undertakings, should the objections be upheld, in accordance with Article 23 of Regulation 1/2003. In such cases, the statement of objections will refer to the relevant principles laid down in the guidelines on setting fines. In the statement of objections, the Commission should indicate the essential facts and matters of law which may result in the imposition of a fine, such as the duration and gravity of the infringement and whether the infringement was committed intentionally or by negligence. The statement of objections should also mention, in a sufficiently precise manner and to the extent possible, the aggravating and attenuating circumstances.[43]

The Commission has the *discretion* to include in the statement of objections further matters relevant to the subsequent calculation of fines, such as the relevant sales figures to be taken into account and the year(s) that will be considered for the value of such sales. Such information may also be provided to the parties following the issuing of the statement of objections. In both cases, if the Commission chooses to provide such information, the parties will be provided with an opportunity to comment.

As shown above, the Commission is not bound in any way by the conclusions spelled out in the statement of objections. However, if the Commission

41 Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, quoted above, p. 26.

42 Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, quoted above, p. 26.

43 Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, quoted above, p. 21.

intends to depart from them in its final decision or to disadvantage the undertakings by the remedies or the fines imposed, it has the duty to inform the undertakings of the changed course of action in order to offer the undertakings the possibility to defend themselves.

The Commission might also inform the parties that, in exceptional cases, it may, upon request, take account of the undertaking's inability to pay and reduce or cancel the fine that might otherwise be imposed if that fine would irretrievably jeopardise the economic viability of the undertaking. This is an important safeguard for undertakings that can be triggered by lodging an inability to pay request and providing detailed and up-to-date financial information to support their request. The inability to pay request offers a new opportunity to the parties to bring further relevant information to the attention of the Commission, but also offers the Commission the opportunity to have access to new information about the undertakings that are investigated.

The decision to open proceedings has been delegated to the Competition Commissioner.[44] As explained above, this decision cannot be challenged in the European Courts because this might result in the judicial branch reaching a decision before the Commission.

10.2.2 *Language Requirements*

Language is an important aspect of every legal procedure. Although not recognised as limit on the Commission's investigative powers, or as a defence right, EU competition law legislation contains extensive provisions concerning the language of the proceedings. First, the documents which the Commission sends to an undertaking based in the European Union should be drafted in the language of the member state in which the undertaking is based. Second, the documents which an undertaking sends to the Commission may be drafted in any one of the official languages of the European Union selected by the sender. The reply and subsequent correspondence should be drafted in the same language. However, in order to avoid delays due to translation, the addressees may waive their right to receive the text in the language of the member state in which the undertaking is based and opt for another language. Duly authorised language waivers can be given for some specific documents or for the whole procedure.[45]

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44 Rules of Procedure of the Commission [C(2000) 3614], OJ L 308, 8.12.2000, pp. 26–34, Article 13.

45 Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, quoted above, p. 12.

During the investigation phase, the language requirements are less strict and the Commission may send simple requests for information in the language of the addressee's location or in English and attach the questionnaire in English. The addressee must also be clearly informed – in the language of the addressee's location – of its right to obtain a translation of the cover letter and/or questionnaire into the language of the addressee's location, as well as the right to reply in that language. This practice allows for more expeditious treatment of information requests, while preserving the rights of addressees.[46]

In the later stages of the procedure, though, the Commission has the duty to communicate in the authentic language of the addressee. Thus, the statement of objections, the preliminary assessment and the decisions adopted pursuant to Articles 7, 9 and 23(2) of Regulation 1/2003 should be notified in the authentic language of the addressee unless it has signed the above-mentioned language waiver. The reply and all subsequent correspondence addressed to the complainant should be in the language of their complaint.[47]

Finally, participants in the oral hearing may request to be heard in an EU official language other than the language of proceedings. In that case, interpretation should be provided during the oral hearing, as long as sufficient advance notice of this requirement is given to the hearing officer.[48]

10.2.3 *In-depth Analysis Prior to the Adoption of a Prohibition Decision*

When the Commission acquires new evidence that will be used in a decision, it must bring this to the attention of the parties concerned by a letter of facts. The letter of facts gives undertakings the opportunity to provide written comments on the new evidence within a fixed time limit. A request for an extension of this time limit may be made by way of a reasoned request to the Commission. If the Directorate-General for Competition and the addressee disagree about a requested extension, the addressee may refer the matter to the hearing officer by means of a reasoned request.[49] If a letter of facts is issued, access would in general be granted to evidence gathered after the statement of objections up to the date of the said letter of facts. However, in cases where the Commission

46 Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, quoted above, p. 12.

47 Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, quoted above, p. 12.

48 Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, quoted above, p. 12.

49 Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, quoted above, p. 25.

intends to rely only upon specific evidence that concerns one or a limited number of parties and/or isolated issues (in particular those regarding the determination of the amount of the fine or issues of parental liability), access would be provided only to the parties directly concerned and to the evidence relating to the issue(s) in question.[50]

Only the documents mentioned in the statement of objections may be treated as admissible evidence against an undertaking. This point was raised in *ICI* in which the applicant company complained that, when the Commission sent it the statement of objections, it did not send it all the documents on which it based the decision and that the Commission thus made it impossible for them to explain their contents. The Court highlighted that according to its case-law,

> the important point is not the documents as such but the conclusions which the Commission has drawn from them, and if those documents were not mentioned in the statement of objections, the undertaking concerned was entitled to take the view that they were of no importance for the purposes of the case. By not informing an undertaking that certain documents would be used in the Decision, the Commission prevented it from putting forward at the appropriate time its view of the probative value of such documents. It follows that those documents cannot be regarded as admissible evidence.[51]

The translation of the facts discovered into legal reasoning is an important step in every procedure. The intermediate legal interpretation of facts offered by the Commission to the undertakings in its statement of objections can, however, be transformed, adapted or given up in the final legal reasoning put forward in the decision. This issue was raised in the case of *Mannesmannrohren-Werke* where the applicant undertaking complained that the discrepancy in legal reasoning between the statement of objections and the Commission's Decision breached its rights of defence. In that regard, the Court noted that

> the legal classification of the facts made in the statement of objections can, by definition, be only provisional, and a subsequent Commission decision cannot be annulled on the sole ground that the definitive conclusions drawn from those facts do not correspond precisely with

50 Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, quoted above, p. 26.

51 T-13/89, *ICI v Commission*, ECLI:EU:T:1992:35, paragraph 34.

> that intermediate classification. The Commission is required to hear the addressees of a statement of objections and, where necessary, to take account of any observations made in response to the objections by amending its analysis specifically in order to respect their rights of defence.[52]

The Notice on Best Practices explains that throughout the procedure, the Directorate-General for Competition endeavours to offer the parties, on its own motion or upon request, "ample opportunity for open and frank discussions – taking into account the stage of the investigation – and to make their points of view known".[53] This is achieved by organizing state of play meetings, triangular meetings and meetings with the Commissioner or the Director-General.

State of play meetings can be offered to the parties being investigated for the purpose of contributing to the "quality and efficiency of the decision-making process and to ensure transparency and communication".[54] In the context of cartel proceedings, one state of play meeting will be offered after the oral hearing. Furthermore, two specific state of play meetings will be offered in the context of procedures leading to commitment decisions and to complainants where the Commission has opened proceedings under Article 11(6) of Regulation 1/2003 and intends to inform the complainant that it will reject its complaint by formal letter.[55]

State of play meetings can be conducted at the Commission's premises or held by telephone or videoconference. They are chaired by the Director-General, Deputy Director-General or by the responsible head of unit.

Triangular meetings are meetings held between the Directorate-General for Competition, the undertakings being investigated and the complainant and/or third parties. The purpose of triangular meetings is "to verify the accuracy of factual issues of all the parties in a single meeting (…) for example, where two or more opposing views or information have been put forward as to key data or evidence".[56]

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52 T-44/00, *Mannesmannrohren-Werke v Commission*, quoted above, paragraph 100.

53 Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, quoted above, p. 17.

54 Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, quoted above, p. 18.

55 Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, quoted above, p. 18.

56 Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, quoted above, p. 19.

Triangular meetings are chaired by the Director-General or Deputy Director-General.[57]

Lastly, the Notice on Best Practices states that

> it is normal practice to offer senior officers of the parties subject to the proceedings and the complainant an opportunity *to discuss the case either with the Director-General for competition, the Deputy Director-General for antitrust, or if appropriate, with the Commissioner responsible for Competition*. The senior officers may be accompanied by their legal and/or economic advisors.[58] (emphasis added)

Once the Commission has finished collecting and assessing the facts, and once the parties concerned have had an opportunity to challenge them orally or in writing, the Commission may adopt a prohibition decision. The Commission established a few *checks and balances* in order to ensure that all relevant views and evidence are properly taken into account before a final decision is adopted, and that the assessment proposed by the case team is sound and takes account of parties' arguments.[59] At the same time, these checks and balances are part of the Commission's internal deliberation process and the documents produced during these deliberations are generally not part of the accessible file.

The internal checks and balances to the DG COMP put in place are (1) the chief economist, (2) peer review, (3) the hearing officer, (4) the legal service and other associated Commission services and (5) the advisory committee.

The *chief economist*'s task is to assist in evaluating the economic impact of the Commission's actions in the field of competition, and to provide guidance on issues of economics and econometrics in the application of EU competition rules. The chief economist contributes to individual competition cases, in particular in cases involving complex economic issues and quantitative analysis. At the request of the legal service, the chief economist assists with cases pending before the Court of Justice of the European Union.[60]

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57 Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, quoted above, p. 19.

58 Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, quoted above, p. 19.

59 European Commission. Directorate-General for Competition. *Proceedings for the application of Articles 101 and 102 TFEU: Key Actors and Checks and Balances*. Page 2. Available at http://ec.europa.eu/competition/antitrust/key_actors_en.pdf accessed on 23 February 2021.

60 European Commission. Directorate-General for Competition. *Proceedings for the application of Articles 101 and 102 TFEU: Key Actors and Checks and Balances*, quoted above, p. 2.

Peer review was initially used in complex merger cases, but was later extended to other types of in-depth investigation.[61]

The Commission explains that peer review is an instrument intended to provide a "fresh pair of eyes" to look at all or certain aspects of the assessment performed by the case team. It is the Director-General, together with the Commissioner, who decide which cases will be reviewed by peer review panel. A peer review team is appointed for this purpose.

The organisation of the panel and the members of the peer review team are not made public and the peer review of a case does not involve the parties. The peer review team is granted full access to the file and the case team.

The aim of the Peer Review Panel is to have an open discussion on the line proposed by the case team. The Panel will "either identify areas where further work is necessary; identify objections that should be dropped; recommend that the case is not pursued further; or recommend that the case team continue with the case on an unchanged basis. The Panel's recommendations are purely internal and are not disclosed to the parties to the proceedings, complainants or any other third party".[62]

The findings and recommendations of the Panel are reported to the Director-General, who is then responsible for making a proposal to the Commissioner that reflects all available evidence and analysis.

The *Hearing Officers* are appointed by the President of the Commission for the purpose of ensuring that procedural rights are safeguarded during the proceedings. The hearing officer organises and conducts the oral hearing and reports to the Competition Commissioner on it. Generally, the hearing officer may present to the Competition Commissioner observations on any matter arising out of the proceedings. He/she also prepares a final report to the College of Commissioners before the final decision is taken.[63]

DG COMP must also consult the Commission's *legal service and other DG s* responsible for the products, services or policy areas concerned in a particular case.[64]

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61 Van Bael, Ivo and Jean-François Bellis. *Competition Law of the European Community.* Bruxelles: Kluwer Law International, 2005, p. 11.

62 European Commission. Directorate-General for Competition. *Proceedings for the application of Articles 101 and 102 TFEU: Key Actors and Checks and Balances*, quoted above.

63 European Commission. Directorate-General for Competition. *Proceedings for the application of Articles 101 and 102 TFEU: Key Actors and Checks and Balances*, quoted above, p. 3.

64 European Commission. Directorate-General for Competition. *Proceedings for the application of Articles 101 and 102 TFEU: Key Actors and Checks and Balances*, quoted above, p. 4.

Finally, Article 14(1) of Regulation 1/2003 indicates that the Commission shall consult an *Advisory Committee on Restrictive Practices and Dominant Positions* prior to the taking of any decision concerning:
– A finding and termination of infringement;
– Interim measures;
– Commitment decisions;
– A finding of inapplicability of Article 101 or 102;
– Imposition of fines;
– Final imposition of a periodic penalty; or
– The withdrawal of the benefit of a block exemption in individual cases.
The Advisory Committee is composed of representatives of the competition authorities of the member states. For meetings in which issues other than individual cases are being discussed, an additional member state representative competent in competition matters may be appointed.[65]

Although the Commission shall take the utmost account of the opinion delivered by the advisory committee, it is not bound by it. However, the Commission shall inform the committee of the manner in which its opinion has been taken into account.[66] In addition, where the advisory committee delivers a written opinion, this opinion shall be appended to the draft decision.

10.2.4 *Formal Adoption of a Prohibition Decision*

The final step towards the adoption of a prohibition decision – after the investigation and decision-making phases – is the formal adoption of the decision. Article 4 of the Rules of Procedure provides that the Commission's decisions can be taken at meetings, or, alternatively, by written procedure, by empowerment or by delegation.

The *written procedure* is provided for in Article 12 of the Rules of Procedure of the Commission. This procedure implies that the text of the proposal be circulated in writing to all Members of the Commission with a time limit within which members must make known any reservations or amendments they wish to make. Proposals on which no Member of the Commission has made reservations, with which the Directorates-General directly involved are

65 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, quoted above, article 14(2).

66 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, quoted above, article 14(5).

in agreement and which are endorsed by the legal service, shall stand adopted by the Commission.

Van Bael notes that due to the heavy workload of the Commission, most competition decisions are adopted by the Commission without any debate, by the written procedure.[67] Schwarze has noted that the written procedure "raises no doubts of a legal nature, since it preserves the basic responsibility of all commissioners and merely alters the voting procedure in a way that is not crucial".[68]

An illustration of written procedure can be found in *Buchler*, wherein the applicants complained that the Commission's decision should be declared invalid due to the fact that the Commissioners had not received a complete file of the case. The Court replied that the Members of the Commission received complete and detailed information regarding the essential points of the case and had access to the entire file.[69]

Alternatively, Article 13 of the Rules of Procedure provides that the Commission might – provided that the principle of collective responsibility is fully respected – *empower* one or more of its Members (1) to take management or administrative measures on its behalf; (2) to adopt the definitive text of any instrument or proposal to be presented to other institutions the substance of which has already been determined in discussion; or (3) to subdelegate the above-mentioned powers to the Directors-General and Heads of Service.

The empowerment and delegation procedures appear to be more problematic. Except for the brevity and expediency of their formulation, Schwarze highlighted that the legitimacy of the transfers of power is problematic because they diminish "the responsibility of the collegiate body as a whole".[70]

After the formal adoption of a decision by the College of Commissioners, the Commission will notify the decision to the parties and will publish it in the Official Journal of the European Union.

10.3 Commitments Procedure

Article 9(1) of Regulation 1/2003 stipulates that

> where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned

67 Van Bael, *op. cit.*, p. 210.
68 Schwarze, *op. cit.*, p. 1209.
69 C-44/69, *Buchler & Co. v Commission*, ECLI:EU:C:1970:72, paragraph 22.
70 Schwarze, *op. cit.*, p. 1210.

> offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission.

The main difference between a prohibition decision pursuant to Article 7 and a commitment decision pursuant to Article 9 of Regulation 1/2003 is that the former contains a finding of an infringement while the latter makes the commitments binding without a statement of infringement. A commitment decision will conclude, however, that, in light of the commitments offered, there are no longer grounds for action by the Commission. Moreover, unlike Article 7 decisions, commitments are offered by undertakings on a voluntary basis.[71] Former Commissioner Almunia stated that "commitments invite a cooperative attitude on the part of the companies, which I always regard as a good thing".[72]

Commissioner Almunia noted that both the undertakings and the Commission benefit from pursuing this procedure. On the one hand, most companies involved in anti-competitive practices accept the commitment procedure and go for the solution that can best protect their interests and reputation, allowing for a faster closing of the case and without a formal acceptance of wrongdoing. The Commission on the other hand, appreciates the swiftness and flexibility that the commitment procedure brings.[73]

It is for the undertakings to approach DG COMP to explore the Commission's readiness to pursue the case with the aim of reaching a commitment decision. The commitments may be offered from the moment of the initiation of the proceedings until the moment when the Commission adopts a decision, although undertakings will be encouraged to open the floor for discussing commitments as early as possible.

Once the undertakings have expressed an interest in discussing commitments, DG COMP will indicate the timeframe within which the discussions on potential commitments should be concluded and will present to them the preliminary competition concerns arising from the investigation.

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71 Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, quoted above, p. 26.

72 European Commission. Joaquin Almunia. *Remedies, Commitments and Settlements in Antitrust*. Speech, 8 Mar 2013. Available at http://europa.eu/rapid/press-release_SPEECH-13-210_en.htm accessed on 23 February 2021.

73 European Commission. Joaquin Almunia, quoted above.

Although neither Regulation 1/2003, nor the Implementing Regulation define what the elements of a *preliminary assessment* should be, in practice it is a written letter addressed to the undertaking(s) concerned in which the Commission describes the facts, the behaviour under scrutiny, the legal basis of the decision and the competition law concerns that justify the adoption of a decision.

The Commission must conduct a market test of the proposed commitments before making them binding by decision. The Commission will only conduct a market test if it considers that the commitments offered *prima facie* address the competition concerns identified. The Commission must publish in the Official Journal of the European Union a market test notice containing a concise summary of the case and the main content of the commitments, whilst respecting the obligations of professional secrecy. It will also publish on the DG COMP's website the full text of the commitments in the authentic language. In order to enhance the transparency of the process, the Commission will also publish a press release setting out the key issues of the case and the proposed commitments.[74]

There is no time limit to these negotiations; in difficult cases the negotiations can continue until the very last minute.

If the undertakings are unwilling to submit an amended version of the commitments, the Commission can revert to the Article 7 procedure.

If an agreement is reached, the Commission will adopt a decision pursuant to Article 9(1) of Regulation 1/2003 making the commitments binding and thus enforceable.

10.4 Procedure for Rejection of Complaints

The Commission may, after appropriate assessment of the factual and legal circumstances of an individual case, reject a complaint. The rejection of complaints can be justified by (1) insufficient grounds for acting; (2) lack of competence or (3) lack of evidence.

If the Commission, after careful examination of a case, comes to the preliminary conclusion that it should not pursue the case, it will inform the complainant in a meeting or by phone that it has come to the preliminary view that the case should be rejected. This gives the opportunity to the complainant

74 Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, quoted above, p. 28.

to withdraw its complaint. Otherwise, the Commission will inform the complainant by a formal letter of its preliminary findings and set a time limit for its written observations. In this context, the complainant has the right to request access to the documents on which the Commission bases its provisional assessment.[75]

If the complainant does not answer the Commission's letter, the complaint will be considered to be withdrawn on the basis of Article 7(3) of the Implementing Regulation. If the complainant replies by providing information that does not change its preliminary assessment, the Commission will reject the complaint by a decision on the basis of Article 7(2) of the Implementing Regulation.

10.5 Settlement Procedures

There are currently two settlement procedures used by the Commission: the informal settlement procedure and the formal settlement procedure.

Very little is known about the procedure by which the Commission informally settles competition law cases. Van Bael has estimated that more than 90% of infringement cases are closed using the informal settlement procedure.[76] He argues that informal settlements take place "in a purely negotiated and informal way, without any clear procedural steps and usually with very limited publicity".[77] He concludes that "the core weakness of informal settlements is that they do not lead to any formal decision".[78]

Another author has highlighted that despite the introduction of the commitment procedure, the Commission still continues, as before the entry into force of Regulation 1/2003, to settle cases informally, provided it considers such a solution appropriate in its antitrust enforcement action.[79] The author puts forward the example of the case where the Commission welcomed the new iPhone policies announced by Apple. Formal antitrust proceedings were commenced against Apple in 2007 in cases *COMP/39154 PO/iTunes* and *COMP/*

75 Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, quoted above, p. 29.

76 Van Bael, *op. cit.*, p. 290.

77 Van Bael, *op. cit.*

78 Van Bael, *op. cit.*, p. 292.

79 Cavicchi, Piero. "The European Commission's Discretion as to the Adoption of Article 9 Commitment Decisions: Lessons from Alrosa." *Discussion paper// Europa-Kolleg Hamburg, Institute for European Integration* 3 (2011), p.5. Available at http://hdl.handle.net/10419/45859 accessed on 23 February 2021.

39174 Which/iTunes, before the Commission decided to close them in light of Apple's announcement that it would equalise prices for downloading songs from its iTunes online store in Europe.[80]

The European Commission introduced the formal settlement procedure in 2008 as a package comprising:

– Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 733/2004, as regards the conduct of settlement procedures in cartel cases; and
– Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases which describes the new procedure in detail.

The rationale for these legislative changes, as explained in their preambles, is three-fold and includes: (1) the need for a simplified procedure; (2) the need to acknowledge and reward the parties voluntarily cooperating with the Commission and thus promote a culture of cooperation; and (3) the need to reduce litigation before the European Courts in cartel cases.

The Competition Commissioner commented at the time of the adoption of the package that

> this new settlement procedure will reinforce deterrence by helping the Commission deal more quickly with cartel cases, freeing up resources to open new investigations. Companies which are convinced that the Commission can prove their involvement in a cartel, will also benefit from quicker decisions and a fine reduction.[81]

The settlement procedure applies only to cartel cases. As pointed out "since cartels are deliberate, flagrant infringements, in such cases the debate between the suspect companies and the Commission focuses on the scope and accuracy of the facts and on the value and extent of evidence in the file".[82] Indeed, due to the fact that discussions about intent, market definition, pro and

80 European Commission. "Antitrust: European Commission Welcomes Apple's Announcement to Equalise Prices for Music Downloads from iTunes in Europe." *Press Release Database* IP/08/22. 9 Jan 2008. Available at http://europa.eu/rapid/press-release_IP-08-22_en.htm accessed on 23 February 2021.

81 European Commission. "Antitrust: Commission Introduces Settlement Procedure for Cartels." *Press Release Database* IP/08/1056. 30 Jun 2008. Available at http://europa.eu/rapid/press-release_IP-08-1056_en.htm accessed on 23 February 2021.

82 Tierno Centella, *op. cit.*, p. 30.

anti-competitive effects are missing, the settlement discussions "are not meant to extract more evidence but to debate the preliminary findings and the evidence already gathered by the Commission".[83]

The Commission Notice on Settlement describes the six stages of the formal settlement procedure in cartel cases: (1) investigation as usual; (2) exploratory steps regarding settlement; (3) bilateral rounds of settlement discussions; (4) settlement; (5) 'settled' statement of objections; and (6) 'settlement' decision.[84]

As a normal investigation takes place before the settlement phase, settlements do not mean "investigative shortcut". On the contrary, "the Commission enters into this phase only when it has sufficient elements to proceed with the case in standard procedure".[85]

There is no monopoly on the right to propose the settlement of the case; either of the parties or the Commission may express interest in this procedure. The Commission, however, has a broad margin of discretion to choose the cases which are suitable for settlement, to decide to engage in settlement discussion, to discontinue them or to pursue the settlement procedure until the end.[86] A general principle, though, is that the settlement procedure cannot be imposed on the parties.[87] The Commission's broad margin of discretion in the settlement procedure extends to the reasons for choosing to take the path of settlement. In this regard, account may be taken of the probability of reaching a common understanding regarding the scope of the potential objections in light of the provisional calendar, the number of parties involved and the foreseeable conflicting positions. The Commission's decision may also be informed by the prospect of achieving efficiencies and the possibility of creating a precedent.[88]

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83 Tierno Centella, *op. cit.*, p. 31.

84 Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, OJ C 167, 2.7.2008, pp. 1–6.

85 Laina, Flavio, and Elina Laurinen. "The EU Cartel Settlement Procedure: Current Status and Challenges." *Journal of European Competition Law and Practice* 4.4 (2013): pp. 302–311, p. 2.

86 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, quoted above, preamble 4.

87 Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, quoted above, p. 1.

88 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, quoted above, preamble 4.

When the Commission decides to explore the parties' interest to engage in settlement discussions, it will set a time limit of a minimum of two weeks within which the parties may express in writing their interest in pursuing this procedural option.

The next stage of the settlement procedure comprises bilateral rounds of settlement discussions that start when one or a few parties make a request to settle. The bilateral rounds of discussions move gradually toward a more intense exchange of information between the Commission and the parties. The Commission retains the discretion to determine the appropriateness of the pace, the timing of disclosing evidence and the potential fine.[89] No formal records of the settlement discussions are kept at this stage because this "allows the parties to have frank exchanges and helps protect confidentiality of settlement discussions".[90]

Laina and Laurinen acknowledged that this is "a challenging process, as intensive and confidential bilateral discussions are carried out in parallel with all parties and consensus must be reached with all of them".[91] They emphasise that by no means is participation in settlement discussions synonymous with an admission of an infringement, a conclusion that can only be reached at the end of the bilateral discussions.[92]

During the discussions, parties may submit technical papers or 'non-papers' which address various technical aspects of the case in order to facilitate the discussions, but which cannot be used as evidence.[93]

After the bilateral discussions, parties may introduce a formal request to settle in the form of a settlement submission. The settlement submissions should contain the following elements: (1) a clear and unequivocal acknowledgement of the of the parties' liability for the infringement, including the main facts, their legal qualification, the role played by the party in the infringement, and the duration of their participation; (2) the maximum amount of the fine that the party foresees and that they would accept; (3) a statement that they have been sufficiently informed and that they had sufficient opportunity to make their views known; (4) a statement that they do not envisage requesting access to the file or to be heard in the oral hearing; and (5) the parties' agreement to

89 Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, quoted above, p. 3.

90 Tierno Centella, *op. cit.*, p. 33.

91 Laina and Laurinen, *op. cit.*, p. 3.

92 Laina and Laurinen, *op. cit.*

93 Laina and Laurinen, *op. cit.*, p. 4.

receive the statement of objections and the final decision in an agreed language of the European Union.[94] The settlement request is an important step and, once the party makes it, it cannot be withdrawn.

The Commission retains the right, after the receipt of the settlement request, to adopt a statement of objections that reflects the parties' settlement request and thus continue the settlement procedure or to disregard the request and adopt a prohibition decision.

However, after the parties' replies to the statement of objections confirming their commitment to settle, the Commission may proceed to the adoption of the final decision pursuant to Articles 7 and/or 23 of Regulation 1/2003.[95] The cooperation towards settlement will be mentioned by the Commission in its final decision. When the Commission decides to reward the party for settlement, it will reduce the fine by 10%.[96]

Settlement decisions are adopted in the same way as prohibition decisions. They will include a finding of an infringement and a fine.

One author concluded that the Settlement Package shows that the Commission "does not rest on its laurels, but actively searches for ways to maintain and improve its performance and record against a moving target, so that its enforcement efforts increase deterrence against cartel behaviour".[97]

94 Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, quoted above, p. 3.

95 Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, quoted above, p. 4.

96 Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, quoted above, p. 5.

97 Tierno Centella, *op. cit.*, p. 35.

CHAPTER 11

The Commission's Powers of Investigation

11.1 Sanctions

One of the most important powers of the European Commission is the power to sanction the undertakings that breach Articles 101 or 102 TFEU. A retrospective view on the Commission's fining practice indicates that in the early years of European competition law, the fines for breaches of cartel legislation or for abuses of dominant position were low. Legal certainty was a concept foreign to the European Commission as shown by the Commission's change of heart starting with the well-known decision in *Pioneer* adopted by the Commission in 1980.[1] By 1991 however, the Commission was ready to make full use of Regulation 17 and impose fines of up to 10% of the annual turnover of the companies involved. In the recent years, the fines imposed by the Commission have raised many eyebrows, until it became clear that a fine of 1 billion Euros would no longer be an exception.

The CJEU has consistently held that the Commission benefits from a *large margin of discretion* when it comes to calculating and imposing fines for breach of Articles 101 and 102 TFEU. The reproach, however, was that the method of setting the fine should be a transparent one, so as to enable the addressee to understand how the Commission reached that amount and to grasp the connection between the behaviour that is reproached and the fine that is imposed. In one of those critiques, the Court held that

> the Commission must, if it systematically took into account certain basic factors in order to fix the amount of fines, set out those factors in the body of the decision in order to enable the addressees of the decision to verify that the level of the fine is correct and to assess whether there has been any discrimination.[2]

In response to these critiques, the Commission issued in 1998 its first fining guidelines.[3] These guidelines were intended to

1 C-100/80, *Musique Diffusion française v Commission*, quoted above.

2 T-347/94, *Mayr-Melnhof Kartongesellschaft v Commission*, paragraph 285.

3 Information from the Commission – Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty, OJ C 9, 14.1.1998, pp. 3–5.

> ensure the transparency and impartiality of the Commission's decisions, in the eyes of the undertakings and of the Court of Justice alike, whilst upholding the discretion which the Commission is granted under the relevant legislation to set fines within the limit of 10% of overall turnover. This discretion must however follow a coherent and non-discriminatory policy which is consistent with the objectives pursued in penalizing infringements of the competition rules.[4]

In 2006, the Commission issued a revised version of the fining guidelines to further develop and refine its policy on fines.[5] The Commission stressed in the introduction that the power to impose fines on undertakings or associations of undertakings which, intentionally or negligently, infringe on Article 101 or 102 of the TFEU

> is one of the means conferred on it in order for it to carry out the task of supervision entrusted to it by the Treaty. That task not only includes the duty to investigate and sanction individual infringements, but it also encompasses the duty to pursue a general policy designed to apply, in competition matters, the principles laid down by the Treaty and to steer the conduct of undertakings in the light of those principles. For this purpose, the Commission must ensure that its action has the necessary deterrent effect. (…) Fines should have a sufficiently deterrent effect, not only in order to sanction the undertakings concerned (specific deterrence) but also in order to deter other undertakings from engaging in, or continuing, behaviour that is contrary to Articles 81 and 82 of the EC Treaty (general deterrence).[6]

The European courts have also considered the question of the legal value of the fining guidelines in view of their soft law nature. The CJEU found in *Dansk Rorindustry and Others* that

> in adopting such rules of conduct and announcing by publishing them that they will henceforth apply to the cases to which they relate, the institution in question imposes a limit on the exercise of its discretion and cannot

4 Information from the Commission – Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty, quoted above, introductory paragraph.

5 Guidelines of method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, quoted above.

6 Guidelines of method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, quoted above, p. 2.

> depart from those rules under the pain of being found, where appropriate, to be in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations. It cannot therefore be excluded that, on certain conditions and depending on their conduct, such rules of conduct, which are for general application, may produce legal effects.[7]

Article 23 of Regulation 1/2003 holds that fines can be imposed for two types of breaches: (1) fines for procedural infringements and (2) fines for substantive breaches of European competition law.

Articles 23(1) of the Regulation on Procedure indicates that the Commission may impose by decision a fine for the following behaviours: supply of incorrect or misleading information in response to a request made by the Commission, or disrespect of the time limit to provide the information; production of the required books or other records related to the business in incomplete form during an inspection or refusal to submit to an inspection; refusal to answer questions during an inspection; or breaking of seals.

Despite the Commission's large use of its fining powers, the instances where Article 23(1) is applied are rare. It is more likely that the Commission will consider the behaviours described above as aggravating circumstances under Article 23(2).

Article 23(2) enumerates the situations in which the Commission may impose fines for breach of substantive competition rules: infringement of Article 101 or Article 102 TFEU; contravention of a decision ordering interim measures under Article 8 of Regulation 1/2003; and failure to comply with a commitment made binding by a decision pursuant to Article 9.

Turning now to the method of calculating the fines, the Commission will first establish the basic amount that will then be adjusted to take into consideration all the aggravating or mitigating factors. The Commission may also add a specific increase for deterrence, making sure, however, that the fine does not exceed the 10% ceiling. On rare occasions, the Commission will also take into account the undertaking's inability to pay the fine due to economic or social hardship.

11.2 Leniency

The Commission's practice in the field of leniency was launched in 1996 by the introduction of the Leniency Notice.[8] This was subsequently updated in

7 C-189/02 P, *Dansk Rørindustri and Others v Commission*, ECLI:EU:C:2005:408, paragraph 212.

8 Commission Notice on the non-imposition or reduction of fines in cartel cases, OJ C 207, 18.7.1996, p. 4–6.

2002.[9] A second update followed shortly after in 2006.[10] The three leniency programmes in force so far have been successful. From 1996 until 2002, more than eighty leniency applications were lodged under the 1996 Leniency Notice and sixteen out of eighteen cartel decisions adopted by the Commission during this time were triggered by leniency applications.[11] Under the 2002 Leniency Notice, the Commission received 104 applications for full immunity and 99 applications for reductions of fines.[12]

The 2006 Leniency Notice provides for two procedures: full immunity from fines and reduction of fines.

The Commission can grant immunity from any fine which would otherwise have been imposed on an undertaking disclosing its participation in an alleged cartel affecting the internal market, provided that it is the first to submit information and evidence which can enable the Commission to carry out a targeted inspection or find an infringement in connection with the alleged cartel.[13][14]

Immunity can be granted pursuant to Article 8(a) of the Leniency Notice if, at the time of the submission, the Commission had not already had sufficient evidence to adopt a decision to carry out an inspection in connection with the alleged cartel or had already carried out such an inspection.[15]

The leniency applicant must provide, first of all, a corporate statement which must include a detailed description of the alleged cartel arrangement, including its aims, activities and functioning; the product or service concerned, the geographic scope, the duration of and the estimated market volumes affected by the alleged cartel; the specific dates, locations, content of and participants in alleged cartel contacts; and all relevant explanations in connection with the pieces of evidence provided in support of the application. Second, the application must include the name and address of the undertaking submitting the immunity application as well as the names and addresses of all the

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9 Commission notice on immunity from fines and reduction of fines in cartel cases, OJ C 45, 19.2.2002, p. 3–5.

10 Commission notice on immunity from fines and reduction of fines in cartel cases, quoted above.

11 Arbault, François and Francisco Peiro. "The Commission's New Notice on Immunity and Reduction of Fines in Cartel Cases: Building on Success." *Competition Policy Newsletter* 2 (June 2002): pp. 15–22.

12 European Commission. *Report on Competition Policy 2006*. Luxembourg: Office for Official Publications of the European Communities, 2007, p. 12.

13 Commission notice on immunity from fines and reduction of fines in cartel cases, quoted above, p. 18.

14 Commission notice on immunity from fines and reduction of fines in cartel cases, quoted above, p. 18.

15 Commission notice on immunity from fines and reduction of fines in cartel cases, quoted above, p. 18.

other undertakings that are involved with the alleged cartel. Third, the applicant must provide the names, positions, office locations and home addresses of all individuals who are currently or have been involved in the past with the alleged cartel. Fourth, the leniency applicant must inform the Commission about other competition authorities, inside or outside the EU, which have been approached or would be approached in relation to the alleged cartel. Lastly the leniency applicant must provide other evidence in its possession or available to it at the time of the submission, including in particular any evidence contemporaneous to the alleged infringement.[16]

The corporate statement is the central piece of any immunity or reduction of fines application. The Commission defines it as "a voluntary presentation by or on behalf of an undertaking to the Commission of the undertaking's knowledge of a cartel and its role therein prepared specially to be submitted under this Notice".[17] The corporate statement cannot be retracted once submitted and it forms part of the Commission's file. It can be presented either in written form or orally.

Immunity can be granted pursuant to Article 8(b) if the Commission does not already have enough evidence to find an infringement and that no undertaking had already been granted immunity under Article (8)(a) in connection with the alleged cartel. Thus, in order to qualify for immunity, the undertaking lodging a leniency application must be the first to lodge such a request or would otherwise not qualify for immunity.

The undertakings have a duty to cooperate with the Commission genuinely, fully, on a continuous basis and expeditiously from the time they submit the application throughout the Commission's administrative procedure. The undertaking must also end their involvement in the alleged cartel immediately, except for what involvement would, in the Commission's view, be reasonably necessary to preserve the integrity of the inspections.[18]

The Commission can grant immunity status to only one undertaking involved in an alleged cartel, however it can also grant a few reductions of fines to the undertakings that do not qualify for immunity. Thus, undertakings disclosing their participation in an alleged cartel affecting the internal market

16 Commission notice on immunity from fines and reduction of fines in cartel cases, quoted above, p. 18.

17 Commission notice on immunity from fines and reduction of fines in cartel cases, quoted above, p. 21.

18 Commission notice on immunity from fines and reduction of fines in cartel cases, quoted above, p. 18.

that do not meet the conditions for immunity may otherwise be eligible to benefit from a reduction of fine.[19]

In order to qualify for a reduction of fine, the undertaking making the request must provide the Commission with evidence of the alleged infringement which represents significant added value with respect to the evidence already in the Commission's possession and must meet the cumulative conditions set out above. The Leniency Notice defines the concept of "added value" as referring "to the extent to which the evidence provided strengthens, by its very nature and/or its level of detail, the Commission's ability to prove the alleged cartel".[20] To perform this assessment, the Leniency Notice indicates that the Commission

> will generally consider written evidence originating from the period of time to which the facts pertain to have a greater value than evidence subsequently established. Incriminating evidence directly relevant to the facts in question will generally be considered to have a greater value than that with only indirect relevance. Similarly, the degree of corroboration from other sources required for the evidence submitted to be relied upon against other undertakings involved in the case will have an impact on the value of that evidence, so that compelling evidence will be attributed a greater value than evidence such as statements which require corroboration if contested.[21]

The first undertaking to provide significant added value will receive a fine reduction ranging from 30–50% of the fine which would otherwise be imposed. The second undertaking will receive a reduction of 20–30%, and the subsequent undertakings will receive reductions of up to 20%.[22]

11.3 Sector Inquiries

The Commission has the power to investigate sectors of the economy and types of agreements. Article 17 of the Regulation 1/2003 provides that

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19 Commission notice on immunity from fines and reduction of fines in cartel cases, quoted above, p. 20.

20 Commission notice on immunity from fines and reduction of fines in cartel cases, quoted above, p. 20.

21 Commission notice on immunity from fines and reduction of fines in cartel cases, quoted above, p. 20.

22 Commission notice on immunity from fines and reduction of fines in cartel cases, quoted above, p. 20.

> where the trend of trade between Member States, the rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the common market, the Commission may conduct its inquiry into a particular sector of the economy or into a particular type of agreements across various sectors. In the course of that inquiry, the Commission may request the undertakings or associations of undertakings concerned to supply the information necessary for giving effect to Articles 81 and 82 of the Treaty and may carry out any inspections necessary for that purpose.[23]

The Commission can request the disclosure of any agreement, decision or concerted practice that it considers necessary.

Former Competition Commissioner Neelie Kroes explained that sector inquiries are to be launched in areas where there appear to be sustained competition problems, possibly due to competition infringements, with the possibility for introducing better regulation in a sector which is key for consumers and for competitiveness.[24]

The Commission publishes a preliminary report on the results of its inquiry and invites comments from interested parties.[25] A final report is then released, taking stock of the findings and the views expressed by the third parties in writing or during an oral hearing.

The Commission has increasingly relied on sector inquiries in recent years, with inquiries authorised in the media sector, the energy sector, the financial services sector and the pharmaceutical sector.

Van Bael points out that "sector inquiries are first of all an information-gathering exercise that provides the Commission with in-depth knowledge about markets and is therefore 'upstream' of proceedings in specific cases. The knowledge gained about the market can form the basis of specific enforcement initiatives at a later stage".[26]

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23 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, quoted above, article 17(1).

24 European Commission. Neelie Kroes. *Fact-based Competition Policy – the Contribution of Sector Inquiries to Better Regulation, Priority Setting and Detection*. Speech, 26 Mar 2007. Available at http://europa.eu/rapid/press-release_SPEECH-07-186_en.pdf accessed on 23 February 2021.

25 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, quoted above, article 17(1).

26 Van Bael, *op. cit.* p. 149.

The decision to authorise a sector inquiry can be challenged before the CJEU.

11.4 Requests for Information

The Commission can, by simple request or by decision, require undertakings and associations of undertakings to provide all information necessary for the performance of its investigative duties.[27]

When the Commission sends a simple request for information to an undertaking or association of undertakings, it states the legal basis and the purpose of the request, specifies what information is required and fixes the time limit within which the information is to be provided. The Commission also informs the undertakings about the penalties provided for in Article 23 in cases of supplying incorrect or misleading information.[28] The Commission also indicates the right of the undertaking to have the decision reviewed by the Court of Justice.[29]

The Commission forwards a copy of the request for information to the government and national competition authorities concerned, which in turn provide the Commission with all the necessary information for the performance of its duties.[30]

The Commission invites the addressees of the request for information to identify in their replies any information that contains business secrets or other confidential information.

11.5 The Power to Take Statements

Article 19 of Regulation 1/2003 provides that the Commission may interview any natural or legal person who consents to be interviewed for the purpose of

27 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, quoted above, article 18(1).

28 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, quoted above, article 18(2).

29 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, quoted above, article 18(3).

30 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, quoted above, article 18(5).

collecting information relating to the subject-matter of an investigation.[31] The Commission has to inform the person of the voluntary nature of the interview and of its intention to record it.[32] The interview may be conducted face-to-face, by telephone or by electronic means.[33]

When the interview is granted at the premises of an undertaking, the Commission must inform the competition authority of the member state in whose territory the interview takes place. If so requested by the competition authority of that member state, its officials must assist the Commission in conducting the interview.[34]

11.6 Powers of Inspection

Article 20 of Regulation 1/2003 contains extensive provisions concerning the Commission's powers of inspection. The regulation strengthened these powers, confirming that the Commission's right to inspection includes the powers:

- to enter any premises, land and means of transport of undertakings and associations of undertakings;
- to examine the books and other records related to the business, irrespective of the medium on which they are stored;
- to take or obtain in any form copies of or extracts from such books or records;
- to seal any business premises and books or records for the period and to the extent necessary for the inspection; and
- to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject-matter and purpose of the inspection and to record the answers.[35]

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31 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, quoted above, article 19(1).

32 Regulation No 17 First Regulation implementing Articles 85 and 86 of the Treaty, quoted above, article 3(1).

33 Regulation No 17 First Regulation implementing Articles 85 and 86 of the Treaty, quoted above, article 3(2).

34 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, quoted above, article 19(2).

35 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, quoted above, article 20(2).

There is no limit as to the number of officials and other accompanying persons who are authorised to perform the inspection. They will, however, exercise their powers upon production of a written authorisation specifying the subject matter and purpose of the inspection and the penalties provided for in Article 23 in case the production of the required books or other records related to the business is incomplete or where the answers to questions asked under paragraph 2 of the present Article are incorrect or misleading.[36] The decision must specify (a) the subject matter and purpose of the inspection, (b) the date of the inspection, (c) the penalties provided for in Articles 23 and 24 and (d) the right to have the decision reviewed by the CJEU. The Commission shall take such decisions after consulting the competition authority of the member state in whose territory the inspection is to be conducted.[37]

The undertakings and associations of undertakings must submit to inspections ordered by decisions of the Commission.

36 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, quoted above, article 20(3).

37 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, quoted above, article 20(4).

CHAPTER 12

Limits on the Commission's Powers of Investigation

Two general rules limit or interrupt the Commission's powers of investigation: (1) general EU law principles and (2) the duty to respect the rights of the defence.

12.1 General Principles of Limitation

The powers of investigation of the European Commission have been increasing over the years. The European courts have developed or adapted general principles of European law to limit, frame or render more predictable the use of the Commission's powers. However, these principles appear to be moral statements and desiderates rather than rules that can tame the Commission's powers, and indeed the European courts have rarely relied on them to annul the Commission's decisions. Despite this, the importance of the general principles of limitation cannot be denied. First of all, they form the context in which the Commission operates and interacts with other EU institutions and with the undertakings. Second, they are common signposts that identify the not always obvious limits of power of the European Commission. Lastly and most importantly they are applicable to all EU competition law enforcement procedures in the EU. Even when due process is weak, as in the case of commitment procedures and settlements, the Commission is still bound by these general principles of EU law.

12.1.1 *The Principle of Proportionality*

The principle of proportionality is a general principle of EU law, expressly worded in Article 49(3) of the Charter which requires that the measures adopted by European Union institutions must not exceed what is appropriate and necessary for attaining the objective pursued. When there is a choice between several appropriate measures, the least onerous must be chosen. The disadvantages caused must not be disproportionate to the aims pursued.[1]

1 *Alrosa v Commission*, quoted above, paragraph 98.

Applying the principle of proportionality, the ECJ stated in *Dow Chemicals Iberica and Others* that every investigation by the Commission must be "necessary".

The Court noted that

> in all the legal systems of the Member States, any intervention by the public authorities in the sphere of private activities of any person, whether natural or legal, must have a legal basis and be justified on the grounds laid down by law, and, consequently, those systems provide, although in different forms, protection against arbitrary or disproportionate intervention. The need for such protection must be recognized as a general principle of Community law. In that regard, it should be pointed out that the Court has held that it has the power to determine whether measures of investigation taken by the Commission under the ECSC Treaty are excessive.[2]

The Court later explained that both the investigation as such and the Commission's specific discovery principles can be assessed against the proportionality principle, in order to ensure that they "do not constitute, in relation to the aim pursued by the investigation in question, a disproportionate and intolerable interference".[3]

12.1.2 *The Principle of Territoriality*

The European Commission is competent to investigate breaches of competition law that have occurred within the territory of the EU. However, due to the way in which businesses are currently located and working, this issue is far from being settled. In particular, the question arose as to whether the Commission can request information and documents from a company that is situated outside the territory of the EU. The Commission explained it has

> only limited powers to obtain information from firms situated outside the EU. Under international law, the Commission is not empowered to conduct investigations outside the bounds of its territorial competence if they would infringe upon the national sovereignty of the non-member country in whose territory it was purporting to act. In such cases, the

2 C-97/87, *Dow Chemical Ibérica and Others v Commission*, ECLI:EU:C:1989:380, paragraph 16.

3 C-94/00, *Roquette Frères v Directeur général de la concurrence, de la consommation et de la répression des fraudes, and Commission of the European Communities*, ECLI:EU:C:2002:603, paragraph 76.

> Community can send out requests for information, but it cannot impose sanctions if a firm fails to comply. One option open to the Commission is to direct a request for information to a subsidiary of a non-EU firm which is based in the EU.[4]

12.1.3 *The Duty to Act within a Reasonable Time*

The Commission's investigations cannot last indefinitely; a decision must be reached within a reasonable time. The European Court of Justice has recognised the duty to act within a reasonable time as a general principle of community law and a corollary of the principle of sound administration.[5]

This principle is also now expressly mentioned in the Charter of Fundamental Rights which states in its Article 41(1) that "every person has the right to have his or her affairs handled within a reasonable time by the institutions, bodies, offices and agencies of the Union". The Charter does not distinguish between a general duty of the European institutions to act within reasonable deadlines and a special, more severe duty of the European Commission when it investigates market breaches under Articles 101 and 102 TFEU. Neither do the Charter, the Treaty or the European courts impose any deadlines on the Commission for investigating or closing cases. The European courts, however, will perform a case-by-case analysis in light of certain criteria such as the context of the case and its complexity, the conduct of the parties and of the Commission, and the interest of the undertakings concerned.

12.1.4 *Duty to State Reasons*

The duty to state reasons is an important principle of EU law that is now enshrined in Article 296 TFEU and Article 41(2) of the Charter of Fundamental Rights, which provides for the obligation of the administration to give reasons for its decisions.

In investigations covering Articles 101 and 102 TFEU, the Commission has a duty to give reasons both for its findings and for the penalties imposed. The European Court of Justice held, in a case concerning state aid, that the Commission is required to deliver its reasons in a clear and unequivocal fashion so as to

> enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review. The

4 European Commission. *Dealing with the Commission Notifications: complaints, inspections and fact-finding powers under Articles 85 and 86 of the EEC Treaty*, quoted above, p. 22.

5 T-213/00, *CMA CGM and Others v Commission*, ECLI:EU:T:2003:76, paragraph 317.

requirement to state reasons must be appraised by reference to the circumstances of each case. The question whether the statement of reasons meets the requirement of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question.[6]

12.2 The Rights of the Defence

12.2.1. The Right to Be Heard

The notification of the statement of objections to the undertakings concerned triggers the right to be heard, which is one of the pillars of the rights of the defence in European competition law. The right to be heard in European competition law has two aspects that complement each other: (a) the written comments and (b) the oral hearing.

Regulation 1/2003 ensures that before taking decisions as provided for in Articles 7, 8, 23 and 24(2), the Commission must give the undertakings or associations of undertakings which are the subject of the proceedings the opportunity to be heard on the matters to which the Commission has taken objection. This is of crucial importance as the Commission can base its decisions only on objections on which the parties concerned have been able to comment.[7]

The right to be heard is not guaranteed by Regulation 1/2003 in commitment proceedings. In settlement proceedings, the right to be heard is guaranteed by Regulation 622/2008.

The parties concerned must be informed about all the objections raised against them in the statement of objections that must be sent to each party. The Commission must also set a time limit within which they can react to these objections. The concerned parties should prepare and send their reply, which can describe the facts that support or go against the Commission's assertions. They can also attach evidence in support of their allegations. Finally,

6 T-95/03, *Asociación de Empresarios de Estaciones de Servicio de la Comunidad Autónoma de Madrid and Federación Catalana de Estaciones de Servicio v Commission of the European Communities*, ECLI:EU:T:2006:385, paragraph 108.

7 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, quoted above, article 27.

Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty Implementing Regulation, quoted above, article 11.

they can propose that the Commission hears persons who may corroborate the facts set out in their submission.[8]

Aside from the parties concerned, the Commission can also hear in writing the complainants and other third parties. Complainants should be associated closely with the proceedings.[9] When the Commission has issued a statement of objections relating to a matter in respect of which it has received a complaint, it must provide the complainant with a copy of the non-confidential version of the statement of objections and set a time limit within which the complainant may make known its views in writing.[10]

The Commission may also decide to hear third parties that have either been identified by the parties concerned or by the member states, or are deemed by the Commission to have an interest in the proceedings. Third parties may themselves request to be heard when they have an interest in the proceedings. Such applications to be heard shall, where they show a sufficient interest, be granted.[11]

As to the right to be heard orally, the interested parties can request an oral hearing before or, at the latest, when submitting their reply to the statement of objections.[12]

The Commission sets up the date of the oral hearing and invites the parties concerned or other interested third parties that the Commission will admit to the hearing. The Commission also invites the competition authorities of the member states to take part in the oral hearing. It may likewise invite officials and civil servants of other authorities of the member states.[13]

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8 Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty Implementing Regulation, quoted above, article 10.

9 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, quoted above, article 27.

10 Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty Implementing Regulation, quoted above, article 6(1).

11 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, quoted above, article 27(3).

12 Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty Implementing Regulation, quoted above, article 12.

13 Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty Implementing Regulation, quoted above, article 14(2) and (3).

The hearing officer organizes and conducts the hearing. He fixes the date, the duration and the place of the hearing. He ensures that the oral hearing provides addressees of the statement of objections, other involved parties, as well as complainants and interested third persons which have been admitted to the oral hearing, with sufficient opportunity to express and develop their views.[14] In order to ensure the proper preparation of the oral hearing, the hearing officer can, after consulting the director responsible, supply in advance to the persons invited to the hearing a list of questions which might be raised during the hearings. He can also indicate to the persons invited to the hearing the focal areas for debate, having regard, in particular, to the facts and issues that the parties want to raise.[15] The hearing officer may also ask for the prior written notification of the essential contents of the intended statements of persons invited to the hearing.[16] He has the competence to decide whether new documents should be admitted during the hearing and which persons should be heard on behalf of a party.[17]

After the hearing, the hearing officer submits an interim report and later a final report to the competent member of the Commission on the hearing and the conclusions he or she draws with regard to the respect for the effective exercise of procedural rights.[18]

The persons heard by the Commission may be assisted by their lawyers or other qualified persons.[19] Oral hearings are not public.[20] Each person may be

14 Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, OJ L 275, 20.10.2011, pp. 29–37, article 10.

15 Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, quoted above, article 11(1).

16 Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, quoted above, article 11(3).

17 Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, quoted above, article 12(2).

18 Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, quoted above, articles 14 and 16.

19 Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty Implementing Regulation, quoted above, article 14(4).

20 Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty Implementing Regulation, quoted above, article 14(6).

heard separately or in the presence of other persons invited to attend, having regard to the legitimate interest of the undertakings in the protection of their business secrets and other confidential information.

With regard to the right to ask questions during the hearing, the hearing officer may grant the parties this right, however the existing legislation provides no guidance as to the circumstances in which this right may be granted. The statements made by each person heard have to be recorded, they can be disclosed upon request to the persons who attended the hearing.[21]

12.2.2 *Access to File*

Access to file is one of the most important procedural guarantees in European competition law proceedings and constitutes "a major breakthrough in the field of due process and an essential prerequisite for the exercise of the right to be heard".[22] It is also an example of how fundamental rights have developed in the field of competition law through the common work of the European courts' case-law and the practice of the European Commission.

Access to file was initially construed to encompass only access to inculpatory evidence. However, from 1982 the Commission changed its practice, granting access to the entire file when investigating Articles 101 and 102. This practice was translated into a legal principle in 1991, when the CFI ruled that

> in establishing a procedure for providing access to file in competition cases, the Commission imposed on itself rules exceeding the requirements laid down by the Court of Justice. (…) The Commission may not depart from rules which it has thus imposed on itself. (…) It follows that the Commission has an obligation to make available to the undertakings involved in Articles 81(1) proceedings all documents, whether in their favour or otherwise, which it has obtained during the course of the investigation, save where the business secrets of other undertakings, the internal documents of the Commission and other confidential information are involved.[23]

In *ICI*, the CFI relied on the equality of arms principle to explain that "in a competition case the knowledge which the undertaking concerned has of the file

21 Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty Implementing Regulation, quoted above, article 14(8).

22 Van Bael, *op. cit.*, p. 176.

23 T-7/89, *Hercules Chemicals v Commission*, ECLI:EU:T:1991:75, paragraphs 53–54.

used in the proceedings is the same as that of the Commission".[24] In *Solvay*, the CFI held that the Commission should give the defendants access to the entire file: "it cannot be for the Commission alone to decide which documents are of use for the defence. The Commission must give the advisers of the undertaking concerned the opportunity to examine documents which may be relevant so that their probative value for the defence can be assessed".[25]

In 1997, the Commission published guidelines on the right of access to file, aiming to bring its practice in line with the jurisprudence of the CJEU. In 200,5 the Commission issued a Notice on Access to File, replacing the guidelines adopted in 1997. In addition, Regulation on Procedure, the Implementing Regulation and the Charter provide for the right to have access to the Commission's file. However, access to the Commission's files under Articles 101 and 102 TFEU can only be granted to the addressees of the statement of objections.

The *Commission's file* consists of all documents which have been obtained, produced and/or assembled by DG COMP during the investigation. Documents collected during an investigation which, following a more detailed examination, prove to be unrelated to the subject matter of the case in question, may be returned to the undertaking from which they have been obtained. Upon return, these documents will no longer constitute part of the file.[26]

Accessible documents are all documents that compose the Commission's file, with the exception of internal documents, business secrets of other undertakings, or other confidential information.[27]

Access to file is granted upon request and, normally, on a single occasion, following the communication of the statement of objections to the parties concerned. As a general rule, therefore, no access can be granted to other parties' replies to the Commission's objections unless such documents constitute new evidence – whether of an incriminating or of an exculpatory nature – and the Commission intends to rely on it.[28]

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24 T-37/91, *ICI v Commission*, ECLI:EU:T:1995:119, paragraph 64.

25 T-30/91, *Solvay v Commission*, ECLI:EU:T:1995:115, paragraph 81.

26 Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004, OJ C 325, 22.12.2005, pp. 7–15, p. 8.

27 Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004, quoted above, p. 8.

28 Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004, quoted above, p. 12.

Access to file may be granted in one of the following ways, taking due account of the technical capabilities of the parties:

– by means of CD-ROM(S) or any other electronic data storage device as may become available in future;
– through copies of the accessible file in paper form sent to them by mail; or
– by inviting them to examine the accessible file on the Commission's premises.

The Commission may choose any combination of these methods. In order to facilitate access to the file, the parties receive an enumerative list of documents setting out the content of the Commission file.[29]

The Notice on Access to File describes two main types of non-accessible documents: the Commission's internal documents and documents containing business secrets and other confidential information.

Article 15(2) stipulates that the right of access to the file does not extend to *internal documents* of the Commission or of the competition authorities of the member states. The right of access to the file does not cover the correspondence between the Commission and the competition authorities of the member states or between the latter where such correspondence is contained in the file of the Commission.

The Commission's internal documents can be neither incriminating nor exculpatory and they do not constitute, therefore, part of the evidence on which the Commission can rely in its assessment of a case. Thus, the parties will not be granted access to internal documents in the Commission file.

An important part of the Commission's internal documents are the *minutes of meetings*. There is however no obligation for the Commission to draft any minutes of meetings with any person or undertaking. More importantly, if the Commission chooses to make notes of such meetings, such documents constitute the Commission's own interpretation of what was said at the meetings, for which reason they are classified as internal documents. In exceptional cases, however, the Commission can disclose the content of its minutes. Thus, for example, where the undertaking has agreed, the minutes will be made accessible after deletion of any business secrets or other confidential information. Such agreed minutes constitute part of the evidence on which the Commission can rely in its assessment of a case.[30]

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29 Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004, quoted above, p. 15.

30 Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004, quoted above, p. 9.

Article 15(2) of the Implementing Regulation provides that business secrets and other confidential information are not required to be disclosed under the right of access to file.

Business secrets are defined broadly as including technical and/or financial information relating to an undertaking's know-how, methods of assessing costs, production secrets and processes, supply sources, quantities produced and sold, market shares, customer and distributor lists, marketing plans, cost and price structures and sales strategies.[31]

Other confidential information may include "information other than business secrets, which may be considered as confidential, insofar as its disclosure would significantly harm a person or undertaking".[32] Confidential information is case-specific and it may include, for example, information provided by third parties about undertakings which are able to place very considerable economic or commercial pressure on their competitors or on their trading partners, customers or suppliers, including retaliatory measures. The notion of other confidential information may include, therefore, information that would enable the parties to identify complainants or other third parties where those have a justified wish to remain anonymous.[33]

The Commission can either accept the confidentiality claims when they are justified or reject them, in which case, if the party insists on confidentiality, it will be for the hearing officer to settle the matter.

The Commission explains that the confidential nature of a document is not a bar to its disclosure if such information is an inculpatory or an exculpatory document. In this case, the need to safeguard the rights of the defence of the parties through the provision of the widest possible access to the Commission file may outweigh the concern to protect confidential information of other parties. It is for the Commission to assess whether those circumstances apply to any specific situation. This calls for an assessment of all relevant elements, including the relevance of the information in determining whether or not an infringement has been committed, and its probative value; whether the

31 Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004, quoted above, p. 10.

32 Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004, quoted above, p. 10.

33 Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004, quoted above, p. 10.

information is indispensable; the degree of sensitivity involved; and the preliminary view of the seriousness of the alleged infringement.[34]

12.2.3 *The Right to Remain Silent*

The right to remain silent is a principle which argues that no one can be compelled to incriminate oneself. This principle prevents extortion of information or the use of investigative measures that force the accused person to acknowledge his guilt.

There is no express provision concerning the right to remain silent in European competition law. On the contrary, the legislation places an obligation of cooperation on the undertakings, an obligation that encompasses the duty to answer requests for information, the duty to provide requested documents and the duty to collaborate during inspections.

However, in *Orkem*, the Court of Justice developed an exception to the undertakings' obligation of cooperation with the Commission. The Court argued that an undertaking has the right to remain silent when faced with questions that can be viewed as possibly requiring the company to admit the existence of an infringement.[35]

The EU Courts held in a later case that "a right to silence can be recognized only to the extent that the undertaking concerned would be compelled to provide answers which might involve an admission on its part of the existence of an infringement".[36] The CFI explained that this approach was motivated by the need to preserve the efficiency of the Commission's enforcement powers.[37]

This exception is now codified in Recital 23 of the preamble to the Regulation 1/2003 which highlights that "when complying with a decision of the Commission, undertakings cannot be forced to admit that they have committed an infringement, but they are in any event obliged to answer factual questions and to provide documents, even if this information may be used to establish against them or another undertaking the existence of an infringement".

Thus, undertakings must produce all the documents that the Commission requests, but should answer only those questions which are not directly incriminatory. The Commission itself explained that

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34 Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004, quoted above, p. 11.

35 C-374/87, *Orkem v Commission*, ECLI:EU:C:1989:387, paragraph 35.

36 T-236/01, *Tokai Carbon v Commission*, ECLI:EU:T:2004:118, paragraph 402.

37 T-236/01, *Tokai Carbon v Commission*, quoted above, paragraph 402–403.

> it is not permitted to ask leading questions, where giving a truthful answer would lead the firm to confess to an infringement. (…) It remains the task of the Commission to prove the facts, as it has found them, in support of the conclusion that there has been an infringement of the competition rules. Requiring firms to answer oppressive questions would effectively deprive them of their right to a hearing in the subsequent adjudicatory stage of proceedings.[38]

38 European Commission. *Dealing with the Commission Notifications: complaints, inspections and fact-finding powers under Articles 85 and 86 of the EEC Treaty*, quoted above.

CHAPTER 13

A Risk-Based Framework for Safeguarding the European Commission's Independence

I have started this part of the book with the description of academic and political discourse surrounding the notion of judicial independence and outlined the principles formulated by the ECtHR on this subject. Chapter 9 described the *objective environment* in which EU competition law decisions are adopted and highlighted the political-bureaucratic interface that is engaged when the European Commission acts as an investigator, prosecutor and adjudicator during competition law enforcement proceedings. Chapters 10, 11 and 12 described the *anatomy of the procedure leading to a competition law decision*.

In the current chapter I will attempt to juxtapose the fair trial standards of independence developed by the ECtHR with the political-bureaucratic interface of the Commission. The purpose of this exercise is to test whether the European Commission can be deemed an independent and impartial adjudicator for the purpose of Article 6(1) ECHR.

13.1 Identifying the Risks to Independence in EU Competition Law Proceedings

I will follow a three-columned analysis in the current section, as Table 2 below indicates. This analysis will juxtapose procedural moments with the existing risks to the independent exercise of the adjudicative power and the existing safeguards.

The following *procedural moments* will be analysed:

- Steps taken by the EU Commission outside the framework of an official investigation;
- Official receipt of a formal complaint or a leniency application;
- Opening of an investigation or issuing of a statement of objections;
- Initial assessment and in-depth investigation of a complaint; and
- Formal adoption of a decision.

The following *risks to independence* will be interpreted:

- Interference – Describing potential involvement or influence over DG COMP by other directorates of the Commission or by one of the Commissioners;

– External influence – Describing the potential involvement with or influence that lobbying groups or private interests may exercise over the Commission's employees;
– Anonymity – Describing the fact that the members of the DG COMP case team handling a competition law complaint are unknown to the public;
– Collegiality – Describing the collegiate nature of decision-making employed by the College of Commissioners;
– Appearances – Describing potential doubts that complainants or defendants may entertain about the Commission's independence;
– Cumulation of functions – Describing the concomitant exercise of investigative, prosecutorial and adjudicative functions by the EU Commission;
– Bias – Describing the preconceived ideas that staff involved in EU competition law proceedings might entertain due to their prior involvement with the case, the claimants or the defendants; and
– Momentum bias – Describing the risk that a lengthy investigation will lead to the adoption of a decision due to the time and resources spent investigating.

The last column of the analysis is dedicated to the *existing safeguards* that might counter the identified risks. These safeguards are the following:

– General behavioural safeguards – Describing EU law provisions concerning the independence of the EU Commission. General behavioural safeguards include the TFEU provisions concerning the independence of Commissioners, the Code of Conduct for Commissioners, the Staff Regulations, Rules of Procedure of the EU Commission and the Code of Good Administrative Behaviour. They were described in sections 9.1.2. and 9.2.2. above;
– Language requirements – Describing the obligation that the EU Commission has to communicate both with the complainants and the defendants in a language they can understand;
– Rights of defence – Describing the right to be heard that the defendants have and the involvement of the hearing officer with the proceedings;
– Meetings with the EU Commission – Describing state of play meetings, triangular meetings or bilateral meetings with the EU Commissioner for Competition or the Director-General of the DG COMP;
– Internal peer review – Describing the mechanisms put in place with the EU Commission for the purpose of ensuring checks and balances. These mechanisms describe the involvement of the Chief Economist, the EU Commission's Legal Service, the other DG s and the Advisory Committee;

– Public scrutiny – Describing the accountability that derives from the public's knowledge about the competition law proceedings opened by the EU Commission; and
– Judicial review – Describing the judicial review performed by the CJEU.

TABLE 2 Risks to independent adjudication and existing safeguards in EU competition law

Procedural Moment	Risks to Independence	Existing Safeguards
Outside official proceedings: Agenda-setting Monitoring by the Commission Informal complaints	– External influence – Interference – Bias – Appearances	– General behavioural safeguards
Receipt of formal complaints Receipt of leniency application	– External influence – Interference	– General behavioural safeguards – Language requirements
Opening of investigation/ Statement of Objections	– Interference – Cumulation of functions – Bias – Anonymity	– General behavioural safeguards – Public scrutiny – Language requirements – Rights of defence
Initial assessment and in-depth investigation	– External influence – Interference – Cumulation of functions – Bias – Anonymity – Meetings with the EU Commission	– General behavioural safeguards – Language requirements – Rights of defence – Meetings with the EU Commission
Formal adoption of decision	– Cumulation of functions – Bias – Momentum bias – Collegiality – Appearances	– General behavioural safeguards – Internal peer review – Public scrutiny – Judicial review

13.1.1 *Risks to Independence Outside Official Proceedings*

It is important to notice that the EU Commission shapes EU competition policy and investigates breaches of competition law outside official proceedings as well. The political priorities set by the President of the Commission guide DG COMP's work during the whole mandate. At the same time, the DG COMP should monitor and gather information about the priority policy areas. Finally, as some authors have highlighted, DG COMP receives and settles informally competition law complaints. Allegedly, 90% of the competition cases that the Commission receives are settled informally.[1]

This situation raises serious concerns in relation to the independence of the EU Commission. *First*, since this off-procedure activity takes place outside the legal framework provided for by the existing hard law and soft law instruments in competition law, the risks of external influence, interference and bias are high. The only safeguards that apply to this type of competition law enforcement are the ones provided for by the Staff Regulations, the Rules of Procedure and by the Code of Good Administrative Behaviour, all of which are soft-law instruments. These general behavioural safeguards are sufficient for an administrative authority that has adjudicative powers. First, these standards do not clarify the involvement of the political branch of the Commission with the case. Since the enforcement of EU competition law requires the involvement of both the College of Commissioners and the DG COMP, the question arises as to how the College of Commissioners participates in the cases that are settled informally.

Second, questions about the practical aspects of handling informal complaints, such as the staff in charge of receiving the complaints or the procedure for negotiating an informal settlement, also raise serious questions about the independence of the EU Commission.

Lastly, it might be argued that this type of competition law-making yields large efficiency benefits in terms of competition policy making. However, this procedure rests on anonymity and gives the appearance that the EU Commission acts more like a secret service than a competition enforcement agency.

13.1.2 *Risks to Independence upon Receipt of Formal Complaints*

The receipt of a formal complaint or of a leniency application marks the beginning of formal competition law enforcement proceedings. This procedural moment activates the known legal framework for the enforcement

1 Van Bael, *op. cit.*, p. 290.

of competition policy in the EU and the rights of the defendants. A formal complaint or a leniency application also triggers the complainants` legitimate expectations that the Commission will reach a decision within a reasonable time and will correct the relevant market failure. In other words, this step marks the beginning of competition law proceedings whose course can be predicted by the parties involved and in which the Commission's powers will be exercised in a foreseeable way.

The risks to independence at this stage of the procedure are minimal. However, it is possible that external or internal pressure could be exercised on the staff receiving the complaints or involved with their preliminary handling. This pressure could be directed towards assigning lesser priority to cases or, on the contrary, assigning higher priority to cases.

13.1.3 *Risks to Independence during Opening of Proceedings*

The opening of proceedings, which in the case of cartel cases, coincides with the issuing of the statement of objections, marks the moment when defendants formally learn about the Commission's investigation and the evidence gathered against them. If the Commission issues a press release, the general public is also informed about the opening of the proceedings.

The risks to independence at this stage are important. *First*, there is the risk that staff involved in the off-procedure investigation of the case would be assigned to work as a case team. This means that staff members who might have spent years gathering information about the anti-competitive practices of the defendants would then be requested to act as prosecutors. Taking into account the organigram of DG COMP and its sectoral teams mentioned in Section 9.2.3. above, the probability that the same members of staff involved in investigation would be involved in the prosecution is very high. The alternative scenario would mean, for example, that staff from the division dealing with mergers in the energy sector might be required to be a part of the team prosecuting cartels in the big data sector. This scenario, although it might contribute to the Commission's independence, is very unlikely. DG COMP was praised during the two Eurobarometer exercises described in section 9.2.3. above as an administration with highly specialized teams. The reasoning that the EU courts use to defer to the discretion of the EU Commission on the grounds that the EU Commission is better-placed to acquire specialized knowledge on competition law matters might apply to the Commission's internal mechanisms as well. In fact, there might be an internal, sectoral deference within DG COMP that could affect the independent handling of complaints.

Second, the anonymity of the case-handlers can affect the independence of proceedings. Whereas the complainants and the defendants would have

the opportunity to meet the members of the case team assigned by DG COMP to handle a case, the rest of the public does not know the names of the staff members involved with the case. This means that the public or the competition community is deprived of the possibility to identify DG COMP staff members who might have personal or economic links – such as owning shares – with the defendants or the complainants. In this context, one can argue that European consumers – on whose behalf competition proceedings are initiated – should have the right to know the identity of the persons using public funds to prosecute breaches of competition law and to impose fines in the name of the public interest. Also, the anonymity of the prosecutorial function in this scenario diminishes the level of personal responsibility and accountability of each member of staff. Lastly, in light of the concerns raised during the Eurobarometer polls concerning the frequent changes of DG COMP's case team during proceedings, it seems fair to inquire into the reasons for these staff movements. Changes in the composition of case teams can strengthen independence by removing members who appear to be biased or linked to the complainants or the defendants. However, such changes might also weaken independent decision-making by removing case handlers who refuse to follow political instructions.

The existing safeguards at this stage are more meaningful than during other stages of competition law enforcement proceedings. The general behavioural safeguards are accompanied by safeguards stemming from publicity-driven accountability. Once the general public is informed about the proceedings, it can contribute to them by sharing information in support or against the EU Commission's proposed line of argument. In addition, the existing legal framework indicates that the statement of objections is issued in order to ensure the rights of defence of the defendants. However, rights of the defence in this context only refer to the right to be heard.

13.1.4 *Risks to Independence during Initial Assessment and In-Depth Investigation*

The initial assessment and the in-depth investigation performed by DG COMP are the stages of EU competition law proceedings during which the defendants have most rights and obligations. Defendants have the right to request state of play meetings, triangular meetings and meetings with the EU Commissioner for Competition or with the Director General for Competition. However, the Commission has full discretion when it comes to granting such meetings. What is more, when these meetings take place, the exchanges taking place during them are not public and do not thus form part of the case file. Hence, as the table above proposes, these meetings can be both a risk to independent

decision-making and a safeguard. Since not enough is known publicly about them, it is difficult to propose a definite argument in favour of their assessment.

Unlike the meetings described above, for which the Commission retains full discretion concerning their approval, the Commission must organise one meeting to allow the defendant to be heard. The hearing is organised by the hearing officer, who reports directly to the EU Commissioner for Competition. The purpose of the hearing is to allow the defendant company to present its case to the Commission. However, in light of the whole enforcement procedure, it appears that such hearings are mere formalities. *First*, in light of the other meetings that can take place between the EU Commission and the defendants and which are off-record, it is important to understand what the added value of a hearing is other than ticking a box. This is particularly important both from the point of view of the length of proceedings and of the fact that these meetings are organized using public funds. *Second*, the hearing officer is, as the name suggests, only in charge of hearing the defendants. He is not a member of the case team and definitely not a specialist in the substantive issues raised during proceedings. The input of the hearing officer is thus more formal than substantive.

13.1.5 *Risks to Independence during Formal Adoption of Decisions*

The final step of EU competition law proceedings is the formal adoption of a decision. Independence at this stage of the proceedings faces serious risks. The case team that has so far cumulated investigative and prosecutorial powers is now also called to exercise adjudicative powers. In addition to the bias originating from the cumulation of functions, this step of the proceedings can also be influenced by a momentum bias. In fact, prior to the official initiation of proceedings, staff members of DG COMP might have spent a few years investigating the concerned market, handling complaints and choosing the complaint that has the highest probability of success. The opening of proceedings and the official investigation involve both the Commission's human resources and reputation capital. Thus, before the formal adoption of a decision, a variety of services from the Commission would have been involved with reading and reviewing the decision prepared and drafted by the DG COMP. Thus, the expectation of adopting the proposed decision might create a bias favouring the adoption of the decision.

The procedure for the adoption of EU competition law decisions can be either written or oral. It is well known that these decisions are long and incorporate complex economic analysis. It is also known that in the case of a written procedure, the Commissioners receive a proposed decision one week before

its adoption. It is not clear how much in advance the Commissioners receive the proposed decision in case of oral procedure. It is also not clear if members of the Commissioners' cabinets have access to the proposed decision or if they can influence the Commissioner's opinion on it. Finally, it is unclear if the formal adoption of a decision is another instance of internal deferral to DG COMP's judgement or if the Commissioners truly take the time to consider the proposed decision. In view of the fact that the CJEU spends a few years on each competition law appeal, it might be argued that the College of Commissioners adopts the decision without examining the details of the case.

In any case, the decisions proposed by DG COMP are adopted by the College of Commissioners, a collegial institution. Dissenting votes may be voiced during the adoption procedure but are not made public. Whereas collegiality has its place in policy-making and institution-building, it sits oddly with the requirement that adjudicators be independent. It amounts to saying, "*our institution* thinks that you are guilty," and this, in turn, is a rather Orwellian approach to justice.

13.2 Mitigating the Identified Risks

The analysis that I have provided in the section 13.1. above described the risks to independence that may arise during EU competition law enforcement proceedings. For the purpose of identifying mitigating measures, I have identified four main types of risks:

- *Off-record procedural risks* arising from competition law enforcement that takes place outside the regular legal framework or from a lack of procedural rules;
- *Structural risks* resulting from the design of EU competition policy enforcement;
- *Anonymity risks* arising from the anonymity of DG COMP case handlers; and
- *Collegiality risks* arising from the collegiate nature of decision-making employed by the EU Commission.

Table 3 below categorises the risks identified in the enforcement of EU competition law proceedings by focusing on the procedural moments that raise most concerns in relation to independent decision-making.

13.2.1 *Off-Record Procedural Risks to Independence*

The off-record procedural risks to independent decision-making refer to investigative measures employed by the EU Commission before the opening of

TABLE 3 Types of risks to independence in EU competition law

Procedural Moment	Risks to Independence	Type of Risk
Outside official proceedings: Agenda-setting Monitoring by the Commission Informal complaints	– External influence – Interference – Bias – Appearances	– Off-record procedural risks
Initial assessment and in-depth investigation	– External influence – Interference – Cumulation of functions – Bias – Anonymity – Meetings with the EU Commission	– Off-record procedural risks – Structural risks – Anonymity risks
Formal adoption of decision	– Cumulating functions – Bias – Momentum bias – Collegiality – Appearances	– Structural risks – Anonymity risks – Collegiality risks

competition law proceedings or during the proceedings. These risks create the appearance that the EU Commission acts like a secret service agency collecting information about markets and undertakings outside the scope of formal investigations.

These risks could be mitigated by clarifying the applicable rules of procedure. *First*, DG COMP could publish the total number of complaints received yearly and the number of complaints per sectors. This would allow the general public to judge if the EU Commission is responding to complaints raised by the market or to its own political agenda. *Second*, DG COMP could publish the yearly number of informal settlements and the remedies imposed in these cases. *Third*, the applicable procedural framework could clarify the investigative measures the DG COMP can perform before the opening of proceedings. *Last*, the minutes of the meetings between the EU Commission and the defendants could be made part of the case file.

13.2.2 *Structural Risks to Independence*

The structural risks to independent decision-making arise from the design of the EU competition enforcement system itself. These are, therefore, inevitable risks in the sense that any system designed in the same way would produce the same results. These risks concern the interference of the political branch of the EU Commission with the enforcement of EU competition law. They also concern the concomitant exercise by the EU Commission of investigative, prosecutorial and adjudicative powers.

Structural risks to independent decision-making stem from the fact that EU competition law enforcement has historically not been concerned with independence. Neither Regulation 1/2003, nor the implementing regulation mention independent decision-making. However, the constitutional design of the EU has dramatically changed with the adoption of the Charter of Fundamental Rights and the TFEU-imposed duty to accede to the ECHR. The new constitutional design of the EU requires the safeguarding of independent decision-making.

Despite their importance, structural risks are hard to address because they require changes to EU Treaties. At the same time, it would be possible to diminish the impact of the structural risks by creating a culture of independence within the EU Commission. As it has been shown above, the EU Commission has an autonomous bureaucracy. Autonomy, however, only complicates the efforts to create independent decision-makers. Whereas autonomy expresses the relationship between the political and the bureaucratic branches of an institution, independence qualifies first and foremost the relationship towards adjudicators and the act of adjudication. Both autonomy and independence are acts of self-centring, but autonomy seeks to ensure bureaucratic freedom of action from political interests in the institution, whereas independence protects the persons and the decision-making processes from influence, even by members of the bureaucracy itself.

Aside from constitutional remedies to mitigate structural risks to independence, a few measures could be implemented using soft-law instruments. *First*, the EU Commission could adopt a standard of independent decision-making when dealing with EU competition law. Unlike now, independence could become a guiding principle of decision-making. *Second*, DG COMP could assign separate teams of staff to investigate, prosecute and adjudicate cases. It would also be important to physically separate the team performing adjudicative functions in separate buildings in order to decrease the influence or pressure exercised on it.

13.2.3 *Risks to Independence Posed by Collegiality*

Collegiality can be a risk because it diminishes the personal accountability of the Commissioners for the adopted decision. Collegiality, a typical feature of judicial decision-making, is not provided for by the EU treaties. It was the Commission itself, while adopting its own Rules of Procedure, that declared the collegiate nature of its decision-making.

Whereas collegiality can appear as a safeguard for independent adjudication, the contrary is achieved within the EU Commission. The Commissioners are politicians who, in the same day, must take decisions on numerous matters on their agenda. The Rules of Procedure provide for the same two procedures – written or oral – to be employed for the adoption of all the items on the agenda. The fact that adjudication is treated by the EU Commissioners in the same way as the adoption of political matters raises separate issues of fairness. However, what appears of concern in the context of this analysis is the fact that collegiality prevents the defendants and other interested parties from contesting the independence of decision-making. Only if the adopted decision provided for a breakdown of the Commissioners' individual votes could the defendants show that certain Commissioners are linked to the complainants, that they consistently defend national politics or that they have endorsed opposing legal reasoning in the past.

Thus, changing the collegiality rules employed for the enforcement of EU competition law would not only strengthen the independence of the decision-making process, it would render the College of Commissioners more accountable and more diligent.

13.2.4 *Anonymity Risks to Independence*

The last type of risk to independent decision-making is posed by the anonymity of the case handlers. The risks presented by anonymity are similar to those presented by collegiality. Except for the lack of accountability, anonymity also increases the risk of interference by providing for the possibility of arbitrary removal of case handlers who might entertain minority views. In addition, anonymity also increases the risk of disclosure of information to defendants, complainants or third parties in a way that may pose serious concern to independent decision-making. DG COMP is aware of this risk as it highlights in its Annual Activity Reports the number of cases of inadvertent disclosure of information and the measures taken to correct the situation.[2]

2 See for example European Commission. Directorate-General for Competition. *2017 Annual Activity Report*, quoted above, p. 54.

This type of risk is easy to address; the names of the case handlers could be disclosed starting with the opening of the proceedings and changes in team formation could be explained at least to the parties.

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I have undertaken a difficult task in Part 3 of the current book: to test whether the European Commission fulfils the independence requirement imposed by Article 6(1) ECHR when enforcing EU competition law. In the course of the analysis, Chapter 7 described the growing importance of the administrative state and the issues raised by the required independence of the newly-created regulators and of national competition authorities. At the same time, the administrative state brought about administrative institutions/agencies mandated to perform adjudicative tasks. Since judicial independence is a constitutional requirement imposed on the courts, the question of how judicial independence is to be understood in the context of administrative agencies performing adjudicatory functions is far from settled. This question is, however, of prime importance for the European Commission in light of the Union's commitment to democracy and to accede to the ECHR. The wider perspective offered in Chapter 7 stressed that the notion of independence is of concern both for national and international institution-building.

Chapter 8 was dedicated to the analysis of the ECtHR's case-law on the independence and impartiality of tribunals. The ECtHR's case-law indicates that member states can delegate adjudicatory tasks to administrative tribunals or agencies. At the same time, the ECtHR requires states to ensure independence of adjudication irrespective of the nature of the dispute. In other words, according to the case-law of the ECtHR, judicial independence should not be affected by the constitutional setup chosen by the state to provide adjudication.

What is more, as Section 8.4. suggested, the case-law of the ECtHR highlights a relationship between the seriousness of the dispute and the availability of safeguards protecting the independence of adjudication or judicial review. This conceptual framework was applied to test the EU Commission's independence.

Chapter 9 focused on the *objective environment* in which EU competition decisions are adopted and showed that they are prepared by the Directorate General for Competition – that is, by the bureaucratic side of the EU Commission – and are adopted by the College of Commissioners – that is, the political side of the EU Commission. In addition, the DG COMP cumulates investigative, prosecutorial and adjudicative powers when it enforces EU competition law. This set up suggests that independent adjudication cannot

be presumed in EU competition law despite the fact that the EU has adopted a series of soft law instruments requiring both the Commissioners and the Commission's civil service to act independently.

Chapters 10, 11 and 12 focused on the *anatomy of EU competition law decisions* and described the procedures used by the EU Commission to enforce Articles 101 and 102 TFEU, the Commission's powers of investigation and the existing limits on its powers. This in-depth account showed that the EU Commission benefits from a *wide discretion of action* at all points during the procedure. This discretion allows the DG COMP to act off-record, by informally settling cases, to select the cases it wishes to pursue, to accept or reject meetings with the defendants and to impose large fines.

Based on the principle derived from the ECtHR's case-law – that disputes with serious consequences should provide for safeguards to preserve independent adjudication – Chapter 13 mapped the potential risks to the independence of the EU Commission when acting as an enforcer of EU competition law. Four types of risks were thus identified: off-record procedural risks, structural risks, anonymity risks and collegiality risks. Most of these risks are the result of the design of competition law system and mitigating them would require a change in the EU Treaties. Other risks to independent decision-making arise from the way in which the EU Commission has framed its own decision-making powers. These risks to independent decision-making could be mitigated by changes in practice.

Before closing this chapter, a clarification should be offered about the *relationship between the right to be heard and independent adjudication* during EU competition law proceedings. The right to be heard, together with other guarantees such as proportionality, do strengthen the appearance of fairness of the whole process. At the same time, these guarantees provide the defendants with actionable rights that also shape the Commission's actions. However, the relationship between the right to be heard and the right to an independent and impartial tribunal is not a direct one. An administrative tribunal can be fully independent and still disrespect the defendants' right to be heard. Also, a tribunal that is not independent can hear a defendant in a way that is compatible with the right to a fair trial. The two, however, are distinct classes of rights; they are not interchangeable and they should be satisfied concomitantly.

The *relationship between the right to an independent and impartial tribunal and the right to an effective judicial review* can be a direct one if – as the ECtHR has indicated – a lack of independence can be corrected during judicial review. If, on contrary, the lack of independence is due to a structural issue, it cannot be cured during judicial review.

It can thus be concluded that, due to the objective environment in which EU competition law decisions are adopted and to the anatomy of the decisions, serious risks to independence exists in EU competition law. The large fines imposed by the EU Commission in competition law cases and the reputational cost of Article 101 or 102 TFEU proceedings represent serious consequences that should be accompanied by deep due process guarantees and in-depth judicial review. I will discuss at length the issue of correcting lack of independence through judicial review in Part 4.

PART 4

Fair Trial and Judicial Review of EU Competition Law

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Introduction to Part 4

This book embarked on analysing how the EU Commission engages with corporate bigness in the EU using competition law. For this purpose, I have proposed that the right to a fair trial enshrined in Article 6(1) ECHR can play a central role in this process by ensuing that the fight against corporate bigness does not create the sort of "administrative bigness" Louis Brandeis warned against. I have analysed in Part 3 the interaction between Article 6(1) ECHR and the EU Commission as competition enforcement agency. Working with the ECtHR's autonomous concept of "independent and impartial tribunal", I have suggested in Part 3 that the EU Commission cannot be deemed to be an independent adjudicator for the purpose of Article 6(1) ECHR. The next step of the analysis will be dedicated to examining whether the judicial review performed by the EU Courts can cure this lack of independence as required by Article 6(1) ECHR. Figure 10 below offers a visual representation of the current endeavour.

The method I follow in Part 4 is similar to the method I have applied previously. Chapter 14 will describe the case-law of the ECtHR concerning the right to an effective judicial remedy. Chapter 15 will be devoted to analysing

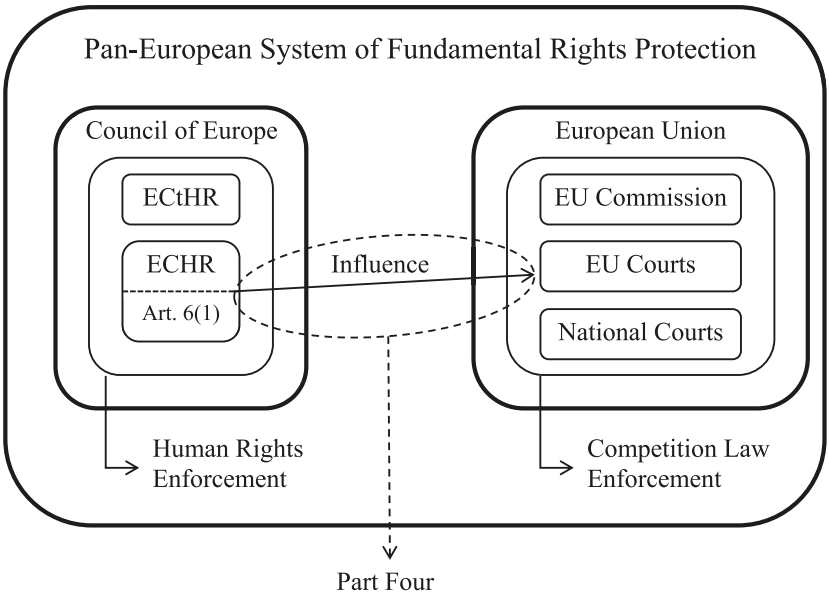

FIGURE 10 The influence of article 6(1) ECHR on the judicial review of EU competition law

the relevance of this case-law to EU competition law. Chapter 16 will describe the case-law of the EU courts concerning the right to judicial review. Finally, Chapter 17 will be dedicated to examining the reasons for the deferential judicial review preferred by the EU Courts in EU competition law.

CHAPTER 14

Case-law of the ECtHR on the Right to an Effective Judicial Review

The ECHR does not provide for the right to judicial review as such. However, it is indirectly established by Article 6(1) and Article 13 ECHR which provide for the right to a fair trial and the right to an effective remedy respectively. Unlike Article 6(1) ECHR, Article 13 applies equally to all types of disputes adjudicated by courts and administrative tribunals.

Article 13 ECHR stipulates that "everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity".

Two judges have called Article 13 ECHR "the most obscure" provision of the Convention.[1] In the same vein, it has been noted that the approaches to the interpretation of Article 13 ECHR by the ECtHR "have oscillated, now demanding more of states, now less, as they have sought an understanding of Article 13 which fits into the whole structure of the Convention".[2]

The ECtHR explained that Article 13 ECHR is an auxiliary provision, which can only be invoked in relation to another Convention right. In this sense, Article 13 guarantees "the availability of a remedy at national level to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order".[3]

The effectiveness of the remedy provided for by Article 13 ECHR has four elements:

1) institutional, requiring that the decision-maker fulfils a minimum standard of independence from the authority allegedly responsible for the breach of the Convention;
2) substantive, establishing that where a member state incorporates the Convention into the domestic law, Convention rights can be directly invoked before the domestic courts;

1 Judges Matscher and Pinheiro Farinha, partly dissenting opinion in ECtHR. *Malone v. the United Kingdom*, application no. 8691/79, judgement of 2 Aug 1984.

2 Harris, D., M. O'Boyle, Ed Bates and C.M. Buckley, *op. cit.*, p. 445.

3 ECtHR. *Soering v. the United Kingdom*, application no. 14038/88, judgement of 7 Jul 1989, paragraph 12.

3) remedial, granting remedies for applicants whose claims are accepted by the domestic courts;
4) material, implying that the applicant must be able to take advantage of the remedy at her disposal.[4]

Article 13 ECHR partially covers the subject-matter of Article 6(1) ECHR. When there is substantive overlap, the Court considers only the complaints raised under Article 6(1) ECHR because the requirements of Article 13 ECHR are less strict than the requirements of Article 6(1) ECHR which absorbs them for this matter.

14.1 Judicial Review in Administrative Law Disputes

In *Obermeier*, following unsuccessful domestic proceedings to challenge the applicant's dismissal, he lodged an application at the ECtHR complaining that the domestic labour courts had considered themselves bound by the administrative decisions authorising his dismissal and that they had thereby deprived him of the right to judicial review.[5]

The ECtHR noted that the domestic Austrian courts have inferred from the existing legislation that they were precluded from inquiring into the validity of a dismissal which had received the authorisation of the administration's board. The domestic courts could only determine "whether the discretion enjoyed by the administrative authorities has been used in a manner compatible with the object and purpose of the law".[6] In practice, the test applied by the domestic administrative courts meant that they could not re-examine decisions taken by the administrative authorities. As a result, individuals challenging their dismissal remained in the majority of cases, including the present one, did not benefit from judicial review.

A few years later, another case against Austria raising the issue of effective judicial review reached the ECtHR. In that case, a plot of land belonging to the applicant and cutting in two his estate had been expropriated in order to build a provincial highway.[7] The applicant contested this measure, complaining in particular about the lack of a public hearing and about the refuse to appoint an independent expert to assess the consequences of the proposed expropriation. The relevant administrative authorities, the Constitutional Court and the

4 Harris, D., M. O'Boyle, Ed Bates and C.M. Buckley, *op. cit.*, p. 450.
5 ECtHR. *Obermeier v. Austria*, application no. 11761/85, judgement of 28 Jun 1990.
6 *Obermeier v. Austria*, quoted above, paragraph 70.
7 ECtHR. *Zumtobel v. Austria*, application no. 12235/86, judgement of 21 Sep 1993.

Administrative Court all dismissed the applicant's appeal. The Constitutional Court of Austria decided "not to entertain the application since, in view of (…) the authorities' discretion in determining the routes of highways, the application did not have sufficient prospects of success".[8]

The Administrative Court of Austria defined its jurisdiction in the following way. First, it was not allowed to put itself in the place of the administrative authority in order to take evidence, which the latter may have omitted to take, and was not allowed to supplement the investigation by itself taking investigative measures to establish the facts. Second, the Administrative Court could take evidence in order to determine whether an essential procedural requirement has been breached and to establish whether a procedural defect was essential or whether the administrative authority could have reached a different decision if that procedural defect had been avoided.

The ECtHR centred its analysis on the fact that, under Austrian Law, expropriation was not a matter exclusively within the discretion of the administrative authorities. The ECtHR noted, that despite its deference to the administrative authority, there was no violation of Article 6 because the Austrian Administrative Court "in fact considered these submissions on their merits, point by point, without ever having to decline jurisdiction in replying to them or in ascertaining various facts".[9]

In *Bryan*, an enforcement notice was served on the applicant to demolish two buildings that he had allegedly erected in breach of the planning legislation. The applicant complained that the High Court had no power to disturb the findings of fact made by the administrative authority unless there was a defect which was so great as to go to jurisdiction.[10]

The ECtHR started its analysis by noting that the High Court's appeal could not embrace all the aspects raised by the applicant against the administrative authority's decision. The ECtHR noted that, as it was frequent in the Council of Europe Member States, administrative law appeals did not embrace (1) rehearing of original complains, (2) substitution of the domestic courts' reasoning for that of the administration or (3) unlimited jurisdiction over the facts. However, in the case brought by Mr Bryan, the administrative decision at issue 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

8 *Zumtobel v. Austria*, quoted above, paragraph 12.

9 *Zumtobel v. Austria*, quoted above, paragraph 32.

10 ECtHR. *Bryan v. the United Kingdom*, application no. 19178/91, judgement of 22 Nov 1995.

in the sense that no inspector properly directing himself would have drawn such an inference".[11]

Furthermore, the ECtHR stressed that the sufficiency of review should be tested in relation to matters such as the (1) subject-matter of the decision appealed against, (2) the manner in which that decision was arrived at, (3) the content of the dispute, including the desired and actual grounds of appeal, (4) the possibility to review shortcomings in the procedure.[12]

Focusing on the subject-matter of the dispute, the ECtHR highlighted that there was no conflict over the facts of the case or the inferences that the inspector drew from the facts. Rather, the case revolved around "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. The ECtHR noted that such set-ups 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 § 1".[13] Highlighting that the case at hand was a typical example of the exercise of discretionary judgement in the regulation of citizens' conduct in the sphere of town and country planning, the ECtHR concluded that there was no violation of Article 6(1) ECHR.

Some 10 years later, the ECtHR reassessed the test proposed in *Bryan*. In *Tsfayo* the applicant, who was a political refugee, benefitted from social housing provided by the social services department of Hammersmith and Fulham Council (the Council). Due to the applicant's lack of familiarity with the benefits system and her poor English, she was late to re-apply for social housing. As a result, the housing association started eviction proceedings against the applicant. At the same time, a court order allowed the Council to deduct GBP 2.60 per week from the applicant's income support of GBP 35.87.[14]

The applicant's appeal to the Housing Benefit Review Board (HBRB) was rejected. The High Court dismissed the applicant's application for leave to apply for judicial review because, first, the ECHR had not yet been incorporated into English law and, second, because the HBRB's decision was neither unreasonable not irrational. The applicant complained to the ECtHR that her right to a fair trial had been breached in the domestic proceedings due to the fact that the HBRB was not independent and impartial and, unlike *Bryan*, the

11 *Bryan v. the United Kingdom*, quoted above, paragraph 44.
12 *Bryan v. the United Kingdom*, quoted above, paragraphs 45–46.
13 *Bryan v. the United Kingdom*, quoted above, paragraph 47.
14 ECtHR. *Tsfayo v. the United Kingdom*, application no. 60860/00, judgement of 14 Nov 2006.

judicial review performed by the High Court was not such as to remedy a lack of independence at first instance.

The ECtHR first distinguished the present case from *Bryan* and the ensuing case-law against the United Kingdom in which the issues to be determined required a measure of professional knowledge or experience and the exercise of administrative discretion pursuant to wider policy aims.[15] In contrast, the case at hand posed a simple question of fact, by trying to clarify whether there was "good cause" for the applicant's delay in reapplying for social housing. In addition, the HBRB rejected the applicant's claim on the basis of their assessment of her credibility.

Second, the ECtHR noted that, in contrast to domestic and Strasbourg cases referred to above, the HBRB was not merely lacking in independence from the executive, but was directly connected to one of the parties to the dispute. In fact, the HBRB included five councillors from the local authority which would be required to pay the benefit if awarded. The ECtHR unanimously found a violation of Article 6 and highlighted that such a connection might "infect the independence of judgment in relation to the finding of primary fact in a manner which could not be adequately scrutinised or rectified by judicial review. The safeguards built into the HBRB procedure were not adequate to overcome this fundamental lack of objective impartiality".[16]

In *Terra Woningen B.V.*, the applicant company alleged a violation of Article 6(1) ECHR in that they had not had the benefit of effective judicial review because the District Court had considered itself bound by the Provincial Executive's finding in respect of the soil pollution and its effects on public health and the environment.[17]

The ECtHR noted that it was indeed unclear whether the soil pollution reached the threshold of serious danger to public health or the environment

15 See, for example, ECtHr. *X. v. the United Kingdom* (*dec.*), application no. 28530/95, judgement of 19 Jan 1998, concerning a determination by the Secretary of State that the applicant was not a fit and proper person to be chief executive of an insurance company.

ECtHR. *Stefan v. the United Kingdom* (*dec.*), application no. 29419/95, judgement of 9 Dec 1997, concerning proceedings before the General Medical Council ("GMC") to establish whether or not the applicant was mentally ill and thus unfit to practise as a doctor.

ECtHR. *Wickramsinghe v. the United Kingdom* (*dec.*), application no. 31503/96, judgement of 9 Dec 1997, concerning disciplinary proceedings before the GMC.

And see also ECtHR. *Kingsley v. the United Kingdom* [GC], application no. 35605/97, judgement of 28 May 2002, paragraph 32.

16 *Tsfayo v. the United Kingdom*, quoted above, paragraphs 47–49.

17 ECtHR. *Terra Woningen B.V. v. the Netherlands*, application no. 20641/92, judgement of 17 Dec 1996.

such as to justify a reduction of the rent applied by the applicant company. However, what went against the spirit of the right to a fair trial was the domestic courts' assumption that the serious danger to public health and to the environment was necessarily implied by the decision of the administrative authority. By drawing a relationship of necessary implication between the contested facts and the administrative authority's qualification of them, domestic courts deprived themselves of jurisdiction to examine crucial facts concerning the dispute at hand. The Court concluded that for these reasons, the applicant company did not have access to a tribunal having sufficient jurisdiction to adjudicate the case before it.[18]

In a similar case, the applicant was employed by the Bulgarian Railroad Office.[19] Her contract of employment stated that she worked as a dormitory supervisor and social activities coordinator, but, in fact, the applicant worked as a typist at the local section of the Bulgarian Communist Party. The applicant was examined by the Diagnostic Expert Commission (DEC) that found that she was suffering from vegetative polyoneuropathy of the upper limbs, a disease featured on the Table of Occupational Diseases. The DEC, relying solely on the applicant's job description, found that the position occupied by her officially – dormitory supervisor and social activities coordinator – did not entail increased strain on her upper limbs. The DEC concluded therefore that the applicant suffered from a non-occupational disease as no causal link could be established between her work conditions and the disease. This finding was upheld by the Central Diagnostic Expert Commission (CDEC) and by the domestic courts. The Bulgarian Supreme Court deferred to the reasoning of DEC and concluded that the applicant has not established before them the existence of a causal link between her disease and the conditions of work as a typist.[20]

The ECtHR started its assessment by noting that the domestic courts have deferred the assessment of a crucial fact to the domestic administrative authorities and have thus deprived themselves of jurisdiction to sit on the applicant's case. Such a set-up is compatible with the right to a fair trial only when the decisions of the administrative authorities were delivered following a procedure that is itself in line with Article 6. In the case at hand, the disputed administrative authority was under the authority of the Ministry of Health, their members were remunerated under service contracts with the Ministry of Health and did not have tenure. Furthermore, the DEC did not have rules

18 *Terra Woningen B.V. v. the Netherlands*, quoted above, paragraphs 50–55.

19 ECtHR. *I.D. v. Bulgaria*, application no. 43578/98, judgement of 28 Apr 2005.

20 *I.D. v. Bulgaria*, quoted above, paragraph 24.

of procedure, did not hold public hearings and took decisions about medical examinations that they themselves held. As to the judicial review performed by the domestic courts, the ECtHR noted that the Government have not furnished any example of a judicial decision confirming that a person was able to appeal against a decision of the CDEC during the period at issue. The ECtHR found unanimously a violation of Article 6.[21]

In *Kingsley*, the applicant applied for judicial review of the decision of the Gaming Board by which he has been deprived of the right to hold a managerial position in the gaming industry. Both Justice Jowitt and the Court of Appeal dismissed the applicant's request for judicial review.[22]

Justice Jowitt noted that counsel from the Gaming Board accepted the existence of an appearance of bias in the proceedings involving the applicant. However, he noted that the existing appearance of bias did not give rise to a real gander of injustice due to the following elements: (1) the applicant benefitted from an extended hearing, (2) he had ample opportunity to present evidence in his favour, (3) there a few findings in favor of the applicant and 4) the calibre and experience of the Panel Members. Justice Jowitt found that even if there was bias on the part of the Gaming Board, it was justified by the doctrine of necessity:

> When a body is charged by statute with the power or duty, which cannot be delegated, to make a decision in circumstances in which a question of bias arises because:
>
> (i) in pursuance of that statutory power or duty an initial view has been formed upon a matter affecting the interests of someone in respect of whom the body in the exercise of its statutory power or duty has thereafter to make a decision, or final decision, after receiving and considering representations which he is entitled to make or
>
> (ii) in the exercise of a statutory power or duty to make a decision a conflict arises between the interests of another or others which have to be taken into account and the body's own interests.
>
> The decision will not be liable to be impugned on account of bias provided that:

21 *I.D. v. Bulgaria*, quoted above, paragraphs 50–55.

22 ECtHR. *Kingsley v. the United Kingdom*, application no. 35605/97, judgement of 7 Nov 2000.

(i) if only some of those charged with the power or duty to decide are potentially affected by bias such of them as can lawfully withdraw from the decision making do so and
(ii) those of the decision makers who are potentially affected by bias but cannot lawfully withdraw use their best endeavours to avoid the effect of bias and, consistently with the purpose for which its decision has to be made the body takes what reasonable steps are open to it to minimise the risk of bias affecting them.[23]

The Court disagreed with the UK domestic authorities and found a violation of Article 6(1) ECHR, arguing that

> it is generally inherent in the notion of judicial review that, if a ground of challenge is upheld, the reviewing court has power to quash the impugned decision, and that either the decision will then be taken by the review court or the case will be remitted for a fresh decision by the same or a different body. Thus where, as here, complaint is made of a lack of impartiality on the part of the decision-making body, the concept of full jurisdiction involves that the reviewing court not only considers the complaint but has the ability to quash the impugned decision and to remit the case for a new decision by an impartial body.[24]

In another case involving deference to administrative bodies justified by the technical knowledge they held, the applicant was dismissed from a high-ranking position in the Ministry of Internal Affairs as a result of a psychological assessment performed on him.[25] The applicant unsuccessfully contested his dismissal before the national courts.

The ECtHR highlighted that the reliance of the domestic courts on the expert opinions of specialized agencies was not contrary to Article 6(1) ECHR. However, when the domestic courts consider themselves bound by the assessment of such agencies and refuse to analyse the facts of the case for that matter, they may breach the right of access to a court as guaranteed by Article 6(1) ECHR. In the case at issue, the domestic courts refused to scrutinize the most important issue of the applicant's case, that is his mental fitness to carry duties in the Ministry of Internal Affairs. In addition, none of the authorities involved with the case put forward a justification for such an approach, except for the

23 *Kingsley v. the United Kingdom*, quoted above, paragraph 24.
24 *Kingsley v. the United Kingdom*, quoted above, paragraph 58.
25 *Fazliyski v. Bulgaria*, quoted above.

existing statutory bar.[26] For these reasons, the Court concluded that Article 6(1) ECHR has been violated in the case at issue.

14.2 Judicial Review in Disputes Involving "Criminal Charges"

The general applicability of Article 6(1) ECHR to disputes concerning a "criminal charge" has been discussed in Section 5.3. above.

In the early case *Schmautzer* the applicant was fined by the federal police 300 Austrian schillings with twenty-four hours' imprisonment in default of payment for not wearing a seat-belt. The latter was considered an administrative criminal offence under Austrian Law. The applicant complained at the ECtHR that the domestic authorities that were involved in his case were not "tribunals" as required by Article 6(1) ECHR.[27]

The ECtHR highlighted that the powers of the Administrative Court in the present case must be assessed in the light of the fact that the court was sitting in proceedings that were of a criminal nature for the purposes of the Convention. This meant therefore that a judicial body with full jurisdiction should have the "power to quash in all respects, on questions of fact and law, the decision of the body below".[28] The ECtHR also took into account a judgement of the Austrian Constitutional Court which held that limited review of criminal penalties was unconstitutional.

In *Menarini*, the applicant received a fine of 6 million euro from the Italian Competition Authority (AGCM) for breach of competition law.[29] The applicant complained that the review of legality performed by the Italian administrative courts was incompatible with Article 6(1) ECHR. The applicant company further complained that the Italian administrative courts could not substitute their own assessments to those of AGCM, could only apply the legal norms identified by AGCM and had no means to modify AGCM's decision. The applicant company contested the practice of the Italian Court of Cassation to consider that, when the administrative authority was endowed with discretionary powers, the domestic courts could not substitute their arguments to those of the independent administrative authority, but merely verify the logic and coherence of the power exercised by the administrative body.

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26 *Fazliyski v. Bulgaria*, quoted above, paragraphs 56–62.

27 ECtHR. *Schmautzer v. Austria*, application no. 15523/89, judgement of 23 Oct 1995.

28 *Schmautzer v. Austria*, quoted above, paragraph 36.

29 *Menarini Diagnostics S.R.L. v Italy*, quoted above.

The ECtHR highlighted that Article 6(1) ECHR required a full review of decisions reached by administrative authorities that did not meet independence requirements. The Court further noted that the characteristics of an administrative procedure may differ from those of a purely criminal procedure. However, the Court insisted that, while these characteristics cannot relief a Member State from their obligation to respect all the guarantees enshrined in Article 6(1) ECHR, they can, however, influence means of implementation.[30]

On the facts of the case, the Court found – with five votes to one – that the Italian system of judicial review of competition decisions was compatible with Article 6(1) ECHR. The Italian courts went beyond a review of legality, they verified if AGCM has used its powers appropriately, they assessed the soundness and proportionality of the choices made by AGCM and they even checked the soundness and proportionality of the AGCM's technical evaluations. Lastly, the Italian courts performed a full review of the fine imposed by AGCM.[31]

In his dissenting opinion, Judge Pinto de Albuquerque disagreed with the majority's conclusion. He drew the attention to the long-standing and constant jurisprudence of the Italian courts to exercise restraint when reviewing the decisions of AGCM. According to this jurisprudence, the administrative courts cannot exercise a substitutive power to replace the reasoning of the administrative authority concerning the technical assessment of facts with their own. Judge Albuquerque argued that this jurisprudence leads to the extraction of the essence of the case from the Italian courts' jurisdiction.

He further argued that in the case at hand, the Italian administrative judges have merely given a formal *beneplacitus* while performing an internal control that does not offer any guarantees for the already convicted. He draws the attention to the fact that the text of the Administrative Tribunals referred 60 times to the text of the administrative decision and the judgement delivered by the *Conseil d'Etat* referred to it 40 times. The courts called to review the decision of the AGCM merely repeated the arguments already presented by the latter. Lastly, they presented no autonomous, concrete and detailed analysis of the illegality and culpability of the applicant's behaviour.

Judge Albuquerque intimates that a full review performed by an administrative tribunal is not a mere *reformatio* (reform) of the administrative decision, but a *revisio* (re-examination) of it. He also highlights that full review is necessarily an exhaustive review as well. He further contends that acceptance of pseudo-criminal law or of a criminal law with two speeds as in the case at

30 *Menarini Diagnostics S.R.L. v Italy*, quoted above, paragraph 60.

31 *Menarini Diagnostics S.R.L. v Italy*, quoted above, paragraphs 64–65.

hand will have two inevitable consequences: the usurpation by the administrative authorities of the judicial power to punish and the capitulation of individual freedom before a powerful administration. Judge Albuquerque insists that whereas imperatives such as the efficiency of the justice system and the technical complexity of the modern administrative organization can justify endowing the latter with a punitive power, this does not justify the fact that the administrative authorities have the last word concerning the exercise of repressive power.[32]

In *Steininger*, the applicant company complained about a breach of their right to a fair trial in a case concerning the payment of state aid parafiscal surcharges.[33] The administrative authorities that adopted decisions in the applicant's case were Agrarmarkt Austria (AMA), the Federal Ministry of Agriculture, Forestry, Environment and Water, the Constitutional Court and the Supreme Administrative Court. The Court noted that neither AMA, nor the Ministry that acted as appeal authorities, could be deemed "tribunals" for the purpose of Article 6(1) ECHR because AMA was a public law body in which some administrative powers were vested and the Federal Ministry of Agriculture, Forestry, Environment and Water was a government authority.

Relying on *Schmautzer*, the Court highlighted that Article 6(1) ECHR was applicable under its criminal head in the present case and found that the review provided by the Administrative Court was insufficient in that it merely related to questions of law, contained no answer to the complaints raised in relation to the facts and consisted merely of a simple reference to a previous decision on a similar matter.[34]

14.3 Judicial Review in Banking Law Disputes

In the case *Credit and Industrial Bank*, compulsory administration was imposed and extended by the Central National Bank (CNB) on the applicant company without its knowledge. The applicant bank complained that it had no effective access to a tribunal.[35]

32 Dissenting opinion Judge Pinto de Albuquerque in ECtHR, *Menarini Diagnostics S.R.L. v Italy*, quoted above, p. 20.

33 ECtHR. *Steininger v. Austria*, application no. 21539/07, judgement of 17 Jul 2012.

34 *Steininger v. Austria*, quoted above, paragraph 57.

35 ECtHR. *Credit and Industrial Bank v. the Czech Republic*, application no. 29010/95, judgement of 21 Oct 2003.

The ECtHR noted that domestic legislation provided for limited review of the CNB's decisions. This review was considered incompatible with Article 6(1) ECHR for the following reasons. First, the domestic courts were precluded in their exercise of judicial review from any substantive analysis of the CNB's decision to impose and extend the compulsory administration. Their only function was to verify if the formal conditions for making an entry in the Companies Register concerning the compulsory administration were met. Second, domestic legislation provided only for a written and private procedure for this type of disputes, without a hearing and without the possibility of opposition from the management of the bank.[36]

In another dispute concerning banking activities, the applicant bank complained about the lack of judicial review in its dispute with the Bulgarian National Bank (BNB) concerning a withdrawal of banking licence and a wind-up order.[37]

The ECtHR noted that the domestic courts thought they were precluded from performing their own examination of a bank's insolvency in those instances when the BNB found the bank to be insolvent. Thus, Sofia City Court and the Supreme Court of Cassation have expressly rejected the applicant's bank requests to present evidence as to its solvability. The Court held that the deferral to the findings of the BNB for an issue which was crucial to the determination of a case was incompatible with Article 6(1) ECHR. The Court accepted that the BNB had significant knowledge in the field of banking and that the measures complained of were imposed during a serious financial crisis that called for immediate response from the authorities. However, no alternative, less radical solution has been considered by the domestic authorities and, what is more, the provision of the Bulgarian Banks Act laying down the prohibition to review the BNB's decisions remained in force despite the end of the crisis.

Interestingly, the Bulgarian Government argued in this case that the limited review of the BNB's decisions was introduced at the demand of IMF during the negotiation concerning the establishment of a currency board. The Court noted however that, on the one hand, the Government had not produced any evidence as to the existence of the alleged agreement and that, on the other hand, even assuming that the agreement existed, its existence did not justify a limitation of the right to a fair trial. The Court stressed in this sense that it was not indifferent to the need to interpret the Convention in such a way as

36 *Credit and Industrial Bank v. the Czech Republic*, quoted above, paragraphs 60–62.

37 ECtHR. *Capital Bank AD v. Bulgaria*, application no. 49429/99, judgement of 24 Nov 2005.

to allow the member states to comply with their international obligations. Despite this, the ECtHR highlighted that the member states' responsibility arising from the ECHR continues after they assume new international obligations. The opposite view would mean that when assuming new international obligations, member states are absolved from their responsibility under the Convention.[38]

14.4 Non-Pecuniary Damage for Breach of the Right to Judicial Review

Article 41 ECHR provides that "if the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only a partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party".

The Court can award two types of damage under Article 41 ECHR: pecuniary and non-pecuniary damage. However, the Court has been less generous in the cases where it found a violation of Article 6(1) ECHR on account of lack of judicial review. In the majority of cases in which the ECtHR has found a breach of the right to a fair trial for lack of access to judicial review, it did not award non-pecuniary damage. The ECtHR reasons that no causal link can be established between the violation and the damage allegedly suffered because of it and that it is highly unclear what the decision of the domestic authorities would have been provided that judicial review had been effective.

This question has been raised in *Kingsley.*[39] The Grand Chamber highlighted that the principle underlying the provision of just satisfaction for a breach of Article 6(1) ECHR was that the applicant should as far as possible be put in the position he would have enjoyed had the proceedings complied with the Convention. The Court however will award financial compensation under Article 41 only where it is satisfied that the loss or damage complained of was actually caused by the violation that the Court has found. This is a corollary of the principle that the State cannot be held liable to pay damages in respect of losses for which it is not responsible.[40]

The ECtHR rejected thus by ten votes to seven the applicant's request to award financial compensation in respect of loss of procedural opportunity or any distress, loss or damage allegedly flowing from the outcome of the domestic

38 *Capital Bank AD v. Bulgaria*, quoted above, paragraph 111.
39 *Kingsley v. the United Kingdom* [GC], quoted above.
40 *Kingsley v. the United Kingdom* [GC], quoted above, paragraph 40.

proceedings. The Court highlighted that a finding of a violation of Article 6 does not entail that the contested domestic decision was not well-founded or that a differently constituted tribunal would have found for the applicant.[41]

41 *Kingsley v. the United Kingdom* [GC], quoted above, paragraph 42.

CHAPTER 15

Relevance of the ECtHR's Case-law on the Right to Judicial Review – A Story of Three Models

A few matters need to be highlighted about the case-law of the ECtHR analysed above. This case-law brings to light a problem common to many European states and the difficulty that the ECtHR had to provide a harmonious interpretation for the right to an effective judicial remedy.

First, even if Article 13 ECHR provides expressly for the right to an effective remedy and for what can be deemed as a wider framework for interpretation, most cases considered by the ECtHR raising concerns about intensity of judicial review are decided under Article 6(1) ECHR. The ECtHR analyses these cases as a breach of the right of access to a court or as a breach of the right to a fair trial. This approach renders the ECtHR's analysis more harmonious because it allows the Court to link judicial review to other safeguards guaranteed by Article 6(1) ECHR, such as independence and the right to be heard. More importantly, it grounds the analysis on judicial review within the terrain of the fairness of justice.

Second, as ECtHR noted in *Bryan*, administrative law appeals that encompassed only a review of legality are common practice in the member states parties to the ECHR.[1] Despite what appears to be a consensus of practice, the ECtHR does not consider the deference to administrative agency and the review of legality to be compatible with the ECHR. At the same time, the ECtHR does not provide for a blanket rejection of this type of administrative law appeals, but follows a case-by-case reasoning.

Third, applicants who complain at the ECtHR about the insufficiency of judicial review performed by the domestic courts in administrative law appeals also tend to complain about the lack of independence of the administrative agency whose decision the applicant is trying to set aside or about a breach of the right to be heard. This fact indicates that applicants expect administrative agencies performing adjudicative functions to behave in the same way as courts. This also indicates that applicants consider that courts should control the excessive exercise of administrative discretion.

1 *Bryan v. the United Kingdom*, quoted above.

Lastly, I have distilled three models of judicial review from the case-law of the ECtHR. These models are based on a causal relation between the quality of the administrative discretion exercised, the impact of the discretion on the individual interests concerned and, lastly, the depth of judicial review. The first model is concerned with the exercise of administrative discretion within polycentric issues. The second model describes the exercise of administrative discretion in monocentric issues. The third model deals with the exercise of administrative discretion as police power.

I describe the proposed models in the following sections.

15.1 Exercise of Administrative Discretion within Polycentric Issues

Modern democracies witnessed an increase in the exercise of administrative discretion for the purpose of achieving wider policy aims. Such discretion is closely associated with political agendas of elected officials. It can be argued that the exercise of administrative discretion for wider policy-making purposes is mandated by the electorate and, thus, part of democratic processes.

An example of this type of administrative discretion would be when individual expropriations are performed in order to construct a highway or a nuclear power plant. In these cases, the professional knowledge of the administrative agency plays an important role. So does the undisturbed exercise of the discretionary powers by the administrative agency. Also, such situations might be the result of both lengthy and costly political processes.

This situation falls under what Fuller and Winston have famously coined as a polycentric issue: "we might visualize this kind of situation by thinking of a spider web. A pull on one strand will distribute tensions after a complicated patter throughout the web as a whole".[2]

Individual interests will often be affected by the exercise of this kind of administrative discretion. However, judicial review might not be the best tool to comprehensively address the affected individual interests. An in-depth judicial review of such cases can block the contested policy. In the example above, if the domestic courts choose to perform an in-depth judicial review and to annul the administrative decision, this might delay the construction of the highway or of the nuclear power plant. At the same time, since a policy decision like the decision to build a highway or a nuclear power plant involves

2 Fuller, L. L., and K.I. Winston. "The Forms and Limits of Adjudication." *Harvard Law Review* 92.2 (1978), pp. 353–409.

hundreds of experts and thousands of working hours, re-hearing such a case during judicial review by only a handful of judges might not appear to be in line with fairness either.

The ECtHR provides that in such cases judicial review should start by clarifying whether the subject-matter of the individual case – that is the factual basis of the case – is disputed. In the example above, this would involve analysing whether the fact of expropriation is disputed. Furthermore, as *Bryan* provides, the sufficiency of judicial review should be assessed depending on the manner in which the decision was reached, the content of the dispute and the possibility to review the shortcomings in the administrative procedure.[3]

What is important in this case is that the individual directly affected by the wider policy aims is heard during all stages of the procedure and is compensated for the loss he/she incurs. In other words, the purpose of this type of judicial review is to ensure that administrative discretion is exercised fairly and that those affected by this exercise are not simply dismissed as nuisances.

Two features would greatly increase the fairness of proceedings involving this type of administrative discretion. *First*, the early stages of the policy-making process must include an assessment of the individual interests that might be affected by it. Citizens and their interests should be seriously considered and mediators should be involved in reaching agreement about contentious issues. This communitarian aspect of the exercise of administrative discretion could diminish the risk of court proceedings because, unless serious evidence of arbitrariness, courts would not satisfy the individual interest due to the limited judicial review that they would perform. Avoiding court proceedings by having properly considered the individual interests involved would thus be a win solution for all parties involved.

Second, having an independent adjudicative branch within the administrative agency enjoying wide discretionary powers would answer all the competing needs that arise in such a context: the administrative agency would have its policy enforced without unnecessary delays, the individuals affected would have their interest considered and loss compensated and the courts would be relieved of a case.

The exercise of administrative discretion within polycentric issues that satisfy the requirements described above would be compatible with even the broadest notion of fairness.

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3 *Bryan v. the United Kingdom*, quoted above.

15.2 Exercise of Administrative Discretion for Monocentric Issues

The opposite of polycentric issues are monocentric issues, that is cases in which administrative discretion in exercised and affects only one individual case. This could concern the dismissal of a staff member, the allocation of social benefits or the insolvency of a bank. Monocentric issues are classical, textbook examples of exercise of administrative discretion.

In these instances, there should be no political capital involved. Less people and resources are involved in the decision-making process and the disputed administrative process is normally regulated by employment law, social benefits laws or insolvency law. An example could be when a citizen is deprived of social benefits by an administrative agency.

Such cases may result in court proceedings either because the administrative authority has made a mistake, or because there is a gap in the relevant normative framework. It might be that the exercise of administrative discretion in this type of individual cases involves specialized knowledge, such as during insolvency proceedings. This fact however does not justify a self-restrained judicial review. On the contrary, the domestic courts can in this case correct mistakes, assess the exercise of the discretionary power in relation to the individual concerned or fill the gap in the normative framework.

Cases of exercise of administrative discretion in monocentric issues – as shown in *Tsfayo* – require a judicial review both of the process of administrative decision making and of the reached decision.[4] Such judicial review should also be able to either re-consider the case or send the case for reconsideration by the administrative authority.

Full judicial review of cases involving monocentric issues performs the important role of quality control of the administrative decisions. When administrative authorities know that their decisions may be reversed or resent for reconsideration, they will be more diligent in the performance of their tasks.

According to the ECtHR, the limited judicial review of the exercise of administrative discretion in monocentric issues is not be compatible with the right to a fair trial.

4 *Tsfayo v. the United Kingdom*, quoted above.

15.3 Exercise of Administrative Discretion as Policing Power

Modern democracies have decriminalized certain fields of law, such as petty offences. Also, partially, economic law offences stopped being considered criminal offences and became instead administrative law offences.

A paradox, however, came to occupy these areas of law. On the one hand, despite removing the "criminal law" tag, the administrative agencies entrusted with enforcing economic law have been empowered with important policing powers. Thus, they can launch investigations, they can search premises, cars and houses, they can seize documents, they can collect and corroborate evidence, they can accuse and fine the offender. On the other hand, the removal of the "criminal law" tag from the economic law offences did not change the extent to which individuals' rights are affected during such proceedings. The paradox has been, both in the policy-making circles and in the academic circles, to treat such proceedings as administrative law despite the bold policing powers exercised by administrative agencies and the effect on individuals' rights. This paradox extended to the exercise of judicial review over such matters. It was expected that courts perform a limited, self-restrained judicial review of administrative action by deferring to the discretion of the administrative agency. In fact, judicial review of economic offences is expected to treat the exercise of administrative discretion as if it concerned polycentric issues.

Another issue which is ignored under this paradox is the fact that the administrative discretion exercised under this model is the most dangerous. Competition law offers a good way to exemplify this assertion. A competition agency typically has the discretion to decide which cartels or abuses of dominant position to pursue and when to pursue them. It is, for example, difficult to imagine a prosecutor who would selectively pursue cases of homicide. Such prosecution is, unfortunately, practiced in countries considered not democratic. However, when competition agencies select which competition law offences to pursue and which not to pursue, they are acting like the prosecutor described above.

This type of exercise of administrative discretion may be the expression of political goals or personal preferences. In addition, the individuals whose rights have been violated during the administrative proceedings should have a forum to complain about the violation of those rights or about the exercise of administrative discretion. For these reasons, the judicial review performed in these cases should be bold and deep in order to assess the exercise of administrative discretion and the respect of the individuals' rights.

The case-law of the ECtHR is clear in this respect. The ECtHR provides that when administrative discretion is exercised in areas that fall under the criminal head of Article 6(1) ECHR, domestic courts should perform a full judicial review. A full review includes the power to hear evidence, the power to quash in all respects and the power to substitute the reasoning of the administrative agency with its own reasoning. These powers should be provided by the domestic legislation and, more importantly, should be exercised in practice.

CHAPTER 16

Case-law of EU Courts on the Right to an Effective Judicial Review

Haltern has remarked that, since there was no Treaty basis for the CJEU's initial human rights jurisprudence, the CJEU had "invented, out of thin air, unwritten European human rights".[1] Rosas describes five stages in the development of human rights protection in the EU: (1) outside the competence of the CJEU; (2) as part of general principles of Community law since 1969; (3) explicit reference to the ECHR since 1974–1979; (4) characterization of the ECHR as having "special significance" since 1989; and (5) reference to individual judgements of the ECtHR since the mid 1990s.[2] The activism that the EU Courts are accused of originates very often from cases concerning human rights.[3] As Muir has noted, "if one defines judicial activism as judicial decisions going beyond the legal framework created by political institutions, the Court's traditional case-law on fundamental rights is a prime of judicial activism. It is indeed largely accepted that the Court asserted the constitutional importance of fundamental rights in the EU legal order despite the original will of the Treaty makers".[4] Interestingly, despite the activism shown by EU courts in cases concerning human rights protection, they have pursued judicial restraint in EU competition law cases, including in relation to fair trial issues raised in competition law disputes. This contradiction is analysed in this chapter.

The entry into force of the EU Charter of Fundamental Rights has marked a new stage in the development of fundamental rights in the EU because, pursuant to the first subparagraph of Article 6(1) TEU, the Charter has the same legal value as the Treaties. In addition, the right to a fair trial has been

1 Haltern, U. "Integration Through Law." *European Integration Theory*. Eds. A. Weiner and T. Diez. Oxford: Oxford University Press, 2004, p. 183.

2 Rosas, Allan. "With a Little Help from My Friends: International Case-Law as a Source of Reference for the EU Courts." *The Global Community Yearbook of International Law and Jurisprudence* (2005), pp. 203–230, p. 214.

3 De Búrca, Gráinne. "The Evolution of EU Human Rights Law." *The Evolution of EU Law*. Eds. Paul Craig and Gráinne de Búrca. Oxford: Oxford University Press, 2011.

4 Muir, Elise. "The Court of Justice: a Fundamental Rights Institution Among Others." *Judicial Activism at the European Court of Justice*. Eds. Mark Dawson, Bruno De Witte and Elise Muir. Cheltenham: Edward Elgar, 2013, pp. 76–77.

formalised for the first time. Thus, Article 47(1) of the Charter provides that everyone whose rights and freedoms guaranteed by EU law are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this article. Article 47(2) stipulates that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone is to have the possibility of being advised, defended and represented. Lastly, Article 47(3) provides that legal aid is to be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice.

According to the explanations relating to Article 47, which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, have to be taken into consideration for the interpretation of the Charter, the second paragraph of Article 47 of the Charter corresponds to Article 6(1) of the ECHR.[5]

The first sentence of Article 52(3) TEU states that, insofar as the Charter contains rights which correspond to those guaranteed by the ECHR, their meaning and scope are to be the same as those laid down by the ECHR. According to the explanation of that provision, the meaning and the scope of the guaranteed rights are to be determined not only by reference to the text of the ECHR, but also, *inter alia*, by reference to the case-law of the ECHR. The second sentence of Article 52(3) of the Charter provides that the first sentence is not to preclude the grant of wider protection by EU law.

These provisions of the Charter and of the TEU suggest that fundamental rights in the EU should be interpreted at least as widely as the interpretation offered by the ECtHR.[6] In order to analyse if these Treaty provisions are respected in relation to the review of EU Commission's decisions in competition law cases, the following section will describe the case-law of the EU Courts on the right to effective judicial protection and the right to effective judicial review. As it will be shown, the existing system of judicial review combines limited review of the substance of the case with the unlimited review of fines. The EU Commission's discretion is wide and exercised during all stages of enforcement proceedings. Lastly, this section highlights the connection that the EU Courts have developed between the right to a fair trial and judicial review.

5 Explanations relating to the Charter of Fundamental Rights, quoted above, p. 29.
6 See section 2.5. of this work.

16.1 Right to Effective Judicial Protection

The ECJ recognized relatively early that the principle of effective judicial protection is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 ECHR.[7] In *Marguerite Johnston*, a case which concerned the principle of equal treatment between men and women, the ECJ found that "as the European Parliament, Council and Commission recognized (…) and as the Court has recognized in its decisions, the principles on which that Convention is based must be taken into consideration in Community law".[8] The ECJ also found that "all persons have the right to obtain an effective remedy in a competent court against measures which they consider to be contrary to the principle of equal treatment for men and women" and that it was "for the Member States to ensure effective judicial control as regards compliance with the applicable provisions of Community law and of national legislation intended to give effect to the rights for which the directive provides".[9]

In *Heylens*, the ECJ was faced with a preliminary question seeking to establish whether the principle of the free movement of workers required that it must be possible for a decision refusing to recognize the equivalence of a diploma be made the subject of judicial proceedings.[10]

The ECJ answered affirmatively and found that

> effective judicial review, which must be able to cover the legality of the reasons for the contested decision, presupposes in general that the court to which the matter is referred may require the competent authority to notify its reasons. But where, as in this case, it is more particularly a question of securing the effective protection of a fundamental right

7 C-222/84, *Johnston v Chief Constable of the Royal Ulster Constabulary*, ECLI:EU:C:1986:206, paragraphs 18 and 19.
C-222/86, *Unectef v Heylens*, ECLI:EU:C:1987:442, paragraph 14.
C-424/99, *Commission v Austria*, ECLI:EU:C:2001:642, paragraph 45.
C-50/00 P, *Unión de Pequeños Agricultores v Council*, ECLI:EU:C:2002:462, paragraph 39.
C-467/01, *Eribrand*, ECLI:EU:C:2003:364, paragraph 61.

8 C-222/84, *Johnston v Chief Constable of the Royal Ulster Constabulary*, quoted above, paragraphs 18–19.

9 C-222/84, *Johnston v Chief Constable of the Royal Ulster Constabulary*, quoted above, paragraph 19.

10 C-222/86, *Unectef v Heylens*, quoted above.

> conferred by the Treaty on Community workers, the latter must also be able to defend that right under the best possible conditions and have the possibility of deciding, with a full knowledge of the relevant facts, whether there is any point in their applying to the courts. Consequently, in such circumstances the competent national authority is under a duty to inform them of the reasons on which its refusal is based, either in the decision itself or in a subsequent communication made at their request.[11]

Thus, similar to the case-law of the ECtHR, effective judicial protection was not construed by the ECJ as an abstract concept. Rather, the effectiveness required of judicial protection stems from the need to secure the rights conferred by the EU Treaties. Also, effective judicial protection in the EU implies duties both for the domestic competent administrative and judicial authorities.

Starting with *Oleificio Borelli*, the EU Courts have used a linear analysis for the interpretation of the principle of judicial protection. There, the ECJ has found that judicial control reflects a general principle of Community law stemming from the constitutional traditions common to the member states and enshrined in Articles 6 and 13 ECHR.[12]

In the recent years, the CJEU has developed its jurisprudence on the right to effective judicial protection. However, although the right to an effective legal remedy constitutes a general principle of EU law and was reaffirmed by the Charter, it can only be enforced when the subject-matter of the dispute in the main proceedings is connected with the EU law. In *Chartry*, the Court noted that a dispute between a Belgian national and the Belgian State concerning taxation of activities carried out within the territory of that Member State, was not connected in any way with the provisions of the EC Treaty on the free movement of persons, of services, or of capital.[13] Moreover, that dispute did not concern the application of national measures by which that Member State implement EU law.[14]

In the case *DEB*, the CJEU was asked whether the right to effective judicial protection entails legal aid for legal persons in the form of dispensation from payment of the costs of proceedings or from provision of security for costs before an action is brought.[15] The CJEU highlighted that "the assessment of the

11 C-222/86, *Unectef v Heylens*, quoted above.
12 C-97/91, *Oleificio Borelli* v *Commission*, ECLI:EU:C:1992:491.
13 C-457/09, *Claude Chartry v Belgian State*, ECLI:EU:C:2011:101.
14 C-457/09, *Claude Chartry v Belgian State*, quoted above, paragraphs 22–26.
15 C-279/09, *DEB*, quoted above.

need to grant that aid must be made on the basis of the right of the actual person whose rights and freedoms as guaranteed by EU law have been violated, rather than on the basis of the public interest of society, even if that interest may be one of the criteria for assessing the need for the aid".[16] The Court showed that the principle of effective judicial protection may cover, *inter alia*, dispensation from advance payment of the costs of proceedings and/or the assistance of a lawyer.[17]

In *Brahim Samba Diouf*, the CJEU received a preliminary question asking whether the right to an effective remedy against decisions taken on applications for asylum, and, more generally, the general principle of the right to an effective remedy, must be interpreted as meaning that they preclude rules as a result of which no separate judicial remedy exists against the decision of the competent national authority to examine an application for asylum under an accelerated procedure.[18]

The Court recalled that the effectiveness of a remedy depends on the administrative and judicial system of each Member State seen as a whole and that the principle of judicial protection affords an individual a right of access to a court or tribunal, but not to a number of levels of jurisdiction.[19]

On the facts of the case, the CJEU noted that the procedure to be applied for the examination of the application for asylum, viewed separately and independently from the final decision which grants or rejects the application for asylum, is a measure preparatory to the final decision. As such, an absence of a remedy does not constitute a breach of the right to an effective remedy, "provided, however, that the legality of the final decision adopted in an accelerated procedure – and, in particular, the reasons which led the competent authority to reject the application for asylum as unfounded – may be the subject of a thorough review by the national court, within the framework of an action against the decision rejecting the application".[20]

16 C-279/09, *DEB*, quoted above, paragraph 42.

17 C-279/09, *DEB*, quoted above, paragraphs 59–62.

18 C-69/10, *Brahim Samba Diouf v Ministre du Travail, de l'Emploi et de l'Immigration*, ECLI:EU:C:2011:524.

19 C-69/10, *Brahim Samba Diouf v Ministre du Travail, de l'Emploi et de l'Immigration*, quoted above, paragraphs 46 and 69.

20 C-69/10, *Brahim Samba Diouf v Ministre du Travail, de l'Emploi et de l'Immigration*, paragraph 69.

16.2 Right to Judicial Review in Competition Law Cases – A Matter of Constitutional Design

Judicial review in EU competition law cases is first of all a matter of constitutional design because its tenets are laid down in the TFEU and Regulation 1/2003. Thus, Article 263 TFEU provides that the CJEU has jurisdiction over actions brought against the Commission's decisions.

More precisely, Article 263 TFEU states that

> The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects *vis-à-vis* third parties.
>
> It shall for this purpose have jurisdiction in actions brought (…) on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.

This provision is considered to embody a limited jurisdiction that allows the EU Courts to review the legality of the Commission's decisions. Many scholars have argued that the review of legality does not allow the CJEU to re-examine a case on its merits.[21]

The limited review of legality is accompanied by an unlimited review of fines provided for in Article 261 TFEU which states that regulations adopted by the European Parliament and the Council "may give the Court of Justice of the European Union unlimited jurisdiction with regard to the penalties provided for in such regulations". Article 31 of Council Regulation 1/2003 provides that "the Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed".

It is important to observe that Article 263 TFEU places the decisions that the EU Commission adopts in competition law matters in the same class of acts with the legislative acts of the EU, the acts of the Council or the acts of

21 See Vesterdorf, Bo. "Judicial Review in EU Competition Law: Reflections on the Role of the Community Courts in the EC system of Competition Law Enforcement." *Global Competition Policy* 1 (2005), pp. 3–27, pp. 9 *et seq*.

Bailey, David. "Scope of Judicial Review under Article 81 EC." *Common Market Law Review* 41 (2004), pp. 1327–1360, pp. 1330 et seq.

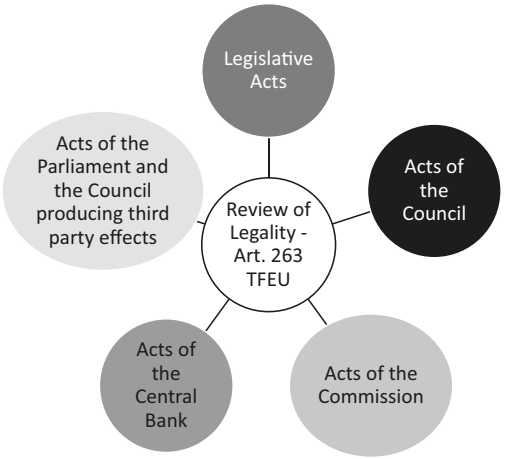

FIGURE 11 Review of legality as construed by art. 263 TFEU

the Central Bank. Figure 11 below offers a visual representation of this constitutional requirement.

The general EU judicial system of *a posteriori* control was directly inspired by the control of administrative bodies exercised by the French *Conseil d'Etat* since 1799, when Napoléon established it.[22] He further noted that, even if the concept of unlimited jurisdiction is not defined in the Treaties, it appears to be derived from the French administrative law concept of *recours de pleine jurisdiction*. This conception of judicial jurisdiction is thought to mandate a court to "deal fully with a dispute and exercise its fullest powers. For example, a court may award damages against the administrative body or revise (as distinct from merely annulling) the administrative act in question".[23] Etoa noted that an increase in the level of judicial review has occurred in relation to the administrative sanctions imposed by the French domestic agencies.[24]

16.3 Limited Review of Legality – Design by Self-Interpretation

According to the case-law of the CJEU, judicial review of the decisions of the EU institutions was arranged by the founding Treaties. In *Chalkor*, the ECJ

22 Derenne, *op. cit.*, p. 74.
23 Derenne, *op. cit.*, p. 77.
24 Etoa, Samuel. "L'évolution du contrôle du juge administratif sur la gravité des sanctions administratives." *L'Actualité juridique. Droit administratif* 7 (2012), Dalloz: p.358.

started its analysis concerning judicial review in a competition law dispute by highlighting that, in addition to the review of legality, provided for under Article 263 TFEU, a review with unlimited jurisdiction was envisaged in regard to the penalties laid down by regulations.[25] In light of this, the failure to review the whole of the contested decision of the Court's own motion does not contravene the principle of effective judicial protection. Compliance with that principle does not require that the EU Courts – which are indeed obliged to respond to the pleas in law raised and to carry out a review of both the law and the facts – should be obliged to undertake of its own motion a new and comprehensive investigation of the file.

The EU Courts have traditionally used two notions to justify maintaining limited powers of review of the EU Commission's competition law decisions: complex economic analysis and the Commission's margin of discretion.

Already in *Consten and Grundig*, the ECJ found that

> judicial review of complex economic evaluations by the Commission (…) must take account of their nature by confining itself to an examination of the relevance of the facts and legal circumstances which the Commission deduces therefrom. This review must in the first place be carried in respect of the reasons given for the decisions which must set out the facts and considerations on which the said evaluations are based.[26]

Whereas initially formulated in relation to Article 101 TFEU, this reasoning was later extended to cover cases involving Article 102 TFEU and merger reviews. Thus, in *Remia*, the ECJ noted that, when confronted with complex economic matters, the 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 misuse of powers".[27]

The EU Courts' self-restraint in cases involving complex economic/technical matters is often accompanied by its corollary principle describing the Commission's margin of discretion. Interestingly, this concept is used by the EU Courts both to justify deference to the Commission's appraisals and

25 C-386/10 P, *Chalkor v Commission*, ECLI:EU:C:2011:815, paragraph 53.

26 C-56/64, *Consten and Grundig v Commission of the EEC*, ECLI:EU:C:1966:41. C-58/64, *Grundig v Commission of the EEC*, ECLI:EU:C:1965:60.

27 C-42/84, *Remia v Commission*, ECLI:EU:C:1985:327.

to deploy a comprehensive judicial review that can lead to setting aside the Commission's decision.

In *Tetra Laval*, the Court of Justice found that while the EU Courts

> recognize that the Commission has a margin of appreciation in economic and technical matters, that does not mean that they must decline to review the Commission's interpretation of economic and technical data. The EU Courts must not only establish whether the evidence put forward is factually accurate, reliable and consistent but must also determine whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it.[28]

This analysis has been extended by the EU Courts to other areas except competition law.[29]

The EU Courts justify their deferential, limited judicial review – which is employed in most competition law cases – by the need to respect the rule of law and the principle of institutional balance. In relation to the principle of rule of law, the Court established in *Les Verts*, in 1986, that

> the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States not its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty. (…) The Treaty established a complete system of remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions.[30]

This principle of rule of law is now consecrated in Article 13(2) TFEU which states that "each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them".

The principle of institutional balance, has been established in *Meroni*, where the Court argued that a balance of powers was "characteristic of the

28 C-12/03 P, *Commission v Tetra Laval*, ECLI:EU:C:2005:87, paragraph 39.

29 C-405/07 P, *Netherlands v Commission*, ECLI:EU:C:2008:613, paragraph 55; T-475/07, *Dow AgroScience and Others v Commission,* ECLI:EU:T:2011:455, paragraph 153; T-257/07, *France v Commission*, ECLI:EU:T:2011:444, paragraph 87.

30 C-294/83, *Les Verts v European Parliament*, ECLI:EU:C:1986:166, paragraph 23.

institutional structure of the Community".[31] The principle of institutional balance is not provided as such in the TFEU, although it can be deduced from the overall structure of the Treaty.

In addition to the reasons offered by the EU Courts themselves concerning their preference for limited judicial review, scholars argue that Article 33(1) of the Treaty establishing the ECSC was the legislative precursor of the judicial self-restraint currently practiced. David Bailey showed that "as regards the evaluation of economic facts or circumstances relevant to a decision, Article 33 ECSC required the Court of Justice to ascertain only whether the Commission misused its powers or manifestly failed to observe the provisions of the Treaty or any rule of law relating to its application".[32] Bailey highlights that there is no equivalent provision in the TFEU. He adds however that judicial self-restraint is well-established not only in relation to competition matters, but also in the common agricultural policy, anti-dumping duties and the medico-pharmacological sphere.[33]

16.4 Unlimited Review of Fines

The normative framework defining competition law has not suffered many changes since its inception. At the same time, the fining policy applied by the European Commission in competition law cases has changed profoundly. The Commission imposed no fines between 1962 and 1969, when the first cartel decision has been adopted.[34] From that point until the 1980s, the fines imposed by the Commission remained very modest. This trend was replaced in the 1980s by an increasingly aggressive fining policy. In *Pioneer*, a decision that targeted five European subsidiaries and independent distributors of the Japanese manufacturer Pioneer, the Commission imposed the first fine exceeding 10 million US Dollars.[35] When Pioneer challenged this change of fining practice, the ECJ argued that

31 C-9/56, *Meroni v High Authority*, quoted above, paragraph 133.

32 Bailey, David. "Standard of Judicial Review under Articles 101 and 102 TFEU." *The Role of the Court of Justice of the European Union in Competition Law Cases*. Eds. Massimo Merola and Jacques Derennes. Bruxelles: Bruylant, 2012, pp. 103–128, p. 106.

33 Bailey (2012), *op. cit.*, p. 106.

34 European Commission. Case IV/26.045, *Quinine* [1969], OJ L 192, p. 5.

35 European Commission. Case IV/29.595, *Pioneer Hi-Fi Equipment* [1980], OJ L 60, p. 21.

> the fact that the Commission, in the past, imposed fines of a certain level for certain types of infringement does not mean that it is estopped from raising that level within the limits indicated in Regulation 17 if that is necessary to ensure the implementation of community competition policy. On the contrary, the proper application of competition rules requires that the Commission may at any time adjust the level of the fines to the needs of that policy.[36]

Forrester noted that prior to the 1980s, the "Commission's priority regarding cartels had hitherto been rather equivocal: cartels were a known and undesirable feature of economic life, but attacking a national champion was likely to be controversial, and getting good evidence was not easy".[37] However, due to a change of policy in the US targeting international cartels, "the Commission wholeheartedly joined the quest against cartels, as being a primary task of a competition law enforcer".[38]

The modernization program undertaken by DG COMP involved the replacement of Regulation 17/62 with Regulation 1/2003. The Fining Guidelines of 1998 have been replaced by the Fining Guidelines of 2006 and the Leniency Notice. As Tables 4 and 5 below indicate, this process of modernization has been accompanied by a concomitant increase of the fines imposed by the Commission for breaches of EU competition law. Thus, the fines imposed by the Commission between 2015–2020 represent 25% of all the fines imposed since 1990.

The more aggressive fining policy of the Commission has led to the increase in the appeals against the Commission's decisions.

The ECJ construed its own powers of review of the fines imposed in competition law cases in a broader way than the review of legality. In this sense, the ECJ has stated that the unlimited jurisdiction conferred by Article 31 of Regulation 1/2003 authorizes the EU courts "to vary the contested measure, even without annulling it, by taking into account all of the factual circumstances, so as to amend, for example, the amount of the fine".[39]

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36 C-100/80, *Musique Diffusion française v Commission*, quoted above, paragraph 100.

37 Forrester, Ian S. "A Challenge for Europe's Judges: The Review of Fines in Competition Cases." *The Role of the Court of Justice of the European Union in Competition Law Cases*. Eds. Massimo Merola and Jacques Derennes. Bruxelles: Bruylant, 2012, pp. 147–192, p. 150.

38 Forrester (2012), *op. cit*.

39 C-534/07 P, *Prym and Prym Consumer v Commission*, ECLI:EU:C:2009:505, paragraph 86.

TABLE 4 Total of fines imposed by the Commission in EU competition law Cases – 1990–2020[a]

Period	Amount in €
1990–1994	537 491 550
1995–1999	292 838 000
2000–2004	3 458 421 100
2005–2009	9 355 867 500
2010–2014	7 917 218 674
2015–2019	8 307 828 000
2020*	278 639 000
Total	30 148 303 824

* Last update: 29 September 2020

[a] European Commission. *Cartel Statistics*. Available at http://ec.europa.eu/competition/cartels/statistics/statistics.pdf accessed on 23 February 2021. Amounts as imposed by the Commission (incl. corrections following amendment decisions) and NOT corrected for changes following judgments of the Courts (General Court and European Court of Justice) and only considering cartel infringements under Article 101 TFEU (previously Articles 81 resp. 85 and Article 82 resp. Article 86 of the Treaty), only those amounts, which concern the Article 101 TFEU, have been considered.

A few years later, in *Chalkor*, the Court maintained that the review of legality is supplemented by the unlimited jurisdiction which empowers the Courts, in addition to carrying out a mere review of the lawfulness of the penalty, to substitute their own appraisal for the appraisal provided by the Commission and, consequently, to cancel, reduce or increase the fine or penalty payment imposed.[40]

However, despite both the Treaty-encapsulated and self-declared unlimited review of fines, the EU Courts tend to defer to the Commission's margin of appreciation when reviewing the fines. A comparison between Table 5 above describing the fines imposed by the EU Commission and Table 6 below describing the fines adjusted by the EU Courts support this view.

As Table 7 concludes, if at the beginning of the 1990s the EU Courts' review of the fines imposed by the EU Commission resulted in the fines being diminished by 35,9%, starting with 1995 this number rarely went over 10%.

40 C-386/10 P, *Chalkor v Commission*, quoted above, paragraph 63.

TABLE 5 Total of fines imposed by the Commission in EU Competition law cases – 2016–2020[a]

Year	Amount in €
2016	3 726 976 000
2017	1 945 656 000
2018	800 748 000
2019	1 484 877 000
2020*	278 639 000
Total	8 236 896 000

* Last update: 29 September 2020

[a] European Commission. *Cartel Statistics*, quoted above.

Amounts as imposed by the Commission (incl. corrections following amendment decisions) and NOT corrected for changes following judgments of the Courts (General Court and European Court of Justice) and only considering cartel infringements under Article 101 TFEU (previously Articles 81 resp. 85 and Article 82 resp. Article 86 of the Treaty), only those amounts, which concern the Article 101 TFEU, have been considered.

16.5 Margin of Appreciation of the EU Commission and Unlimited Review of Fines

As shown in section 16.4., the CJEU has the constitutional right to perform unlimited judicial review of the fines imposed by the Commission in competition law cases. At the same time, the analysis performed in the section above indicated that the CJEU's judicial review of fines became more deferential since the 1990s. In fact, the Commission's margin of discretion is invoked by the CJEU to justify everything from the Commission's use of the Fining Guidelines, to the analysis of mitigating circumstances and impact on the market. Consistently, the Commission's margin of appreciation in fining matters is justified by the need to ensure the deterrent effect of fines.[41]

The present section highlights landmark cases that define the scope of the Commission's margin of discretion in fining matters.

In *Archer Daniels Midland* the CFI was faced with the question whether the Fining Guidelines are compatible with the principle of non-retroactivity of criminal laws. The CFI noted that that the principle of non-retroactivity of

41 C-100/80, *Musique Diffusion française v Commission*, quoted above, paragraph 108.

TABLE 6 Total of fines imposed by the Commission, adjusted for court judgements – 1990–2020[a]

Period	Amount in €
1990–1994	344 282 550,00
1995–1999	270 963 500,00
2000–2004	3 157 348 710,00
2005–2009	7 863 307 786,50
2010–2014	7 598 728 479,00
2015–2019	8 234 322 023,00
2020*	278 639 000,00
Total	27 747 592 048,50

* Last update: 29 September 2020

[a] European Commission. *Cartel Statistics*, quoted above.
Amounts corrected for changes (incl. corrections following amendment decisions) and judgments of the Courts (General Court and European Court of Justice) and only considering cartel infringements under Article 101 TFEU (previously Article 81 resp. Article 85 of the Treaty). Wherever prohibitions and fines concern infringements of Article 101 TFEU (previously Articles 81 resp. Article 85 and of Article 102 TFEU previously Article 82 resp. Article 86 of the Treaty), only those amounts, which concern the Article 101 TFEU infringements, have been considered.

criminal laws, enshrined in Article 7 ECHR constitutes a general principle of Community law which must be observed when fines are imposed for infringement of the competition rules. The principle of non-retroactivity of criminal laws requires that the penalties imposed correspond with those fixed at the time when the infringement was committed. At the same time, the adoption of guidelines capable of modifying the general competition policy of the Commission as regards fines may fall within the scope of the principle of non-retroactivity.[42]

The CFI also highlighted that by adopting and publishing the Fining Guidelines, the Commission imposes a limit on its own discretion: "it cannot depart from those rules under pain of being found, where appropriate, to be in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations and legal certainty".[43] The CFI concluded

42 T-59/02, *Archer Daniels Midland v Commission*, ECLI:EU:T:2006:272, paragraph 42.

43 T-59/02, *Archer Daniels Midland v Commission*, quoted above, paragraph 43.

TABLE 7 Percentage of fine reduction by EU courts in cartel cases

Period	Imposed	Adjusted	Difference
1990–1994	537 491 550	344 282 550,00	**-35,9%**
1995-1999	292 838 000	270 963 500,00	**-7,5%**
2000–2004	3 458 421 100	3 157 348 710,00	**-8,7%**
2005–2009	9 355 867 500	7 863 307 786,50	**-16,0%**
2010–2014	7 917 218 674	7 598 728 479,00	**-4,0%**
2015–2019	8 307 828 000	8 234 322 023,00	**-0,9%**
2020*	278 639 000	278 639 000,00	**0,0%**
Total	30 148 303 824	27 747 592 048,50	**-8,0%**

* Last update: 29 September 2020

however that "undertakings involved in an administrative procedure in which fines may be imposed cannot acquire a legitimate expectation that the Commission will not exceed the level of fines previously imposed or the method of calculating the fines".[44]

In *KME Germany*, the Commission has fined the applicants for having organized a cartel in the air conditioning and refrigeration business. The applicants lodged an action for annulment, contesting the amount of the fine imposed on them and the fact that the Fining Guidelines used by the Commission for the calculation of the fines was a soft law instrument.[45]

The CFI has, first of all, highlighted that whilst the Fining Guidelines "may not be regarded as rules of law, they nevertheless form rules of practice from which the Commission may not depart in an individual case without giving reasons which are compatible with the principle of equal treatment".[46] The CFI stressed that its role when reviewing the legality of the fines imposed by the Commission was twofold: (1) to assess whether the discretion exercised by the Commission is in line with the method for calculating the fines established in the Guidelines, and in the contrary (2) to verify whether the departure is justified and supported by sufficient legal reasoning. The CFI also added that "the self-limitation on the Commission's discretion arising from the adoption

44 T-59/02, *Archer Daniels Midland v Commission*, quoted above, paragraph 48.

45 T-127/04, *KME Germany and Others v Commission*, ECLI:EU:T:2009:142.

46 T-127/04, *KME Germany and Others v Commission*, quoted above, paragraph 33.

of the Guidelines is not incompatible with the Commission's maintaining a substantial margin of discretion".[47]

Furthermore, the CFI noted that the Commission's duty was not to scientifically prove the impact of a cartel on a market, but rather "to provide specific and credible evidence indicating with reasonable probability that the cartel had an impact on the market".[48]

According to settled case-law, the gravity of an infringement has to be determined by reference to numerous factors, such as the particular circumstances of the case and its context; moreover, there is no binding or exhaustive list of the criteria which must be applied.[49] The criteria for assessing the gravity of an infringement may include the volume and value of the goods in respect of which the infringement was committed and the size and economic power of the undertaking and, consequently, the influence which it is able to exert on the relevant market. Thus, on the one hand, the Commission can have regard both of the total turnover of the undertaking, which gives an indication, albeit approximate and imperfect, of the size of the undertaking and of its economic power, and of the market share of the undertakings concerned on the relevant market, which gives an indication of the scale of the infringement. On the other hand, it is important not to attach on one or other of those figures an importance which is disproportionate in relation to other factors and the fixing of an appropriate fine cannot therefore be the result of a simple calculation based on total turnover.[50]

In addition, when determining the gravity of an infringement, particular account should be taken of the legislative background and economic context of the conduct complained of.[51] Also, in order to assess the actual effect of an infringement on the market the Commission must take as a reference the competition that would exist if there was no infringement.[52]

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47 T-127/04, *KME Germany and Others v Commission*, quoted above, paragraphs 34–35.

48 T-241/01, *Scandinavian Airlines System v Commission*, ECLI:EU:T:2005:296, paragraph 122.

49 Order in C-137/95 P, *SPO and Others v Commission*, ECLI:EU:C:1996:130, paragraph 54.
C-219/95 P, *Ferriere Nord v Commission*, ECLI:EU:C:1997:375, paragraph 33.
And T-9/99, *HFB and Others v Commission*, ECLI:EU:T:2002:70, paragraph 443.

50 C-100/80, *Musique Diffusion française v Commission*, quoted above, paragraphs 120 and 121.
T-77/92, *Parker Pen v Commission*, ECLI:EU:T:1994:85, paragraph 94.

51 C-40/73 (joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114–73), *Suiker Unie and Others v Commission*, ECLI:EU:C:1975:174, paragraph 612. And C-219/95 P, *Ferriere Nord v Commission*, quoted above, paragraph 38.

52 C-40/73, *Suiker Unie and Others v Commission*, quoted above, paragraphs 619–620. T-347/94, *Mayr-Melnhof Kartongesellschaft v Commission*, ECLI:EU:T:1998:101, paragraph 235.
T-141/94, *Thyssen Stahl v Commission*, ECLI:EU:T:1999:48, paragraph 645.

Where an infringement has been committed by several undertakings, the Commission must consider the relative gravity of the participation of each separate undertaking.[53] The gravity of participation implies an analysis of the roles played by each undertaking in the infringement and the duration of their participation.[54]

In *Archer Daniels Midland*, the CFI has shown that the impact of a cartel on the market necessarily involves recourse to assumptions. In this respect, the Commission must in particular consider what the price of the relevant product would have been in the absence of a breach of competition law. However, when examining the causes of actual price developments, it is hazardous to speculate on the part played by each of those causes. In this situation, the Commission cannot be criticised for referring to the actual impact on the market of a cartel having an anti-competitive object, such as a price or sales quota cartel, even though it does not quantify that impact or provide any assessment in figures in this respect. Rather, the actual impact of a cartel on the market must be regarded as having been demonstrated if the Commission is able to provide specific and credible evidence indicating with reasonable probability that the cartel had an impact on the market.[55] In addition, having regard to the administrative and management costs associated with the sound functioning of a complex cartel, and taking account of the risks inherent in the cartel activities, it is reasonable to assume that when undertakings persist with the infringement over a long period of time, this indicates that the cartel members made a certain profit from that cartel which, in turn suggests that the cartel had an actual impact on the relevant market.[56]

The Commission's discretion also extends to the seriousness of the infringement and its composing elements.[57] The Commission also retains a large margin of discretion in relation to the application of aggravating and attenuating circumstances.[58]

The CFI noted that the adoption of the Guidelines has not rendered irrelevant the previous case-law under which the Commission enjoys a discretion as to whether or not to take account of certain matters when setting the amount of the fines. Thus, "in the absence of any binding indication in the Guidelines

53 C-40/73, *Suiker Unie and Others v Commission*, quoted above, paragraph 623.

54 C-49/92 P, *Commission v Anic Partecipazioni*, ECLI:EU:C:1999:356, paragraph 150. And T-6/89, *Enichem Anic v Commission*, ECLI:EU:T:1991:74, paragraph 264.

55 T-59/02, *Archer Daniels Midland v Commission*, ECLI:EU:T:2006:272, paragraphs 160–161.

56 T-59/02, *Archer Daniels Midland v Commission*, ECLI:EU:T:2006:272, paragraph 166.

57 Joined cases T-101/05 and T-111/05, *BASF v Commission*, ECLI:EU:T:2007:290, paragraph 65.

58 T-44/00, *Mannesmannröhren-Werke AG v Commission*, ECLI:EU:T:2004:218, paragraph 307.

regarding the mitigating circumstances that may be taken into account, it must be concluded that the Commission has retained a degree of latitude in making an overall assessment of the extent to which a reduction of fines may be made in respect of mitigating circumstances".[59]

Lastly, the Commission's discretion extends to the cooperation offered by the members of a cartel during the proceedings.[60] This means that only an obvious error of assessment by the Commission is capable of being censured, since the Commission enjoys a wide discretion in assessing the quality and usefulness of the cooperation provided by the undertakings that are being investigated. The quality and usefulness of the cooperation is further qualified in relation to the contributions made by other undertakings.[61]

16.6 The Right to a Fair Legal Process in EU Law

Two periods can be distinguished concerning the development of the right to a fair trial in EU law: before the adoption of the Charter on Fundamental Rights and after the adoption of the Charter.

Before the adoption of the Charter, the CJEU has recognized the existence and importance of the right to a fair trial in European law in general and in European competition law in particular.[62]

Thus, in *Schindler Holding and Others*, the applicants argued that, since the infringements of EU competition law fall within the scope of criminal law, the procedure before the Commission must satisfy the requirements of Article 6(1) ECHR. The applicants claimed that administrative authorities cannot impose penal sanctions unless there is full judicial review. They complained that an action for annulment before the Courts of the European Union was no more than an appeal before an administrative court of last resort and was limited to the pleas in law put forward by the applicants.[63]

The CFI initiated its argument by recalling the general principle of European Union law that everyone is entitled to a fair legal process.[64] The right to a fair legal process has been reaffirmed by Article 47 of the Charter

59 T-127/04, *KME Germany and Others v Commission*, quoted above, paragraph 115.
60 C-328/05, *SGL Carbon AG v Commission*, ECLI:EU:C:2007:277, paragraph 88.
61 T-127/04, *KME Germany and Others v Commission*, quoted above, paragraph 141.
62 C-185/95, *Baustahlgewebe GmbH v Commission of the European Communities*, ECLI:EU:C:1998:608, paragraph 21.
63 T-138/07, *Schindler Holding and Others v Commission*, ECLI:EU:T:201:362, paragraph 49.
64 C-411/04 P, *Salzgitter Mannesmann v Commission*, ECLI:EU:C:2007:54, paragraph 40.

of Fundamental Rights of the European Union and is inspired by the fundamental rights which form an integral part of the general principles of EU law which the EU Courts enforce, drawing inspiration from the constitutional principles common to the Member States and from the guidelines supplied, in particular, by the ECtHR.[65]

The CFI explained, however, that the Commission's decisions imposing fines for the infringement of competition law are not criminal in nature and that, furthermore, the Commission is not a 'tribunal' for the purpose of Article 6(1) ECHR. However, the CFI found that the review of Commission decisions which the Courts of the Union carry out ensures that the requirements of a fair process, as enshrined in Article 6(1) ECHR are satisfied because the applicants may call upon it to undertake an "exhaustive review of both the substantive findings of fact and the Commission's legal appraisal of those facts".[66] Furthermore, in so far as concerns the fines, the EU Courts have unlimited jurisdiction.

On appeal, the applicants complained that the Commission's procedure infringes the principle of the separation of powers and does not comply with the principles of the rule of law that are applicable to criminal procedures under Article 6(1) ECHR. They argued that the case-law to which the CFI referred to in its judgment was obsolete due to the entry into force of the Treaty of Lisbon and the direct applicability of the ECHR.[67]

The CJEU noted first of all that the contested decision was adopted before the entry into force of the Lisbon Treaty. Second, whilst, as Article 6(3) TEU confirms that fundamental rights recognised by the ECHR constitute general principles of the European Union's law and whilst Article 52(3) of the Charter requires rights contained in the Charter which correspond to rights guaranteed by the ECHR to be given the same meaning and scope as those laid down by the ECHR, the latter does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into European Union law.[68] Despite the ECtHR's judgment in *Menarini Diagnostics*, the fact that decisions imposing fines in competition matters are adopted by the Commission is not in itself contrary to Article 6(1) ECHR. On contrary, the

65 T-138/07, *Schindler Holding and Others v Commission*, quoted above, paragraph 51.

66 T-138/07, *Schindler Holding and Others v Commission*, quoted above, paragraph 56.

67 C-501/11 P, *Schindler Holding and Others v Commission*, ECLI:EU:C:2013:522, paragraphs 24–29.

68 C-571/10, *Kamberaj*, ECLI:EU:C:2012:233, paragraph 62. And C-617/10, *Åkerberg Fransson*, ECLI:EU:C:2013:105, paragraph 44.

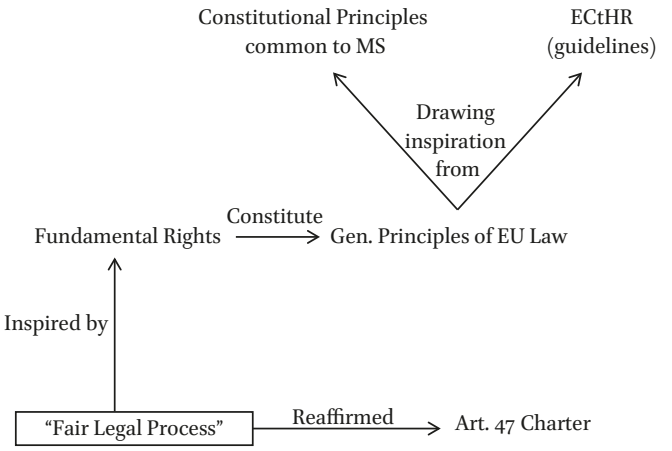

FIGURE 12 Design of the "Fair Legal Process" in the case-law of the EU courts

CJEU argued that the review performed by the European judicature was compatible with the requirements of Article 6(1) ECHR.[69]

Figure 12 below offers a visual representation of the design of the notion "fair legal process" as summarised by the EU Courts in *Schindler Holding and Others* and applied consistently in the case-law. This visual representation suggests that the notion of "fair legal process" is a fundamental right, part of the general principles of EU law, which is inspired by the ECtHR's case-law and the constitutional principles common to the member states. The right to a fair legal process is reaffirmed in Article 47 of the Charter.

The CJEU interpreted the right to a fair legal process to "comprise the right to a tribunal that is independent of the executive power in particular".[70] The CJEU also found that the right to a fair legal process comprised "the right to a legal process within a reasonable time".[71] The CJEU have also had the opportunity to apply the right to a fair legal process in relation to national insolvency proceedings. In *Eurofood*, the ECJ noted that the right to be notified of procedural documents and, more generally, the right to be heard, "occupy an eminent position in the organisation and conduct of a fair legal process. In the context of insolvency proceedings, the right of creditors or their representatives to participate in accordance with the equality of arms principle is of particular importance".[72]

69 C-501/11 P, *Schindler Holding and Others v Commission*, quoted above, paragraphs 30–39.

70 C- 174/98 P (joined with C-189/98 P), *Kingdom of the Netherlands and Gerard van der Wal v Commission of the European Communities*, ECLI:EU:C:2000:1, paragraph 17.

71 C-185/95, *Baustahlgewebe GmbH v Commission of the European Communities*, quoted above, paragraph 21.

72 C-341/04, *Eurofood IFSC Ltd.*, ECLI:EU:C:2006:281, paragraph 66.

The ECJ also added that although

> the specific detailed rules concerning the right to be heard may vary according to the urgency for a ruling to be given, any restriction on the exercise of that right must be duly justified and surrounded by procedural guarantees ensuring that persons concerned by such proceedings actually have the opportunity to challenge the measures adopted in urgency.[73]

Moreover, the right to a fair trial plays an important role in the practice of EU institutions. First, it is important to highlight that since, the entry into force of the Charter, most letters and petitions received by the EU Commission in relation to the Charter concern access to justice. Figure 13 below indicates that 36% of the letters received by the EU Commission in 2010 concerned questions about access to justice, including questions about the right to a fair trial and rights of defence.

The CJEU has also increasingly referred to the Charter in its decisions. From 2011 to 2014, the number of decisions quoting the Charter in their reasoning increased from 43 to 210. Since 2014, that number stayed at around 200.[74] As Figure 14 below shows, the Charter is most often invoked by the CJEU in relation to questions concerning access to justice.

Lastly, the right to an effective remedy and to a fair trial is the most referred to provision of the Charter by the CJEU. Figure 15 below describes the statistics for 2017 as an example.

The CJEU has invoked or relied on Article 47 of the Charter in almost 800 cases since 2010.[75] As the cases below indicate, the CJEU has embraced a wide interpretation of the right to effective judicial review in many cases. *First*, in cases concerning review of *restrictive measures such as freezing of assets*, the CJEU highlighted that, in light of fundamental rights forming an integral part of the EU legal order, they must ensure the full review of the lawfulness of all the acts of the EU.[76] In a recent case, the CJEU highlighted the following:

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73 C-341/04, *Eurofood IFSC Ltd.*, quoted above, paragraph 66.

74 European Commission. 2017 Report on the Application of the EU Charter of Fundamental Rights, p. 25. Available at https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights/application-charter/annual-reports-application-charter_en accessed on 23 February 2021.

75 This information has been collected from InfoCuria, using the search function. Available at: http://curia.europa.eu, accessed on 23 February 2021.

76 Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *European Commission and Others v Yassin Abdullah Kadi*, ECLI:EU:C:2013:518, paragraph 97.

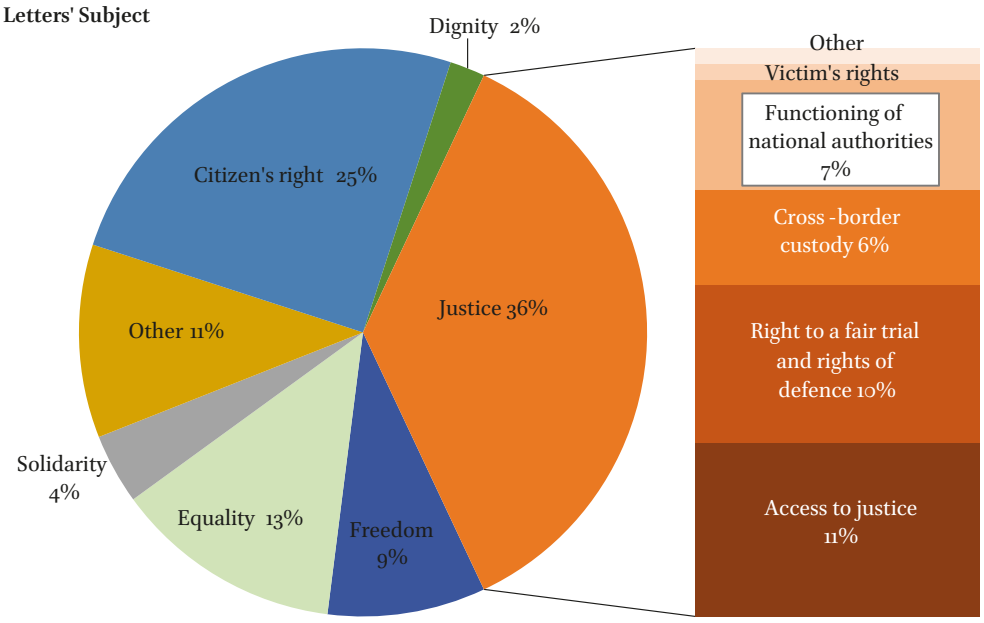

FIGURE 13 Letters received by the EU Commission in relation to the Charter divided by subject
SOURCE: EUROPEAN COMMISSION. 2010 REPORT ON THE APPLICATION OF THE EU CHARTER OF FUNDAMENTAL RIGHTS, P. 76. AVAILABLE AT: HTTPS://OP.EUROPA.EU/EN/PUBLICATION-DETAIL/-/PUBLICATION/3883477D-A821-40DB-B01E-890439FA8942/LANGUAGE-EN ACCESSED ON 23 FEBRUARY 2021.

> The effectiveness of the judicial review guaranteed by Article 47 of the Charter requires (...) that, as part of the review of the lawfulness of the grounds which are the basis of the decision to include or to maintain a person's name on the lists of persons subject to restrictive measures, the Courts of the European Union are to ensure that that decision, which affects that person individually, is taken on a sufficiently solid factual basis. That entails a verification of the factual allegations in the summary of reasons underpinning that decision, with the consequence that judicial review cannot be restricted to an assessment of the cogency in the abstract of the reasons relied on, but must concern whether those reasons, or, at the very least, one of those reasons, deemed sufficient in itself to support that decision, are substantiated.[77]

77 C-530/17, *Mykola Yanovych Azarov v Council*, ECLI:EU:C:2018:1031, paragraph 22.

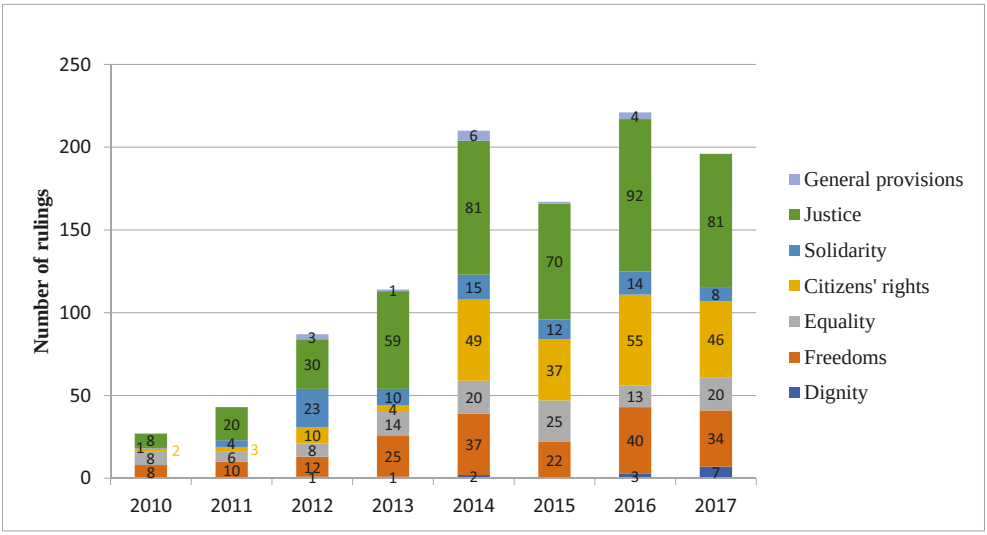

FIGURE 14 Overview of CJEU case-law which quotes the Charter or mentions it in its reasoning
SOURCE: EUROPEAN COMMISSION. 2017 REPORT ON THE APPLICATION OF THE EU CHARTER OF FUNDAMENTAL RIGHTS, QUOTED ABOVE, P. 25.

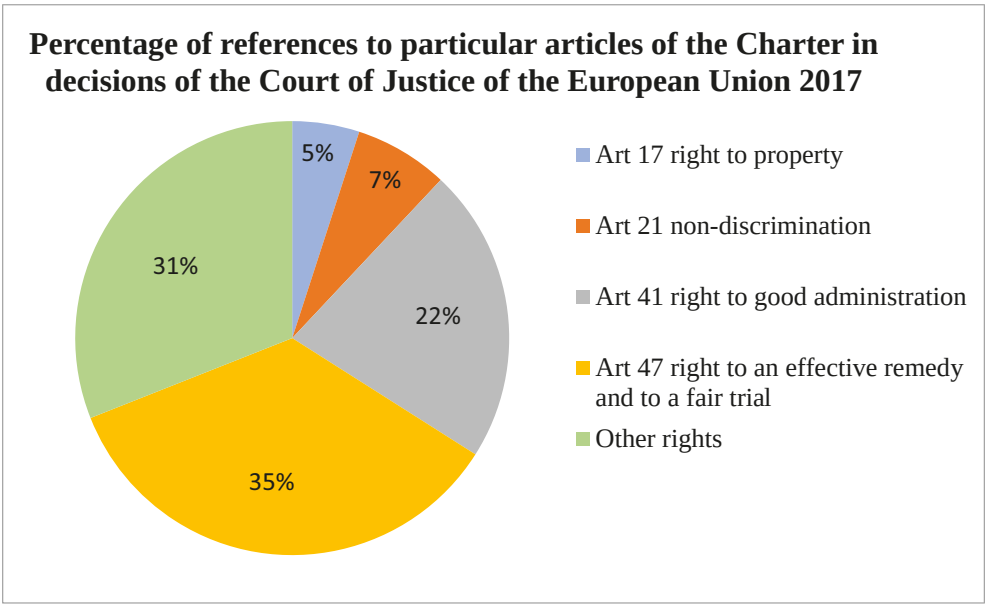

FIGURE 15 Most quoted Charter provisions in the case-law of the CJEU in 2017
SOURCE: EUROPEAN COMMISSION. 2017 REPORT ON THE APPLICATION OF THE EU CHARTER OF FUNDAMENTAL RIGHTS, QUOTED ABOVE, P. 27.

Second, in relation to the right to an effective remedy concerning EU *rules on asylum*, the CJEU found that Article 47 of the Charter, read together with Articles 18 and 19(2) of the Charter, required that applicants for international protection should be able to enforce their rights effectively before a judicial authority.[78]

Despite these developments, the entry into force of the Charter has not affected the limited approach to judicial review preferred by the CJEU in competition law cases. On the one hand, the *EU courts ceased to refer to Article 6(1) ECHR*, arguing that "Article 47 of the Charter implements in European Union law the protection afforded by Article 6(1) of the ECHR. It is necessary, therefore, to refer only to Article 47".[79]

On the other hand, the CJEU has recently highlighted in relation to Article 47 of the Charter that the system of judicial review of Commission decisions relating to proceedings under Articles 101 and 102 TFEU "consists in a review of the legality of the acts of the institutions for which provision is made in Article 263 TFEU, which may be supplemented, pursuant to Article 261 TFEU and at the request of applicants, by the General Court's exercise of unlimited jurisdiction with regard to the penalties imposed in that regard by the Commission".[80]

The case-law described in this chapter exemplifies what Conway qualified as a *lack of a unifying principle of interpretation*. He has shown that "the ECJ has never set out a systematic scheme of interpretative principles".[81] Instead, the ECJ has a "long-standing practice (…) to downplay the significance of legislative and Treaty texts, in favour of a pro-integration innovation and extension of existing legal rules related, at a high level of generality, to the purpose of integration".[82] This conclusion finds evidence easily in the area of effective judicial protection in the EU.

Three periods of interpretation can be deduced from the case-law described above in relation to the right to a fair trial in EU law. *First*, ignoring the wording of the Treaties, the CJEU established that the *right to effective judicial protection* was a general principle of EU law derived from the constitutional traditions common to the Member States and from Articles 6 and 13 ECHR. *Second*, the CJEU established the *right to a fair legal process* derived from the constitutional traditions common to the Member States and the guidelines offered

78 C-175/17, *X v Belastingdienst/Toeslagen*, ECLI:EU:C:2018:776.

79 C-386/10 P, *Chalkor v Commission*, paragraph 51.

80 C-99/17, *Infineon Technologies AG v Commission*, ECLI:EU:C:2018:773, paragraph 47.

81 Conway, Gerard. *The Limits of Legal Reasoning and the European Court of Justice*. Cambridge: Cambridge University Press, 2012, p. 147.

82 Conway, *op. cit.*, p. 170.

by the ECtHR. *Lastly*, following the entry into force of the Charter, the CJEU has abandoned Article 6(1) ECHR and the guidance offered by the ECtHR as a benchmark for the interpretation of the effective judicial protection and of the right to a fair legal process.

Before the entry into force of the Charter, the CJEU has chosen to define the principle of judicial protection and the right to a fair trial in the EU having Article 6(1) ECHR as a benchmark. In other words, the CJEU has opted for a high level of generality in the interpretation of these concepts. This choice should have led to a progressive widening of the concept of fair legal process because its benchmark – Article 6(1) ECHR – has enlarged its scope as well. As shown above, in EU competition law proceedings this has not been the case and the CJEU chose a minimal approach to due process in this area.

Following the entry into force of the Charter, the CJEU has narrowed the level of generality applied in relation to the interpretation of the right to a fair trial by abandoning the previous, Article 6(1) ECHR benchmark.

I have shown in this chapter that the CJEU has not only established general principles of EU law inexistent in the Treaties, but has used a high level of generality for their definition. The CJEU appears to have followed the strategy employed by the ECtHR concerning rights creation and rights interpretation. They have defined effective judicial protection and fair trial using Article 6(1) ECHR as a benchmark in order to capture disputes within the net of its jurisdiction which would otherwise not be justiciable. At the same time, the case-law on competition law indicates that CJEU the has maintained a narrow interpretation of effective judicial protection and fair trial. This narrow interpretation of effective judicial protection and fair trial focuses on substantive fair trial issues such as access to documents or reasoning of decisions. At the same time, this interpretation ignores the structural issues related to effective judicial protection and fair trial, such as the independence of the EU Commission as an adjudicator and deferential judicial review.

CHAPTER 17

Is Judicial Review a Cure for Bigness?

Closing a chapter on the judicial review of EU competition law decisions should be an easy task for a lawyer trained in ECHR matters. The case-law of the ECtHR described in this book suggests that the system of competition law enforcement in the EU does not comply with the requirements of the right to a fair trial as guaranteed by Article 6(1) ECHR. The system of EU competition law enforcement is based on the exercise of administrative discretion as policing powers (Section 8.4.). The EU Commission investigates and prosecutes, opens investigations, searches premises and fines undertakings (Chapters 10 and 11). Such proceedings are considered to be criminal in nature by the ECtHR, irrespective of their domestic qualification (Section 5.3.4.). The judicial review required by Article 6(1) ECHR in such cases should involve a full review of the decision concerned and the power to quash in all respects the disputed administrative decision (Chapters 14 and 15).

These safeguards are not met in EU competition law. The judicial review performed by the EU Courts cannot correct the structural lack of independence of the EU Commission. Moreover, the review of legality combined with the full review of fines cannot lead to a competition law decision adopted by the EU Commission being declared void in full, decided *de novo* by the EU Courts or sent for re-consideration (Chapter 16). Hence, the judicial review of competition law decisions in the EU does not comply with Article 6(1) ECHR.

This conclusion might be valuable in itself, especially in relation to the Treaty-based rules of interpretation of the Charter that establish a link of equivalence between the ECHR, the interpretation of the ECHR by the ECtHR and the provisions of the Charter. This conclusion will be of particular importance if the EU will conclude its accession to the ECHR.

At this point, however, it remains important to understand the reasons that could be grounding the EU Courts' preference for deferential judicial review despite the fact that it is highly contested by practitioners and academics. Such a pursuit is important for a few reasons. *First*, despite the growing investigative powers of the EU Commission and the growing amounts of fines imposed for breaches of EU competition law, there is little evidence that cartels are disappearing or that the dominant firms are abusing less their dominant positions. On the contrary, it appears that the movement toward

concentration of economic power is becoming more obvious and more serious.[1]

The *second* reason to understand the defence of the current system of EU competition law enforcement by the EU Courts is linked to the litigation of such cases. The increased use of commitment and settlement proceedings suggests that undertakings prefer to negotiate and to close competition cases as soon as possible. Some authors have voiced concerns that this would lead to a worrying decrease in court proceedings in EU competition law.[2] These concerns have not been validated. Despite the litigation costs involved, undertakings continue to bring actions against the decisions of the EU Commission and to challenge the Commission's assessments, its independence and the deferential judicial review performed by the EU Courts. In other words, even if the undertakings concerned know that they have little chance to overturn the EU Commission's decisions, they continue to attempt to do so.

Lastly, calls from within the EU adjudicatory establishment indicate a desire to reconceive judicial review in the EU. Thus, Prek and Lefèvre – judge and legal secretary at the GC respectively – acknowledged that the judicial review practiced by the EU Courts should be calibrated according to the type of administrative discretion deployed by the EU Commission.[3] Prek and Lefèvre distinguish between, first, the "power of appraisal" or "discretion proper" when "a rule is intended to delegate to the administration a freedom to decide between different equally lawful course of action". EU Commission exercises "discretion proper" in competition law when it initiates or closes infringement proceedings. In light of the permissive language, the judicial review performed by the CJEU in such cases should be more limited. At the same time, judicial review should take into account the "legal context to which the provision in question belongs".[4]

Second, they note that the EU Commission benefits from a "margin of appraisal" when assessing whether a rule is applicable. However, they argue that neither the interpretation of the law, nor the establishment of facts are source of administrative discretion. On contrary,

1 Wu, *op. cit.*

2 Barbier de la Serre, Eric. "Competition Law Cases before the EU Courts: Is the Well Running Dry." *The Role of the Court of Justice of the European Union in Competition Law Cases.* Eds. Massimo Merola and Jacques Derennes. Bruxelles: Bruylant, 2012, pp. 87–100.

3 Prek, Miro and Silvère Lefèvre. " 'Administrative Discretion', 'Power of Appraisal' and 'Margin of Appraisal' in Judicial Review Proceedings Before the General Court." *Common Market Law Review* 56 (2019): pp. 339–380.

4 Prek and Lefèvre (2019), *op. cit.*, p. 352.

> under Article 19 TEU, the ECJ must ensure that in the interpretation and application of the Treaties the law is observed. Thus, providing a meaning to the legislation is a task entrusted to the EU Courts and not to the administration. The General Court is therefore duty-bound to carry out a thorough review of the interpretation favoured by the administration and, if it disagrees, to substitute its interpretation for that of the administration.[5]

Finally, Prek and Lefèvre acknowledge that the administration may enjoy a margin of discretion when conducting legal appraisal of facts, that is confronting the factual basis of a case with its statutory basis.[6]

In the sections below I propose to comprehend deferential judicial review from novel perspectives. For this purpose, I attempt to solve the conundrum posed to adjudication by economic and technical evidence, by the ethos surrounding the role of the administration, by bias and monoculture and by problems of organized complexity.

17.1 Adjudication and Economic Evidence

Vos has shown that "decision-makers often act in the face of scientific uncertainty and complex technical issues regarding matters ranging from competition law to environmental protection or food safety".[7] Vos has also suggested that in some areas, such as agriculture, environment and pharma, the EU courts have abandoned their deferential standard of review in favour of a more activist stance.[8] In the field of EU competition law, however, the EU courts continue to employ judicial restraint and deferral to the EU Commission's margin of discretion.

As shown above, the CJEU limits its power of review in cases that present complex economic appraisals made by the EU Commission. In these instances, the CJEU will confine its review to verifying whether the procedural rules have been respected, whether the facts have been correctly stated and

5 Prek and Lefèvre (2019), *op. cit.*, p. 355–356.

6 Prek and Lefèvre (2019), *op. cit.*, p. 357.

7 Vos, Ellen. "The European Court of Justice in the face of scientific uncertainty and complexity." *Judicial Activism at the European Court of Justice*. Eds. Mark Dawson, Bruno De Witte and Elise Muir. Cheltenham: Edward Elgar, 2013, p. 142.

8 Vos, *op. cit.*, pp. 145–160.

whether there has been any manifest error of appraisal or misuse of powers.[9] The accompanying reasoning offered by the CJEU is that the EU Commission enjoys a wide margin of appreciation when dealing with complex economic or technical matters.

Ibáñez Colomo has argued that the scope of the notion "complex economic assessments" over which the EU Commission enjoys a margin of appreciation remains "relatively obscure".[10] Furthermore, he highlighted that "if one examines carefully the behaviour of the EU courts, it appears not only that they are less likely to be deferential to the Commission where the analysis of the authority contradicts mainstream economic principles, but that consensus positions have been relied upon to define the substantive boundaries of administrative action".[11] In other words, the EU Courts defer not to the EU Commission as an agency, but to the mainstream economic consensus.

There are at least two arguments, however, that challenge the EU Courts' self-limitation for judicial review. *First*, the EU Treaties do not treat economic evidence, or any other type of expert evidence for that matter, as a superior or privileged category of evidence. Nor do the EU Treaties speak about the privileged margin of appreciation that the EU Commission has when performing economic assessments. Therefore, when the EU Courts limit their powers of review on the ground of the special place occupied by economic evidence or the EU Commission's wide margin of appreciation to assess it, the EU Courts appear to be interfering with the constitutional hierarchy established by EU Treaties. In fact, it could be argued that deference to the EU Commission's appraisals of economic evidence affects the separation of powers within the Union.

There is a *second* reason why limiting judicial review because of the economic assessments prepared by the EU Commission is problematic, this second reason is supplied from within the corps of economists themselves. In fact, when policy-makers and courts – domestic or international – assess economic evidence, they tend to treat it as if it was scientific evidence, subject to consensus. However, economists themselves are contesting the strong reliance of policy-makers on economic evidence.

Keynes and Hayek were two of the most important economic theorists of the last century. It is important to note that, despite the fact that they belong

9 See, between many, T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02 (joined cases), *Bolloré SA and Others v. Commission*, ECLI:EU:T:2007:115, paragraph 664.

10 Ibáñez Colomo, *op. cit.*, p. 719.

11 Ibáñez Colomo, *op. cit.*, p. 720.

to the opposite sides of the political spectrum, they were both concerned with the growing authority of economics over other social fields.

John Maynard Keynes was probably the first to argue against the growing influence of economics, by highlighting that "the ideas of economists and political philosophers, both when they are right and when they are wrong, are more powerful than what is commonly understood. Indeed, the world is ruled by little else".[12]

The Nobel Memorial Prize in Economic Sciences has been introduced in 1968, following the successful lobbying and financing by Sweden's central bank, Sveriges Riksbank. Friedrich August von Hayek was awarded the Nobel Memorial Prize in Economic Sciences in 1974. The speech Hayek offered at the Nobel Banquet starts by acknowledging that if he had been consulted whether to establish a Nobel Memorial Prize in economics, he would "have decidedly advised against it".[13] Hayek offers two compelling reasons for his attitude. First, he highlights that a Nobel Prize in Economic Sciences "would tend to accentuate the swings of scientific fashion". The second reason merits to be quoted in full because it is directly relevant to the topic of this book. Hayek declared that:

> the Nobel Prize confers on an individual an authority which in economics no man ought to possess. This does not matter in the natural sciences. Here the influence exercised by an individual is chiefly an influence on his fellow experts; and they will soon cut him down to size if he exceeds his competence. But the influence of the economists that matters is an influence over laymen: politicians, journalists, civil servants and the public generally. *There is no reason why a man who has made a distinctive contribution to economic science should be omnicompetent on all problems of society* – as the press tends to treat him till in the end he may himself be persuaded to believe. One is even made to feel it a public duty to pronounce on problems to which one may not have devoted special attention.[14] (emphasis added)

This speech Hayek offered in 1974 was not an expression of humility, he was speaking from personal experience. Offer and Söderberg showed that Hayek,

12 Keynes, John Maynard. *The General Theory of Employment, Interest and Money*. London: Macmillan, 1961, p. 383.

13 Von Hayek, Friedrich August. *Banquet Speech*. 10 Dec 1974. Nobel Media AB 2019. Available at https://www.nobelprize.org/prizes/economic-sciences/1974/hayek/speech/ accessed on 23 February 2021.

14 Von Hayek, quoted above.

with the support of American business foundations, initiated the Mont Pélerin Society in 1947. The Mont Pélerin Society gathered economists, journalists and businessmen and became "the intellectual focus of resistance to Social Democracy".[15] Eight of the members of the Mont Pélerin Society went on to win the Nobel Prizes in Economic Sciences.

As Milton Friedman later wrote about his activity as a member of the Mont Pélerin Society, "the threat to a free society that we envisaged at the founding meeting of the Mont Pélerin Society is very different from the threat to a free society that has developed over the intervening period. Our initial fear was of central planning and extensive nationalization. The developing threat has been via the welfare state and redistribution".[16]

Thaler, another winner of the Nobel Memorial Prize in Economic Sciences wrote in an influential work that economics was the most powerful of the social sciences.[17] First, he argued that "of all the social scientists, economists carry the most sway when it comes to influencing public policy. In fact, they hold a virtual monopoly on giving policy advice".[18] Second, Thaler showed that economics was the most powerful of the social sciences in an intellectual sense: "that power derives from the fact that economics has a unified, core theory from which nearly everything else follows". The basic premise of the economic theory is that people choose by optimizing and that such choices are unbiased.

The problem is, however, that neither people, nor markets appear to behave as described in the models proposed by economic theory. Raworth wrote in the opening of her book *Doughnut Economics* that "economics is broken. It has failed to predict, let alone, prevent, financial crises that have shaken the foundations of our society. Its outdated theories have permitted a world in which extreme poverty persists (…). And its blind spots have led to policies that are degrading the living world on a scale that threatens all of our futures".[19]

Raworth criticises the fact that economic theory taught in universities around the world, Econ 101, is a textbook written after WWII. She shows

15 Offer, Avner, and Gabriel Söderberg. *The Nobel Factor: The Prize in Economics, Social Democracy, and the Market Turn* (*1st ed.*). Princeton: Princeton University Press, 2016, p. 9.

16 Friedman to Max Hartwell,10 July 1985. Hoover Institution, Friedman Papers, pp. 200–210.

17 Thaler, Richard H. *Misbehaving: The Making of Behavioral Economics*. New York: W. W. Norton & Company, 2016.

18 Thaler, *op. cit.*, p. 5.

19 Raworth, Kate. *Doughnut Economics: Seven Ways to Think Like a 21st-Century Economist*. Vermont: Chelsea Green Publishing, 2017, p. 3.

that the "citizens of 2050 are being taught an economic mindset that is rooted in the textbooks of 1950, which in turn are rooted in the theories of 1850".[20]

Finally, in *The Economists Hour: How the False Prophets of Free Markets Fractured Our Societies*, Appelbaum offered numerous examples of policy work that resulted in market failures or crashes despite sober economic assessments.[21]

The practitioners involved with EU competition law have been concerned with the growing importance of economic evidence in competition law as well. They acknowledge this to be a form of "economic imperialism over other social sciences".[22] The same authors note that "under the legitimate aim of avoiding excessive formalism in the formulation and application of legal principles, economists have conquered competition law. In a way, this is perhaps fair since we jurists have failed to adequately defend the virtues of keeping competition law as a legal construct".[23]

Bishop, instead, highlights that within a competition law case, economic analysis cannot be disentangled from the legal analysis provided. This implies that the answer to a competition law case "is usually not to be found in the pages of academic journals but rather in close examination of the observed market data; in other words, in a close examination of the market or the economic evidence".[24]

Bishop highlights – unwillingly – the contradiction that is at the core of the debate described in this section. On the one hand, economic evidence is simply expert evidence which can be regularly sought in court proceedings. From this point of view, economic evidence should not be distinguished from medical or forensic evidence submitted during court proceedings. On the other hand, he acknowledges that "one can always find an economist to support any position". In addition, "the fact that expert evidence necessarily reflects the

20 Raworth, *op. cit.*, p. 21.

21 Appelbaum, Binyamin. *The Economists' Hour: False Prophets, Free Markets, and the Fracture of Society*. New York: Little, Brown and Company, 2019.

22 Blanco, Luis Ortiz, and Alfonso Lamadrid de Pablo. "Expert Economic Evidence and Effects-Based Assessments in Competition Law Cases." *The Role of the Court of Justice of the European Union in Competition Law Cases.* Eds. Massimo Merola and Jacques Derennes. Bruxelles: Bruylant, 2012, pp. 305–312, p. 308.

23 Blanco and Lamadrid de Pablo, *op. cit.*

24 Bishop, Simon. "Expert Economic Evidence in European Competition Law Cases: Some Personal Views." *The Role of the Court of Justice of the European Union in Competition Law Cases.* Eds. Massimo Merola and Jacques Derennes. Bruxelles: Bruylant, 2012, pp. 294–304, p. 298.

expert's opinion doesn't render the evidence of little or no value, at least not in principle".[25] What is more, Bishop writes that "those familiar with economic theory will know that a large number of results can be reversed by making an alternative assumption. This is particularly true of modern economic analysis which employs game theoretic methodology".[26]

Bishop concludes that economic evidence should be treated in the same way as other expert evidence and be subjected to *cross-examination at the earliest stages of competition law proceedings*. In practice, though, there is an extremely limited scrutiny of economic evidence within the EU Commission and, in addition, this scrutiny remains internal.[27]

Kaupa goes a step forward in proposing that the EU Courts might be suffering from a *neoliberal bias*.[28] This bias was made obvious in the *Viking* and *Laval* cases.[29] He noted that the EU courts may have fallen victim to a "conventional wisdom trap" in which "the arguments of the economic mainstream are assumed also to represent a neutral position".[30]

Kaupa shows that

> this is a fallacious belief: not only is the economic mainstream divided in terms of economic theory (…). Economic knowledge also cannot simply be transferred into the legal discourse without losing most of its validity. The arguments of economists may sometimes boil down to simple rules, but they are based on a complex set of assumptions and preconditions (…). Legal scholars and practitioners, however, cannot possibly operate these complex economic apparatuses. Instead, they employ radically simplified versions of economic positions, which are no longer valid in a scientific sense.[31]

25 Bishop, *op. cit.*, p. 300.
26 Bishop, *op. cit.,* p. 294.
27 Bishop, *op. cit.*, pp. 300–301.
28 Kaupa, Clemens. "Maybe not Activist Enough? On the Court's Alleged Neoliberal Bias in its Recent Labor Cases." *Judicial Activism at the European Court of Justice*. Eds. Mark Dawson, Bruno de Witte and Elise Muir. Cheltenham: Edward Elgar, 2013, pp. 56–75.
29 C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, ECLI:EU:C:2007:772. C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, ECLI:EU:C:2007:809.
30 Kaupa, *op. cit.*, p. 68.
31 Kaupa, *op. cit*.

The following quote offers a good way to close this section and a description of the compromise needed to embrace economics in competition law without defeating all the other surrounding issues:

> the influence of economics is at odds with its shortcomings as a philosophy, as a scientific doctrine, and as a set of policy norms. The invisible hand is magical thinking, and its repeated disconfirmation has had little effect. On the other hand, economics has a set of empirical disciplines and achievements, with enclaves of technical and even scientific credibility. This suggests some downgrading of authority, but not all the way. Economics is not superior to other sources of authority, but is not necessarily inferior to them either; it should be taken as one voice among many.[32]

17.2 Adjudication and the Administrative Man

Political scientists like Herbert A. Simon have contested the omnipotence of economic thought, understood as monopole of rationality, within the theory of administration. His ideas remain relevant today.

Simon highlighted that social sciences suffer from

> a *case of acute schizophrenia in their treatment of rationality*. At one extreme, we have the economists, who attribute to economic man a preposterously omniscient rationality. Economic man has a complete and consistent system of preferences that allows him always to choose among the alternatives open to him; he is always completely aware of what these alternatives are; there are no limits on the complexity of computations he can perform in order to determine which alternatives are the best; probability calculations are neither frightening nor mysterious to him. At the other extreme, we have those tendencies in social psychology traceable to Freud that try to reduce all cognition to affect.[33] (emphasis added)

Simon notes, however, that the rationality exhibited in an organization "has none of the global omniscience that is attributed to economic man".[34] He

32 Offer and Söderberg, *op. cit.*, p. 15.
33 Simon, *op. cit.*, p. xxiii.
34 Simon, *op. cit.*, p. xxiv.

makes therefore the classical distinction between the *economic man*, always maximizing and presumed to be in charge of organisational decisions, and the *administrative man*, only satisficing instead of maximising and having the actual control of an organisation. For Simon, the economic man can deal with the real world and all its complexity. The administrative man, on the other hand, because of his focus on efficiency, perceives only a simplified model of the real world and "makes his choices using a simple picture of the situation that takes into account just a few of the factors that he regards as most relevant and crucial".[35] Two consequences result from this limited perception of the world. First, the administrative man takes decisions without having considered all the available alternatives. Second, the administrative man "is able to make his decisions with relatively simple rules of thumb that do not make impossible demands upon its capacity for thought".[36]

In one instance, the administrative man is equal in his decision-making powers to the economic man, more precisely in the pursuit of the *principle of efficiency*:

> the theory of administration is concerned with how an organisation should be constructed and operated in order to accomplish its work efficiently. A fundamental right of administration, which follows almost immediately from the rational character of 'good' administration, is that among several alternatives involving the same expenditure the one should be selected which leads to the greatest accomplishment of administrative objectives; and among several alternatives that lead to the same accomplishment the one should be selected which involves the least expenditure. Since this principle of efficiency is characteristic of any activity that attempts rationally to maximize the attainment of certain ends with the use of scarce means, it is characteristic of economic theory as it is of administrative theory.[37]

In a supranational setting like the EU every interaction between the administrative and the judicial branch is meaningful. Conflict between branches of government can be detrimental to integration pursuits. This is obvious from a survey of the literature that questions the shape of the separation of powers in the EU. Conway wrote that "the EU clearly does not represent a pure expression of the tripartite separation of powers between legislative, executive and

35 Simon, *op. cit.*, p. xxv.
36 Simon, *op. cit.*, p. xxvi.
37 Simon, *op. cit.*, p. 39.

judicial branches" and that "the main way in which the EU departs from the tripartite conception of a separation of powers is the role of the Court itself".[38] Höreth, on the other hand, has argued that the EU "has not only the most formalized and complex set of decision-making rules of any political system of the world but also a unique system of checks and balances".[39]

The interesting question to ask within the context of the existing checks and balances within the EU is the extent to which the three branches of government in an incomplete supranational integration project owe each other loyalty and support.

The work of Simon highlights the primordial place occupied by the administration in modern societies and the attempt to equate rationality and rational choice with the administrative exercise of power. In this model of the administration, facts become evidence and the administrators translate reality into decisions maximizing the image and power of the administration. If courts were to challenge frequently these decisions, they might be appearing as challenging the principle of rationality itself. Consequently, if courts were to contest frequently the rationality of the decisions reached by the administration, this might lead to the withering of trust in the administration. In turn, defence of trust in the administration is important not only for the swift democratic processes in a political system, but also for the healthy functioning of the courts themselves. In fact, a lack of trust in the administration might lead to a higher number of administrative decisions being contested. Individuals might seek a defence of the principle of rationality in a court instead of in the administrative agency charged with the matter. The courts' agendas could thus be significantly affected.

Courts must therefore strike a gentle balance when performing judicial review between the need to preserve the exercise of the principle of rationality by the administration and the need to preserve a manageable size of applications against the administration. Deference meets both these needs: on the one hand, by deferring to the decision of the administration, the courts strengthen the image of the administration being a specialist in a certain field. This can also empower the administration to build technical expertise in the field deferred to it. On the other hand, deference can limit the number of

38 Conway, *op. cit.*, p. 200.

39 Höreth, Marcus. "The least Dangerous Branch of European Governance? The European Court of Justice Under the Checks and Balances Doctrine." *Judicial Activism at the European Court of Justice*. Eds. Mark Dawson, Bruno de Witte and Elise Muir. Cheltenham: Edward Elgar, 2013, pp. 32–55, p. 50.

applications being lodged with a court because of the applicants' knowledge that courts will defer.

In the field of EU competition law, the EU Commission seeks to represent the economic man that Simon described. As I have suggested in Part 3 of this work, DG COMP employs a method of investigation based on fact finding and economic theory. Competition law investigations last for many years and involve vital EU Commission resources. Cases are carefully selected by the EU Commission because "policy is often formulated through the choice of individual cases and thus by establishing that a given line of conduct is in breach of a legal provision".[40] Questioning the EU Commission's competition law decisions through constant judicial review would amount to questioning the principle of rationality that the EU Commission is called to embody. Moreover, this would imply sanctioning a way of functioning and policy-making that is considered very successful. If such sanctioning were to happen often, serious questions would arise about the competence of the EU Commission in competition law matters and about the efficiency of the EU Commission's administrative action. This is especially true in light of the fact that only a handful of competition decisions are issued yearly.

To conclude, the deferential judicial review practiced by the EU courts in competition law might be deemed to be necessary for the preservation of efficient administrative action and of the image of the economic man that the EU Commission embodies.

17.3 Adjudication, Bias and Monoculture

A recent trend in social sciences describes the interest psychologists have shown for adjudication and the interest that adjudicators have shown for work on cognitive bias. Sood writes that "there has been a burgeoning of interdisciplinary scholars who are combining tools of psychology and legal scholarship to ask new questions about the law".[41] Sood's academic work has been focused on a bias called motivated cognition, which is "a human tendency to reason toward preferred outcomes by perceiving, interpreting, or evaluating information in a biased manner, without realizing one is doing so".[42]

40 Ibáñez Colomo, *op. cit.*, p. 187.

41 Sood, Avani Mehta. "Applying Empirical Psychology to Inform Courtroom Adjudication – Potential Contributions and Challenges." *Harvard Law Review Forum* 130.301 (2017).

42 Sood, *op. cit.*, p. 303.

The research on cognitive bias affecting adjudication is in its incipient phase. However, it can be suspected that cognitive bias that affects the general population also affects adjudicators. Bias in favour of jurisprudential status quo or against it could be at work in the minds of legal professionals and the general public.

On the one hand, there might be a *bias in favour of judicial activism*. Lawyers and the public at large might prefer a judicial branch that is active. Those affected by this bias might be convinced that judicial restraint is bad for democracy at all times.

On the other hand, a version of the *progress fallacy* might affect the interpretation of fundamental rights. Those holding this bias might be convinced that the interpretation of fundamental rights should always expand, that stagnation or shrinking in rights interpretation negatively affects democracy.

On the opposite side of the spectrum, individuals who favour the maintenance of the current system of judicial review might be victims of the *big on big bias*. Big on big describes the preference for large, powerful institutions as a necessary evil to address the most important problems in the society, such as big companies. With this belief in mind, fighting cartels, for example, is only possible by a large, commanding administrative agency.

A more powerful and pervasive bias is provided by what Michaels calls *monoculture*.[43] Combining research from economics, anthropology, ethics and psychology, Michaels suggests that "the governing pattern that a culture obeys is a master story – one narrative in society that takes over the others, shrinking diversity and forming a monoculture".[44]

In the seventeenth century a religious monoculture was replaced by a scientific monoculture during which "life was understood as a series of questions with knowable answers, and the world became methodical and precise".[45] Michaels argues that the master story that has succeeded the scientific monoculture is the economic monoculture. Although money plays an important role in the economic monoculture, Michaels argues that "the economic story represents a much more nuanced and insidious tapestry of beliefs and assumptions that defines who we are as human beings, what we think the world is like, and how we and the world interact".[46]

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43 Michaels, F.S. *Monoculture: How One Story is Changing Everything*. Canada: Red Clover Press, 2011.

44 Michaels, *op. cit.*, p. 4.

45 Michaels, *op. cit.*, p 6.

46 Michaels, *op. cit.*, p. 14.

The concept of monoculture can be used to describe the persistent attitudes of adjudicators, such as preference for limited review. Arold, Groussot and Petursson have conducted interviews with judges from the CJEU which indicate that two elements contribute to the creation and maintenance of a legal monoculture within the CJEU: socialization of new judges and lack of dissenting opinions.[47] The idea of calling the CJEU a 'family' has been developed early on and the socialization of new judges was an important part of this process. One of their interviewees described this process:

> There was a culture at the Court of developing good social relations between the members of the Court by social means. An incoming judge was invited during a year by his/her colleagues. This helped to form a good professional functioning of the Court. Because, if you know your colleagues better, you know more about their personal backgrounds and family backgrounds, and then it might be easier to discuss issues.[48]

Since there is no in-house training, judges learn with and from their colleagues the practical aspects of the procedure. Since, the stability of the system and coherence of the case-law are important, "newcomers are not expected to change things" and "are not advised, in a collegiate court, to pursue individual ideological goals".[49]

The second element that contributes to the creation of a monoculture within the European judicature is the collegiate nature of the court, with its corollary principle – lack of dissenting opinion. The judges that Arold, Groussot and Petursson interviewed described the adjudication process as a team-work whereby "we come together and then you see what is common in our thinking and you see that there is a lot that is in common although the approaches are different, but you see at the end that we are able to come to a common solution".[50]

As Arold, Groussot and Petursson acknowledge, "in this atmosphere of communality, a strong individualistic view would irritate".[51] As a result, consensus is the preferred option and judges prefer to make concessions in order to reach consensus instead of pursuing majority voting. When consensus cannot be reached, voting takes place in reverse order of seniority to avoid that new

47 Arold Lorenz, Groussot and Petursson, *op. cit.*
48 Arold Lorenz, Groussot and Petursson, *op. cit.*, p 29.
49 Arold Lorenz, Groussot and Petursson, *op. cit.*, p. 30.
50 Arold Lorenz, Groussot and Petursson, *op. cit.*, p. 31.
51 Arold Lorenz, Groussot and Petursson, *op. cit.*

judges are influenced by the votes of senior judges.[52] Finally, in relation to the type of disputes that lead to majority voting, the judges that Arold, Groussot and Petursson interviewed noted that all cases – raising human rights issues, but also very technical matters – can result in strong discussions on the bench. The CJEU judges also noted that "if a question requires specific technical knowledge it can also be quite difficult to arrive at a legal solution".[53]

17.4 Adjudication and Problems of Organized Complexity

> "Science and engineering have been unable to keep pace with the second order effects produced by their first order victories".
>
> Gerald Weinberg

In a paper published in 1948, Warren Weaver argued that there were three types of problems that science was called to solve.[54] The first type were the *problems of simplicity* characteristic of the seventeenth, eighteenth and nineteenth centuries which dealt with problems having one or two variables.

Starting with 1900, "physical sciences developed an attack on nature of an essentially and dramatically new kind", developing analytical methods which could deal with two billion variables. Thus, techniques of probability theory and of statistical mechanism offered an opportunity to the scientific community to deal with what Weaver calls *problems of disorganized complexity*.[55] Problems of disorganized complexity are those in which "the number of variables is very large, and one in which each of the many variables has a behaviour which is individually erratic, or perhaps totally unknown. However, in spite of this helter-skelter, or unknown, behaviour of all the individual variables, the system as a whole possesses certain orderly and analysable average properties".[56]

Weaver argued that in the space between problems with two variables and problems with two billion variables lies a middle region whose prime characteristic is not the number of variables involved in the scientific phenomenon. Weaver argued that "the really important characteristic of the problems of this middle region, which science has as yet little explored or conquered, lies in

52 Arold Lorenz, Groussot and Petursson, *op. cit.*, p. 32.
53 Arold Lorenz, Groussot and Petursson, *op. cit.*, p. 151.
54 Weaver, Warren. "Science and Complexity." *American Scientist* 36 (1948): pp. 536–544.
55 Weaver, *op. cit.*, p. 538.
56 Weaver, *op. cit.*, p. 539.

the fact that these problems, as contrasted with the disorganized situations with which statistics can cope, show the essential feature of organization".[57] In other words, these are *problems of organized complexity*, which can answer challenges in the biological, medical, but also psychological, economic and political sciences.

Weaver highlighted that "science must (…) learn to deal with these problems of organized complexity".[58] He predicted that three developments could contribute to this. First, quantitative experimental methods and mathematical analytical methods used in the physical sciences are embraced by the biological, the medical and the social sciences. Second, the new types of electronic computing devices developed during wartime could be used for scientific research as well. Finally, Weaver places emphasis on another wartime development, the use of mixed-teams approach to operations analysis. Initiated by the British Army during the WWII's most complex anti-submarine and air campaigns, Weaver praised the wisdom of the mixed teams composed of engineers and physicists, but also psychologists, biochemists, endocrinologists and specialists from other social sciences.[59]

The theory developed by Weaver in his 1948 paper can shed light on the topic of the current book in two ways. On the one hand, the legal questions that EU courts are called to answer in EU competition law cases concern problems of organized complexity. The functioning of markets and the behaviour of economic agents on the market concern a large number of variables that are, however, operating as a whole. On the other hand, one could argue that the EU Courts' deferential judicial review is justified by the fact that the EU Commission is better placed to deal with problems of organized complexity. The CJEU employs lawyers and interpreters. The EU Commission, on the other hand, recruits both generalists and specialists from a wide pool of applicants that are trained throughout their career. This can lead, as Weaver envisioned, to mixed, multi-disciplinary teams which are better placed to tackle problems of organized complexity.

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I have offered in Part 4 of the current book to test whether the judicial review performed by the CJEU in EU competition law is compatible with the right to a fair trial enshrined in Article 6(1) ECHR. For this, Chapter 14 described

57 Weaver, *op. cit.*, p. 540.
58 Weaver, *op. cit.*, p. 541.
59 Weaver, *op. cit.*, p. 541.

the case-law of the ECtHR concerning the right to an effective judicial remedy. Chapter 15 argued that the ECtHR distinguished between three situations requiring three types of judicial review depending on the type of administrative discretion exercised.

First, Section 15.1. showed that when administrative discretion was exercised in *polycentric issues*, the review of legality did not breach the right to a fair trial. In these instances, the administrative discretion concerned wide policy matters and was in fact the expression of the electorate's will.

Second, Section 15.2. showed that when administrative discretion concerned *monocentric issue*, only full judicial review was compatible with the right to a fair trial. Such judicial review performed a quality control function over the administrative branch.

Third, Section 15.3. argued that when *administrative discretion was exercised as policing powers*, only full judicial review was acceptable in a democratic society.

Turning to EU competition law then, Chapter 16 showed that, despite the entry into force of the Charter and the wide interpretation offered by the CJEU to the right to an effective remedy in various fields of law, the CJEU maintained their deferential judicial review in EU competition law.

Chapter 17 was devoted to analysing the reasons for which the CJEU prefers judicial deference to EU Commission's practice in competition law. It was suggested that the privileged place occupied by economics within social sciences, the distinction between the economic man and the administrative man, biases, monoculture and the problems of organized complexity can clarify this preference.

To conclude, I must first observe, as it has been shown in particular in Chapters 11 to 13 above, that the EU Commission is exercising not only a wide discretion when enforcing EU competition law. The EU Commission exercises policing powers by investigating, searching, seizing and interrogating. Also, the EU Commission has largely interpreted the breadth of its own powers. It must then follow that the judicial review applied by the CJEU should be full and constant. However, the combined effect of, on the one hand, Articles 261 and 263 TFEU and, on the other hand, the interpretation of these provisions by the CJEU, is that the CJEU continues to apply a limited judicial review of competition law decisions. Therefore, I suggest that such review is incompatible with the right to a fair trial enshrined in Article 6(1) ECHR.

Step into the Future: Bigness and Judicial Power

> We have created a Star Wars civilization, with Stone Age emotions, medieval institutions, and godlike technology.
>
> EDWARD O. WILSON

In this book I have endeavoured to understand the right to a fair trial in EU competition law, particularly in relation to attempts to tackle corporate bigness. On a general level, I have inevitably dealt with the exercise of power, the meaning of law within the exercise of power and the individual person. I will address them here in order to conclude this book.

Power – The most difficult profession – The principle of separation of powers is associated with the name of Charles-Louis de Secondat, baron de La Brède et de Montesquieu who argued that every government should have three branches – the legislative, the executive and the judiciary.[1] The three powers should be separate and should interact in such a way with each other, so that to allow each individual to live in peace with his community:

> The political liberty of the subject is a tranquillity of mind arising from the opinion each person has of his safety. In order to have this liberty, it is requisite the government be so constituted as one man need not be afraid of another.
>
> When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.
>
> Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.
>
> There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three

1 Montesquieu, Charles de Secondat, Baron de. *The Spirit of Laws*. New York: Cosimo Classics, 2011.

> powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.[2]

A contemporary challenge to the principle of separation of powers has been posed by the growth of the executive power and the accompanying process of establishing administrative agencies. Through the process of delegation of power, the legislative establishes new agencies or other types of administrative institutions and invests them with *discretionary powers* to carry on their mandate. These institutions are often created to operate in technical fields, requiring specialized expertise. In addition, these agencies can be mandated to perform policing and adjudicatory functions to enforce the newly-adopted mandate. This process is called delegation and this, in itself, is an interesting denomination. Since *delegation* means transferring authority from the holder to the receiver, this implies that the legislative power is the holder and creator – at least temporarily – of the two other powers: bureaucratic-executive and judicial. This denomination is in line with the democratic principles that vest power in the legislative through the voting process.

Within this setup, a question arises concerning the fate of the judicial power. When the legislative branch delegates adjudicatory tasks to executive officials, what shall the judicial branch do? This question is important especially because judges have traditionally been highly trained specialists, undergoing lengthy periods of study and training and held to high standards of ethical behaviour. This is also important because adjudication traditionally took place in courts of law, on the basis of procedural codes and due process rights. Moreover, adjudication produced written decisions available to the public.

The judicial branch has only two choices in this situation. The first choice is to acquiesce and perform what came to be known as *administrative control*, with deferential judicial review as a type.[3] The other option – which is not the preferred option in most developed countries – is to engage in *in-depth control of the administrative agency* performing policing and adjudicatory tasks.

This book examined this question from the point of view of EU competition law enforcement and described the deferential judicial review performed by the CJEU justified by the complexity of the case and the need to safeguard the institutional balance in the Union. Deferential judicial review can be justified using arguments concerning the constitutional design of the Union or the economic expertise that the EU Commission exhibits in competition law cases.

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2 Montesquieu, *op. cit.*, pp. 173–174.

3 Gerber, *op. cit.*Türk, Alexander. "Oversight of Administrative Rulemaking: Judicial Review." *European Law Journal* 19.1 (2013): pp. 126–142.

One argument that is sometimes overlooked concerns the *litigation style* of cases involving economic law matters. In 1910, when Justice White delivered his opinion in *Standard Oil*, he started by noticing that the case file was "inordinately voluminous, consisting of twenty-three volumes of printed matter, aggregating about twelve thousand pages, containing a vast amount of confusing and conflicting testimony relating to innumerable, complex and varied business transactions, extending over a period of nearly forty years".[4] Justice White further complained that the bill and exhibits covered one hundred and seventy pages of the printed record. In the same vein, Ramsey has argued that "having realized that they had much to lose at the bar in antitrust proceedings, the Standard Oil team has adopted what would become a prominent strategy in future antitrust litigation – forestalling government action by *drowning government attorneys in data and actual findings*".[5] (emphasis added)

Still, the existing arguments concerning deferential judicial review in EU competition law do not answer the question about its compatibility with the principle of separation of powers. At its core, this question boils down to whether the judicial branch can choose to adjudicate or not, knowing that choosing to adjudicate against the executive might be criticized as judicial activism and choosing not to adjudicate – that is to defer – might be perceived as a betrayal of the judicial function.

In this respect, the ECtHR positions itself as a clear defender of the judicial function. Its case-law concerning disputes between individual persons and administrative agencies performing adjudicative powers is clear and prescriptive: domestic courts must exercise effective judicial control over the executive in order to comply with the right to a fair trial. The type of dispute, the length of the file, the complexity of the evidence cannot justify deferential judicial review.

In other words, the ECtHR conceives of the *judicial function as a monopoly* to be exercised by courts or controlled by courts when adjudicative tasks are performed by administrative agencies. The CJEU, on the other hand, conceives of the *judicial function as a shared function* that can be divided between the executive and the judiciary.

The concomitant exercise of investigative, prosecutorial and adjudicatory powers by the EU Commission in EU competition law and the overtly blunt participation of the political branch in competition policy and enforcement are highly problematic. In the context of the discussion about separation of powers it is interesting to note that there is a solution that can satisfy the

4 *Standard Oil Company of New Jersey et Al v. United States*, 221 U.S. 1 (1910).

5 Ramsey, op. cit., p. 31.

standards of fairness of both the ECtHR and the CJEU. This solution would imply a *separation of functions within the EU Commission*, more precisely the separation of the adjudicatory function from the investigative and prosecutorial tasks. The separation of the adjudicatory function would satisfy both the vision of fairness that perceives the judicial function as a monopoly and the CJEU's vision that the judicial function can be shared. Indeed, a separate division in DG COMP or in the Legal Service can be both independent and, at the same time, remain in the EU Commission.

It is important to highlight that this idea, although discrete, is pursued in some jurisdictions. The ICN has shown in a recent study that a large majority of competition authorities require staff to get involved with the legal analysis of a case without being part of the case team.[6] This, in fact, could be the beginning of having separate adjudicating units.

Law – genealogy and kinship – The second topic addressed in this book concerned the law on fundamental rights and competition law, its sources and interpretation by the ECtHR and the CJEU.

The works needed for this book were collected and read not based on a predefined bibliography or in the chronological order of their publication. Rather these works were consulted or thoroughly studied based on availability in libraries, recommendations or hunches. This style of reading brought about a realization on the relations that law has with social sciences.

Until recently, the only other social science in the *genealogical tree of law* was philosophy. It suffices to revert to the works quoted in Chapter 3.1 and one can discern with difficulty the border between law and philosophy, prescription and argumentation. This law-philosophy duo appeared to have been successful, cross-fertilizing and far-reaching.

This situation started to change somewhere in the middle of the last century when academics schooled in both law and economics called for interdisciplinarity and towered a slightly condescending attitude towards the traditional legal scholarship. Richard Posner, a representative of the Chicago School, and himself both a lawyer and an economist, wrote in one of his famous papers that doctrinal analysis views law as largely autonomous in the sense that "its practitioners *do not have to know any other field of learning* in order to contribute to it".[7] (emphasis added)

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6 ICN. *Report on Agency Effectiveness Through Organisational Design*. Available at: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/05/AEWG-Organisational-design-2019-report.pdf accessed on 23 February 2021.

7 Posner, Richard A. "The Present Situation in Legal Scholarship." *Yale Law Journal* 90.5 (1981): pp. 1113–1130, p. 1114.

> He added that the traditional method of legal analysis was
>
> a humane rather than scientific discipline. As in other humanities, great emphasis is placed on writing well (sometimes on writing impressively – which is not the same thing), footnoting copiously, treating every topic exhaustively, and staying within the linguistic and conceptual parameters of the doctrines analysed. Soundness is valued above originality, thoroughness above brevity; (…). In these respects, doctrinal analysis also resembles appellate legal practice. The writing style, the research interest, the overall approach of the doctrinal analyst are close to those of judges and brief writers and doctrinal analysists move smoothly between academic positions and positions in private practice, in the judiciary, in the governmental legal service, and in legislative and quasi-legislative drafting positions.[8]

Posner continued his quest for "fitting interdisciplinary research in the law-school mold" in a later paper in which he argued that the decline of faith in law as an autonomous discipline was affected by the breakdown of the political consensus and the "continuing rise in the prestige and authority of scientific and other exact modes of inquiry".[9]

Law has become increasingly interdisciplinary, but its relations with other social sciences are analogous to *kinship relationships*. Indeed, in the last fifty years of the last century law has forged relationships with economics, political science, literature, anthropology, to name just a few. In the field of competition law, interdisciplinarity was inevitable taking into account that in the large majority of developed countries competition agencies employ an almost even number of economists and lawyers.[10]

It can thus be asked if *deferential judicial review is a form of resistance to interdisciplinarity*. If a case file is based on economic theories or scientific data which the judge is not trained to understand, deferring is not only the wisest, but also the most democratic way of decision-making.

From this vantage point, the difference between the ECtHR and the CJEU is important to grasp. The ECtHR deems deferential judicial review incompatible with the right to a fair trial and stands thus in the camp of the *kinship defenders*. In essence, the ECtHR argues in favour on interdisciplinarity. The

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8 Posner (1981), *op. cit.*, p. 1122.

9 Posner, Richard A. "The Decline of Law as an Autonomous Discipline: 1962–1987." *Harvard Law Review* 100 (1987): pp. 761–780, p. 772.

10 ICN. *Report on Agency Effectiveness Through Organisational Design*. Quote above, pp. 45–47.

CJEU, on the other hand, defers to the EU Commission generously and appears to be standing firmly in the more protective camp of the *genealogy defenders* leaving others to deal with interdisciplinary. This categorization joins the class of scholars who defines the relationship between the ECtHR and the CJEU as a relationship of rivalry, at least at the ideological level.[11]

This account can explain why the CJEU is bold when interpreting fundamental rights – which involve a deep consideration of law and its close relative philosophy – but defers on matters that could border speculation, such as theories of harm or the amount of sanctions to be applied in competition cases.

The individual person – Neil Walker noted that the decline of the Keynesian-Westphalian frame, "remains, at root, the erosion of a political settlement" which require a realignment of the new points at which power is articulated.[12] This book has followed the realignment of the political settlement through the emergence of two new points of power in the freshly globalized world, the big businesses and the individual person.

The right to individual petition at the ECtHR has significantly affected procedural participatory rights of individuals in Europe. The progressive enlargement of the field of application of Article 6(1) ECHR meant that individuals could claim having a right to a fair trial in proceedings traditionally considered belonging to public law and, thus, not justiciable. The numbers speak to support this view. Of all the provisions of the ECHR, the right to a fair trial is the most invoked provision and is at the origin of most violations found by the ECtHR. Interestingly, since the adoption of the Charter and of all its provisions, Article 47 which guarantees the right to an effective remedy and a fair trial produces most complaints and is invoked most often by the EU courts.

These numbers indicate that breaches to the right to life or the prohibition against torture are rare in Europe. They speak in favour of healthy democracies and respect of fundamental rights. At the same time, the large number of applications concerning due process – relying on the ECHR or the Charter – speak about something more profound. They might reflect the distrust in the justice system generated by the administrative state, the growing presence of the executive in the citizens' life and the diminishing sense of individual agency that accompanies it. These numbers may be the reflection of frustrated citizens who feel that they are not heard in the administrative state and that their interests are not taken into account during the policy-making process.

11 Dawson, Mark. "How Does the European Court of Justice Reason? A Review Essay on the Legal Reasoning of the European Court of Justice." *European Law Journal* 20.3 (2014): pp. 423–435.

12 Walker (2008), *op. cit.*, p. 393.

In this sense, it is interesting to note that the recent protests in France have requested that the Ecole Nationale d'Administration (ENA) be dismantled. France is a well-documented case of how the domestic order interacts with the supranational order.[13] Lasser followed the legal debates that led to the 2008 constitutional amendment in France introducing for the first time *a posteriori* constitutional review of legislation on fundamental rights grounds. He found that the rise of judicial review in Europe and the rethinking of the French high courts' procedures in light of Article 6(1) ECHR litigation has had profound effects. He concluded that "the explosive surge of fundamental rights arguments throughout the legal order has drastically reworked the basics of French legal debate; and this stunning argumentative change strongly suggests an important shift in governing mentalities in the direction of more pluralistic and individualistic perspectives".[14]

In the EU, individuals continue having limited procedural participatory rights. Chalmers argued that this is due to the fact that the EU lacks the statist vision wherein constitutional rights are put in place against transgressions that affect individuals. Instead, the EU has embraced a substitute vision – the vision of the European political economy:

> Its fundamental rights, as a reflection of this, can be more *managerial, partial and sympathetic to modern market excesses* than national counterparts and less attentive to the singularity, vulnerability and potential of human existence. They can also be more attuned to its complexities and the stresses and demands posed for individuals by these market processes. As a consequence, it is unsurprising that there has often been innovation. This is not an argument for disposing with EU fundamental rights but for lowering the expectations and seeing fundamental rights as part of a wider EU legal context, which will inevitably contain much to criticize and much to offer.[15] (emphasis added)

The "managerial, partial and sympathetic to modern market excesses" fundamental rights might be in tune with the philosophy broadcasted by the NPM movement and its incessant focus on efficiency and avoidance of red

13 *The Economist.* "Why Emmanuel Macron Wants to Abolish ENA, France's Most Elite College." *The Economist.* 4 May 2019. Available at: https://www.economist.com/europe/2019/05/04/why-emmanuel-macron-wants-to-abolish-ena-frances-most-elite-college accessed on 23 February 2021.

14 Lasser, *op. cit.*, p. 298.

15 Chalmers, *op. cit.*, p. 39.

tape.[16] The problem, however, with this view of fundamental rights is that an individual affected by an action of the EU might not be willing to understand what "managerial fundamental rights" imply. In addition, this "managerial" vision of human rights risks spilling over the national understanding of the same rights.

The two visions on fundamental rights in Europe stand in stark contrast, but do not collide. Even if rivalling each other, the ECtHR and the CJEU are not in a race. There is necessarily a relational element in the self-understanding and self-definition of a nonstate entity, "a sense that its normative purpose and its effectiveness alike are dependent on the cultivation of a network of relations with other entities".[17] It is this *relational capital* that includes both the ECtHR and the CJEU into the same *Pan-European system of fundamental rights protection*, characterized by a shared history, a multilingual community and commitment to the same values. This is to say, however, that utmost care should be exercised when dealing with the relational capital between the two supranational courts.

The fact that the CJEU continues to block the accession of the EU to the ECHR and jurisprudential developments in the recent case-law of the CJEU that unmoored effective judicial protection in the EU from the interpretation of Article 6(1) ECHR should be taken seriously. They might diminish the reputational capital of the ECtHR or they might lead the ECtHR to lower the fundamental rights standards it applies. Neither Europe, nor the EU, nor their half a billion citizens need a weak or irrelevant ECtHR. Rather, they need highly-capable and strong supranational courts to contribute solving current challenges, many of which are legal questions.

One such issue is bigness – both corporate and administrative – as a challenge to modern democracies. In light of this, the ECtHR and its case law on due process remains relevant. The ECtHR has consistently defended the right to a fair trial not simply as a human right, but as a democratic principle. Due process requires the separation of powers within the state and the separation of functions within administrative agencies. Due process requires independence of action and independence of decision. Due process requires effective judicial review of administrative discretion. More importantly, however, the ECtHR has defended a version of due process that requires concern both for the individual person, for the executive action and for the judicial function. The individual interests should be assessed during the policy-making process, but also during policy implementation. Also, individual rights should be

16 See Section 2.2. above for a detailed analysis of NPM.

17 Walker (2008), *op. cit.*, p. 381.

considered when administrative agencies exercise administrative discretion as a form of policing powers. Placing such proceedings in the realm of administrative law and under the expectation that fair trial does not apply might breach the human rights of the individuals affected by these proceedings. What is more serious, however, is that such a situation might erode democracy.

As long as the EU practices "managerial" fundamental rights in fields such as EU competition law, the powers of the ECtHR should be safeguarded as the only supranational bastion of procedural participatory rights.

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