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PROCEDURAL FAIRNESS IN EU COMPETITION LAW: STRENGTHS AND (SOME) WEAKNESSES

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Abstract

The principle of fairness in EU competition law is examined, specifically with respect to enforcement actions of the EU Commission. Reference to the fundamental elements of fairness (such as transparency, impartiality, proportionality, and the right of defense) in made with reference to both EU legislation and case law. The analysis uncovers several strengths in the current framework and highlights critical weaknesses, including the limited judicial scrutiny of the EU Commission's complex economic assessments and the principle that post-investigation documents hold less evidentiary weight. It is suggested that current frameworks need refinement. Indications for further research is also specified.

Key words: *Competition, Competition Law, EU, CJEU, Judicial Review, Fairness*

JEL: K21, L4

1. INTRODUCTION: BACKGROUND, PURPOSE AND SCOPE, RESEARCH QUESTIONS AND METHODOLOGY

The principle of fairness governs the functioning of EU law in general[1] and that of EU competition law in particular, as regards both the administrative procedures carried out by the EU Commission and the judicial review performed by the CJEU thereon[2].

[1] The principle of fairness in EU administrative law is provided, among others, in art. 41 of the Charter of Fundamental Rights of the European Union ("Right to good administration") and in Council Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council, and Commission documents, insofar as it guarantees individuals' access to documents, contributing to fairness in EU administrative procedures. On this issue, generally, see: Craig (2018); Schwarze (2006); Harlow (2002); Krunke and Nehl (2016); Hofmann, Rowe, and Türk (2011).

[2] See, in general: Craig and de Búrca (2020); Tridimas (2006); Wils (2008); Kerse and Khan (2012); Sauterand Siragusa (2013); Faull and Nikpay (2014); Hofmann, Rowe, and Türk (2011); Komninos (2006); Schmidt (2011).

The first, and main, part of this paper is devoted to briefly outlining how the principle of fairness is recognised in EU competition law with respect to the administrative procedures before the EU Commission. The way different issues are organised and dealt with is based on the classification of fundamental principles of fair procedures spelled out, at the international level, by the International Competition Network's (ICN) Framework for Competition Agency Procedures (fundamental principles of fair and effective procedures for competition authorities[3]) and the OECD Recommendation on Transparency and Procedural Fairness in Competition Law Enforcement[4].

Based on the abovesaid analysis, I will also list some current applications of EU competition law that, in my view, *conflict* with the principles of fair procedures and provide some proposals for future improvement.

At the end, a brief set of conclusions will be provided.

2. THE "CRIMINAL NATURE" OF THE SANCTIONS IMPOSED BY COMPETITION AUTHORITIES AND THE CONSEQUENT "CRIMINAL NATURE" OF THE RELATED INVESTIGATORY PROCEDURE

It is worth recalling that the nature of the offence[5] and especially the severity of the sanction[6] make competition law assimilable to a criminal offence[7] pursuant to the *Engel* rule[8]. This is recognised in the ECHR *Menarini* case[9], in light of the consolidated ECHR case law which includes, among others, *Grande Stevens*[10].

It follows, without any doubt, the applicability of all the principles recognised in favour of the defendant in a criminal trial including the principle of presumption of innocence provided for in art. 6(2) of the European Convention on Human Rights, corresponding, in substance, to art. 47 of the Charter of Fundamental Rights of the European Union[11]. This principle is currently stated, in EU compe-

3 ICN (2019).

4 OECD (2020), which is the first multilateral instrument that provides governments with recommendations on due process standards for competition law.

5 ECHR, case 73053/01, Jussila.

6 ECHR, case 13057/87, Demicoli; ECHR, cases 7819/77 et all., Campbell and Fell.

7 The above said criteria apply severally; if no one is conclusive, they may also be assessed jointly: ECHR, case 12547/86, Bendenoun.

8 ECHR, cases 5100/71 et all., Engel.

9 ECHR, case 43509/08, Menarini.

10 ECHR, cases 18640/1 et all., Grande Stevens.

11 Bronckers and Vallery (2011); Wils (2010).

tition law, in art. 2 of Regulation 1/2003, under which "*in any national or Community proceedings […] the burden of proving an infringement […] shall rest on the party or the authority alleging the infringement*".

The extension of criminal trial protections to competition administrative procedures is crucial for the study of the principle of fairness because this cannot be limited to merely formal aspects (such as transparency, access to documents, *etc*.) but must also include substantive aspects related to the presumption of innocence. These include all dimensions of the right to defense and the right to a fair judicial review of the EU Commission's decision.

3. PRINCIPLES RELATING TO FAIRNESS AS REGARDS THE EU COMMISSION'S INDEPENDENCY, IMPARTIALITY AND PROFESSIONALITY. CONFLICTS OF INTEREST

After clarifying the above, the first area of EU competition law relevant to the principle of fairness is that relating to ensuring that enforcement is independent, impartial and professional[12]. These are consolidated principles in EU competition law and are highlighted in the CJEU case law[13].

Competition law enforcement, moreover, must conducted by accountable public bodies that enjoy independence, i.e. "*are free from political interference or pressure, and that interpret, apply and enforce competition law on the basis of relevant legal and economic arguments grounded in sound competition policy principles*"[14]. The CJEU stressed the same needs in cases such as *Pierre Fabre*[15], *Post Danmark*[16] and *FENIN*[17]. In order to perform this tasks, competition authorities and courts must "*give appropriate consideration to all relevant information and evidence that they obtain*"[18]. This principle gained express recognition in art. 41 of the EU Charter of Fundamental Rights, which provides the right to good administration, including consideration of all relevant information and evidence. More specifically, as regards EU competition law, Regulation 1/2003 provides the procedural framework for considering relevant evidence in investigations (artt. 18-21 and 27). In EU

12 OECD (2021), § 2.

13 CJEU, case C-95/04 P, British Airways (2007); GC, case T-201/04, Microsoft (2007). On these issues see: Whish and Bailey (2015); Lenaerts (2007); Gerber (1998).

14 OECD (2021), § 2.a. See: Monti (2007c); Wils (2004); Andreangeli (2010).

15 CJEU, case C-439/09, Pierre Fabre (2011).

16 CJEU, case C-209/10, Post Danmark (2012).

17 T-217/03, FENIN v. Commission

18 OECD (2021), § 2.b.

competition law, however, such principle was constantly affirmed since no later than Consten and *Grundig v. Commission*[19]**.**

A special attention is devoted, within the catalogues of fundamental principles of fair procedures, to the prevention of conflict of interests. In fact, it is provided that officials, including decision makers, must be objective and impartial and must not have "*material personal or financial conflicts of interest in the investigations and enforcement proceedings in which they participate or oversee*". This principle is so relevant that it is provided for in the Charter of Fundamental Rights of the European Union which, in art. 41, provides for the right to good administration, which includes impartiality in decision-making. Also the Commission's Best Practices for the Conduct of Antitrust Proceedings stress the importance of objectivity and impartiality, as does Regulation (EU) No 1024/2013 on conflicts of interest[20].

An efficient and affective identification and prevention or handling of such conflicts also requires a certain degree of proceduralisation and, therefore, the provision of *ad hoc* rules, policies, or guidelines[21]. Therefore a fair procedure requires also clear and transparent rules "*in order to prevent, identify and address any material conflicts of interest of competition authority and court officials*" involved in competition law enforcement[22].

4. PRINCIPLES RELATING TO FAIRNESS AS REGARDS PROCEDURE

The principle of fairness, as it pertains to the procedure before the EU Commission, is structured into several sub-principles. For the purposes of this presentation, I propose to classify these sub-principles into five categories.

4.1. Non-discrimination, proportionality and consistency across similar cases

The international principles of fairness may be organised in a first sub-principle which requires that competition law enforcement is non-discriminatory, propor-

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19 CJEU, case 56/64, Consten and Grundig (1966). See also CJEU, case C-413/14 P, Intel (2017) and GC, case T-79/12, Cisco (2013). In law literature see: Kerse and Khan (2017); Jones and Sufrin (2016); Venit (2010).

20 On the issue see: CJEU, case C-263/09 P, Schenker (2010); CJEU, joined cases C-204/00 P et all., Aalborg Portland (2004); CJEU, case C-280/08 P, Deutsche Telekom (2010). See also: Whish and Bailey (2021); Faull and Nikpay (2014); Wils (2008).

21 ICN (2019), § g.

22 OECD (2021), § 2.c. In EU competition law see Korah (2007); Lianos (2021); Craigand De Búrca (2015).

tionate[23] and consistent across similar cases[24]. This principle can be examined from different perspectives. First of all, competition law enforcement must be carried out "*in a reasonable, consistent and non-discriminatory manner*", without prejudice, among others, to the nationalities and ownership of parties under investigation[25], as also required, in EU law, by art. 41 of the EU Charter of Fundamental Rights and art. 3 of Regulation 1/2003[26].

Investigations, moreover, must be tailored "*to the seriousness and nature of each case*" and avoid the imposition of unnecessary costs and burdens on parties and third parties or on the competition authority[27]. Art. 7 and 8 of Regulation 1/2003 outline proportionality requirements, ensuring investigations and remedies are appropriate to the nature of the case, thus expressly stating a principle that is widely recognised in EU competition law[28]. In fact, the progress of an investigation must be assessed at key stages, in order to decide whether to pursue or close the case[29]. Under EU competition law the framework for assessing whether to continue or terminate investigations, based on the evidence gathered, is outlined in art. 7 of Regulation 1/2003 and further developed in the Commission Notice on Antitrust Best Practices[30].

Rules and guidelines for procedural steps in competition law enforcement must be consistent with the above framework and provide, among others, "*requests for*

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23 Also with respect to the remedies imposed by the EU Commission: see art. 7, para 1, of Regulation 1/2003.

24 OECD (2021), § 3. In EU law this is recognised, in particular, in art. 21 of the EU Charter of Fundamental Rights and art. 9 of Regulation 1/2003, which requires consistency in the application of competition law across cases. See, in case law: CJEU, case C-501/06 P, GlaxoSmithKline (2009), with respect to the principle of non-discrimination in the context of competition law; CJEU, case C-12/03 P, Tetra Laval (2005), with specific reference to the need for proportionality and consistency in competition law enforcement; C-8/08, T-Mobile Netherlands BV v. Commission, where consistency in the application of rules regarding anti-competitive agreements is highlighted. See also: Jones and Sufrin (2016); Lianos (2021); Goyder, (2009).

25 OECD (2021), § 3.a. Under EU competition law see: Monti (2007c); Whish and Bailey (2015); Andreangeli (2010).

26 CJEU case law is consistent in the application of such principles: CJEU, case C-413/14 P, Intel (2017); CJEU, case C-501/06 P, GlaxoSmithKline (2009); GC, case T-168/01, GlaxoSmithKline (2006).

27 OECD (2021), § 3.b.

28 CJEU, case C-12/03 P, Tetra Laval (2005); CJEU, case C-413/14 P, Intel (2017); GC, case T-201/04, Microsoft (2007). See also: Jonesand Sufrin (2016); Wils (2014b); Goyder (2009).

29 OECD (2021), § 3.e.

30 The need to verify whether investigations should be pursued based on the evidence is dealt with since no later than the case CJEU, case 56/64, Consten and Grundig (1966). On this same issue see also, more recently: GC, case T-201/04, Microsoft (2007) and CJEU, case C-413/14 P, Intel (2017), where it is discussed how courts review decisions on whether investigations should be terminated or pursued further. See also: Kerse and Khan (2017); Jones and Sufrin (2016); Wils (2018b).

information, inspections and interviews and ensuring that these steps do not go beyond the scope of the investigation"[31]. Regulation 1/2003 is clear in this respect, especially under artt. 18-21 where it regulates procedural steps such as requests for information, inspections, and interviews. The Commission Notice on Best Practices in Antitrust Proceedings (2011) further details provisions ensuring that these measures are appropriate and do not exceed the limits necessary for the investigation[32].

Internal safeguards for procedural steps must be applied "*in order to ensure lawfulness, proportionality and consistency*"[33]. Cases like *Microsoft v. Commission*[34]**,** *Intel v. Commission* [35]and *European Night Services v. Commission*[36] also deal with these issues[37], as it does art. 19 of Regulation 1/2003.

Objective decision-making must be insured, "*through the thorough examination of facts and evidence, and the application of internal checks and balances for evaluations and decisions*"[38]. The relevance of this principle makes is worthy of being provided for in the EU Charter of Fundamental Rights, more precisely in art. 47, that states the right to a fair hearing, which encompasses the requirement for decisions to be based on objective assessments of facts and evidence. More specifically, in EU competition law, art. 7 of Regulation 1/2003 requires decisions to be made based on thorough and objective examinations of evidence[39].

4.2. Transparency and Predictability

In order to be fair, competition law enforcement must be transparent and predictable[40], as also stated in the Commission Notice on Antitrust Best Practices

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31 OECD (2021), § 3.c.

32 Needs emerged also in cases like CJEU, case C-583/13 P, Deutsche Bahn (2015); CJEU, case C-105/04 P, Nederlandse Federatieve Vereniging (2006); GC, case T-125/03, Akzo (2007). Law literature acknowledges the relevance of these issues: Kerse and Khan (2017); Wils (2007); Jones and Sufrin (2016).

33 OECD (2021), § 3.d.

34 GC, case T-201/04, Microsoft (2007).

35 CJEU, case C-413/14 P, Intel (2017).

36 GC, case T-374/94, European Night Services (1998).

37 See also: Monti (2017); Whish and Bailey (2015); Andreangeli (2010).

38 OECD (2021), § 3.f.

39 In the CJEU case law see: CJEU, case C-413/14 P, Intel (2017); CJEU, Joined Cases C-2/01 P et al., Bundesverband der Arzneimittel-Importeure (2004); GC, case T-201/04, Microsoft (2007) and CJEU, case C-501/06 P, GlaxoSmithKline (2009), which, in particular, stressed the importance of factual and legal objectivity in competition decisions. See also: Monti (2018); Wils (2017b); Lianos (2021).

40 OECD (2021), § 1.

(2011)[41]. This is particularly true after Regulation 1/2003 abolished the need for an explicit approval by the EU Commission to have an agreement exempted under art. 101, para 3, TFUE, and introduced, in art. 1, para 2, a system of self-assessment, under which undertakings are responsible for assessing whether their agreements comply with Article 101, para 3, TFEU[42]. If the application of antitrust law were not predictable, the self-assessment system would, in fact, be inapplicable. This is the reason, among others, of the publication by the EU Commission of "guidelines" on the application of EU competition law, *in particular* with reference to art. 101 TFEU[43].

An issue where transparency plays a role relates to the competition authorities' enforcement priorities, which must be promoted[44].

Fairness also requires that "*the legal framework and procedures of their competition authorities, as well as the applicable procedures and deadlines to lodge applications for court review of decisions*", are publicly available[45] - a right that is guaranteed, under EU competition law, by art. 31 of Regulation 1/2003 and further developed in

41 See also art. 27 of Regulation 1/2003. In case law see: CJEU, case C-67/13 P, Groupement des Cartes Bancaires (2014); CJEU, case C-12/03 P, Tetra Laval (2005); GC, case T-201/04, Microsoft (2007). In law literature see: Wils (2012e); Gormsen (2017); Whish and Bailey (2015).

42 Goyder and Albors-Llorens (2003); Monti (2002); Forrester (2003); Venit (2003a); Wils (2001).

43 See: EU Commission (2022a); EU Commission (2022b); EU Commission (2011b); EU Commission (2009); EU Commission (2008); EU Commission (2006); EU Commission (2004a); EU Commission (2004b); EU Commission (1997).

44 OECD (2021), § 1.c. CJEU, case C-457/10 P, AstraZeneca (2012) addresses how the transparency of enforcement priorities can affect the outcome of cases. GC, case T-271/03, Deutsche Telekom (2008) discusses the need for the Commission to clearly communicate its enforcement priorities. Case C-8/08, T-Mobile Netherlands: Emphasizes the role of enforcement priorities in determining the scope and focus of investigations. See also: Whishand Bailey (2015); Gormsen (2018); Monti (2014). The EU Commission complies with this requirement, as regards anticompetitive agreements, in its Communication on Enforcement Priorities in Applying Article 82 EC (2009) and as regards abuses of dominant positions in its Communication on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings [EU Commission (2009)]. A similar statement of priorities is also drafted with respect to merger control in the Commission Guidelines on the Assessment of Horizontal Mergers [EU Commission (2004a)] and of Non-Horizontal Mergers [EU Commission (2008)], in the Commission Notice on Restrictions Directly Related and Necessary to Concentrations [EU Commission (2005b)] and in the Commission Best Practices on the Conduct of EU Merger Control Proceedings [EU Commission (2004c)]. More generally, the Commission's Annual Reports outline the enforcement priorities for competition policy in a given year.

45 OECD (2021), § 1.a. See also ICN (2019), § c.*i*, with reference to the need that competition laws and regulations that apply to investigations and enforcement proceedings in each jurisdiction are publicly available. See also ICN (2019), § c.*iii* as to ensuring that procedural rules that apply to investigations and enforcement proceedings are publicly available.

the Commission Notice on Antitrust Best Practices[46]. Of course, such procedural rules must be effectively followed and respected by the competition authority, as highlighted by the ICN[47]. This principle is reinforced if the way investigations and enforcement are carried out is clarified or explained by way of publicly available guidance or other statements[48].

The principle of fairness requires not only the definition of rules but also *updating and improving* of these rules over time to the highest possible level. This is the reason why the OECD requires competition authorities to promote the implementation of international competition law enforcement transparency and procedural fairness best practices[49].

The facts, legal basis and sanctions relating to decisions, finally, must be published. This is required, *inter alia*, in order to make such information accessible to undertakings, document it, allow undertakings to verify its content and, if necessary, challenge it before the European courts (see *infra*, § 6). The information that need to be made public expressly includes "*decisions to settle cases, subject to the protection of confidential information*"[50], as provided in art. 30 of Regulation 1/2003, and further developed in the Commission Notice on Best Practices in Antitrust Proceedings[51].

4.3. Confidentiality

Investigations conducted by the EU Commission involve the processing of a large amount of confidential data and information, including, first and foremost, sensi-

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46 See also: C-331/08, Commission v. Alrosa; C-113/04 P, Technische Unie BV v. Commission; GC, case T-201/04, Microsoft (2007). In law literature: Jones and Sufrin (2016); Monti (2007d); Kerseand Khan (2017).

47 ICN (2019), § c.*iv*.

48 ICN (2019), § c.*v*. See art. 28 Regulation 1/2003 and Commission Notice on Antitrust Best Practices (2011). This is recognised in case law: CJEU, case C-269/90, Technische Universität München (1991); CJEU, case C-344/98, Masterfoods (2000); GC, case T-201/04, Microsoft (2007). See also: Gormsen (2012); Whish and Bailey (2015).

49 OECD (2021), § 1.d. In this respect, the EU Commission Communication on International Cooperation in Competition Cases (2012) highlights the importance of the alignment of enforcement practices with international standards and the ECN+ Directive (2019/1) encourages national competition authorities to adopt best practices and ensure procedural fairness in line with international standards. See, in EU case law: CJEU, case C-52/09, TeliaSonera (2011); CJEU, joined cases C-89/85 et all, Ahlström (Wood Pulp) (1993); GC, case T-135/09, Nexans (2012). See also: Fox (2010): 69-90; Wils (2018a); Monti (2021).

50 OECD (2021), § 1.b.

51 See CJEU, case C-67/13 P, Groupement des Cartes Bancaires (2014); C-8/08, T-Mobile Netherlands; GC, case T-201/04, Microsoft (2007), which focuses on the necessity of publishing comprehensive details of the case, including sanctions, while protecting sensitive information. See also Kerseand Khan (2017); Jones and Sufrin (2016); Monti (2016b).

tive commercial data of the undertakings concerned. Such confidential information must be protected, while taking into consideration "*the rights of defence and other legal rights, and the public interest in transparent and effective competition law enforcement*"[52]. This requires ensuring that competition authorities "*appropriately protect against unlawful disclosure of confidential information in their possession*"[53]. Thus, professional secrecy obligations must be imposed on officials "*for information received in their official capacity*"[54]. In this respect, art. 28 of Regulation 1/2003 requires officials of both the European Commission and NCAs to maintain confidentiality of information obtained during investigations[55].

Rules, policies and guidance must be expressly defined with respect to the identification and treatment of confidential information and must be publicly available[56]. In EU competition law, e.g., the Commission's Best Practices for the Conduct of Antitrust Proceedings[57] provide transparency on how confidential information is handled and details on the public availability of rules for confidentiality is also stated in the Commission's Notice on Access to File in Competition Cases[58].

EU case law also addresses the issues of public access to files and confidentiality and discusses the need to balance them, e.g. in *Pfleiderer AG v Bundeskartel-*

52 OECD (2021), § 6. See ICN (2019), § f.*iii*, with reference to the need to consider both the interests of the persons concerned and of the public in fair, effective, and transparent enforcement regarding the disclosure of confidential information during an enforcement proceeding.

53 OECD (2021), § 6.a. See ICN (2019), § f.*ii*, with reference to the need to protect from unlawful disclosure all confidential information obtained or used during investigations and enforcement proceedings. Art. 28 of Regulation (EC) No 1/2003 provides for the protection of confidential information during investigations and mandates that information gathered in investigations must not be disclosed unless necessary for the investigation. Moreover, art. 41 of the Charter of Fundamental Rights of the European Union guarantees the right to good administration, including the right to have one's personal data protected. Case law is consistent in this same direction: CJEU, case C-550/07 P, Akzo (2010); *API v Commission* (C-514/07 P), with particular emphasis on the importance of balancing transparency and confidentiality during investigations; CJEU, case C-457/10 P, AstraZeneca (2012), where the disclosure of confidential information in the context of antitrust investigations is explored. See also: Kerse and Khan (2012); Wils (2016); Monti (2007a).

54 OECD (2021), § 2.e. In EU case law see CJEU, case C-67/13 P, Groupement des Cartes Bancaires (2014); GC, case T-474/04, Pergan Hilfsstoffe (2007); GC, case T-110/07, Siemens (2011). See also: Kerse and Khan (2017); Jones and Sufrin (2016); Lianos (2021).

55 Directive 2019/1 (ECN+ Directive) emphasizes the professional secrecy obligations for officials involved in the enforcement of competition law.

56 ICN (2019), § f.*i*. See also: Wils (2008); Faull and Nikpay (2014); Lianos and Geradin (2013).

57 EU Commission (2011a).

58 EU Commission, Notice on Access to File in Competition Cases (OJ 2005 C 325/07).

lamt[59], *EnBW Energie Baden-Württemberg AG v Commission*[60] and *API v Commission*[61].

4.4. Investigative Process

The investigative process is a key issue that has a peculiar, and much relevant, impact on the way the fairness principle applies in EU competition law. This is the procedural phase in which the existence of the facts constituting the violation of competition law is ascertained and relevant evidence is collected. The investigative process, therefore, represents the step where the case is either built or closed negatively by the EU Commission. This is the reason why in cases like *Aalborg Portland v. Commission* the CJEU expressly emphasized procedural fairness in investigations[62].

In order to allow a full and effective right of defense (see *infra*, § 4), any undertaking that is subject of an investigation must be informed, as soon as practical and legally permissible, of that investigation, according to the status and specific needs (e.g., forensic considerations) of the investigation. This information must include the legal basis for the investigation and the conduct or action under investigation[63]. In EU competition law the process of investigation, particularly regarding the notification of parties, is disciplined in art. 18 of the Council Regulation (EC) No 1/2003, to be read along with art. 27 of the same regulation, which further lays down the right to be heard and the rights of defense.

After an undertaking has been informed that it is the subject of an investigation, or that has notified a merger or other transaction or conduct, it must be provided, with reasonable opportunities for meaningful and timely engagement on significant and relevant factual, legal, economic, and procedural issues, according to the status and specific needs of the investigation[64].

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59 CJEU, case C-360/09, Pfleiderer (2011).

60 CJEU, case C-365/12 P, EnBW Energie (2014) addressed the issue of the balance between public access to files and confidentiality.

61 *API v Commission* (C-514/07 P) explored the limits of disclosure in competition cases.

62 CJEU, joined cases C-204/00 P et all., Aalborg Portland (2004). See also: CJEU, case C-272/09 P, KME Germany (2011) and CJEU, case C-308/04 P, SGL Carbon (2006). In law literature see: Faull and Nikpay (2014); Wils (2012a); Lianos and Geradin (2013).

63 ICN (2019), § d.*i*.

64 ICN (2019), § d.*ii*. In EU competition law see art. 27 of Regulation (EC) No 1/2003, which ensures that enterprises are given the right to be heard, which includes an opportunity to engage in discussions on factual, legal, and economic issues before the Commission makes a decision. On this issue see: CJEU, case C-550/07 P, Akzo (2010); GC, case T-7/89, Hercules Chemicals (1991), which analysed how much access enterprises must have to the case file for meaningful engagement; *Prezes Urzędu*

Moreover, investigative requests must focus on information that is deemed potentially relevant to the competition issues under review as part of the investigation and provide reasonable time for undertakings to respond to requests during investigations, considering the needs to conduct informed investigations and avoid unnecessary delay[65]. Under EU competition law, in fact, the Commission is empowered to request information, provided it is deemed relevant to the case under art. 18(1) of Regulation (EC) No 1/2003[66].

It is true that adequate investigative and co-operation tools must be provided to competition authorities "*to conduct competition law enforcement effectively*"[67], especially as regards powers to investigate and carry out inspections and request information. This implies, however, the need to define **t**he limits of the Commission's investigative powers during dawn raids, the scope of the Commission's powers in obtaining information and the conditions under which information may be collected, which are discussed in EU case law[68].

4.5. Timing of investigations and enforcement proceedings

In implementation of the general principle of fairness it is also essential that competition law enforcement is timely[69], in order to allow competition authorities, parties and third parties "*reasonable time to prepare their actions and responses*"[70], a need that is provided under EU competition law by art. 27 of Regulation (EC) No 1/2003 and further specified in the Commission's Best Practices for the Conduct of Antitrust Proceedings also provide for a reasonable time frame to allow parties to prepare[71].

Komunikacji Elektronicznej v. Commission (C-522/08). See also: Jones and Sufrin (2019); Wils (2005); Odudu (2006).

65 ICN (2019), § d.*iii*.

66 On this issue see also: *Solvay SA v Commission* (T-30/91); *Cargill BV v Commission* (T-277/08); CJEU, case C-457/10 P, AstraZeneca (2012). See in law literature: Whish and Bailey (2021); Van Bael and Bellis (2010); Fiebig (2019).

67 OECD (2021), § 2.f.

68 CJEU, case C-583/13 P, Deutsche Bahn (2015); GC, case T-125/03, Akzo (2007); CJEU, case C-105/04 P, Nederlandse Federatieve Vereniging (2006). See also Wils (2007); Gippini Fournier (2005); Gerber (1998). See also: Ehlermann and Atanasiu (2007); Wils (2008).

69 OECD (2021), § 4. See how delays in investigations may impact on fairness in GC, case T-65/89, BPB (1992). See also GC, case T-462/12, Galp Energía (2015) and CJEU, case C-501/11 P, Schindler (2013), concerning excessive delays in decision-making. See also: Ehlermann and Atanasiu (2007); Wils (2008).

70 OECD (2021), § 4.c.

71 See: CJEU, case C-3/06 P, Groupe Danone (2007); CJEU, case C-360/09, Pfleiderer (2011); GC, case T-7/89, Hercules Chemicals (1991). See also: Faull and Nikpay (2014); Whish and Bailey (2021); Wils (2008).

This requires that enforcement must be completed within a reasonable time, "*taking into account the nature and complexity of the case and the efficient use of the resources of the competition authority*"[72], as provided under art. 7 of Regulation (EC) No 1/2003.

In this respect, the OECD demands a certain level of transparency (on this principle see *supra*, § 3.2) and requires that statutory rules or competition authority guidelines are established and followed, or internal targets are settled, as appropriate, "*for the deadlines or length of procedural steps, taking into account the nature and the complexity of the case*"[73]. It ought to be noted that EU competition law does not explicitly provide for binding statutory deadlines for case completion, but procedural guidelines, such as the Commission's Best Practices for the Conduct of Antitrust Proceedings, establish internal targets[74].

Of course, a proper timing does not depend only on the way regulation is drafted or the Commission operates but is also depends on the way all parties involved in investigations and enforcement proceedings actually behave. This is why the OECD expressly encourages co-operation from parties "*to avoid delay, since party or third party choices or actions can affect investigative timing*"[75].

5. THE RIGHT OF DEFENSE

As it was highlighted above, the imposition of transparency obligations within EU competition proceedings is primarily functional to guarantee the right of defence in favour of the undertakings involved in the investigations. This is the reason why the OECD dedicates a specific paragraph to require that parties are notified in writing "*as soon as feasible and legally permissible that an investigation has been*

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72 OECD (2021), § 4.a. See also ICN (2019), § e, with reference to the need that investigations and aspects of enforcement proceedings must be concluded within a reasonable time period, "*taking into account the nature and complexity of the case*".

73 OECD (2021), § 4.b.

74 See: *Irish Sugar v Commission* (C-497/99 P), a case where delays impacted procedural fairness; GC, case T-201/04, Microsoft (2007); GC, case T-336/07, Telefónica (2012), where the issue whether procedural delays violated due process rights was explored. More in general see: Faull and Nikpay (2014); Jones & Sufrin (2019); Monti (2010).

75 OECD (2021), § 4.d. In EU competition law also Regulation (EC) No 1/2003 implicitly encourages cooperation between parties and competition authorities to ensure efficient investigation and avoid unnecessary delays. The Commission's Best Practices for the Conduct of Antitrust Proceedings also emphasize cooperation to simplify and make investigations more time efficient. The way cooperation between the parties and the authorities may determine procedural delays is dealt with CJEU, case C-280/08 P, Deutsche Telekom (2010) and GC, case T-286/09, Intel (2014) discussed the role of cooperation in timely decision-making. Procedural inefficiencies may also derive from lack of cooperation: *Solvay v Commission* (T-30/91). On these issues see also: Faull and Nikpay (2014); Van Bael and Bellis (2010); Monti (2010).

opened and of its legal basis and subject matter", to the extent that this does not undermine the effectiveness of the investigation[76]. In this respect, art. 18 of Regulation (EC) No 1/2003 requires the EU Commission to inform the undertakings concerned of any pending investigation and art. 27 specifies that the latter must be notified in writing about the initiation and basis of the investigation – unless early disclosure would undermine the investigation's effectiveness (for instance, in dawn raids under art. 20)[77].

After the above notice is provided, it is necessary that the undertakings concerned are informed, as soon as reasonably possible and appropriate during the competition law enforcement process, on "*the factual and legal basis, competition concerns, and the status of the investigation*"[78]. This represents a fundamental requirement to guarantee their right to defence and is embodied, in EU competition law, in art. 27 of Regulation (EC) No 1/2003, along with the exceptions provided in case early disclosure could harm the investigation[79].

In order to be able to defend themselves effectively, undertakings must be informed of the opportunities that must be given them to engage meaningfully in the competition law enforcement process[80], with due regard to the effectiveness of the investigation. In this respect, art. 27 of Regulation (EC) No 1/2003 expressly stated the right to be heard and provides that parties involved in competition investigations must have an opportunity to engage meaningfully. The Commission's Best Practices for the Conduct of Antitrust Proceedings, moreover, emphasize the importance of clear communication to ensure effective participation by undertakings[81]. Also CJEU case law is consistent in affirming this principle in cases like

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76 OECD (2021), § 5.a.

77 On the way such principle is recognised in case law see: GC, case T-7/89, Hercules Chemicals (1991); CJEU, case C-550/07 P, Akzo (2010); *Roquette Frères SA v Commission* (C-94/00). See also: Kerse and Khan (2012); Wils (2012a); Van Bael and Bellis (2010); Gerard (2020).

78 OECD (2021), § 5.b. See ICN (2019), § h.*i*, as to the need to provide persons subject to an enforcement proceeding "*timely notice of the alleged violations or claims against them*". See ICN (2019), § h.*ii*, with reference to the need that persons subject to a contested enforcement proceeding should be provided "*reasonable and timely access to the information related to the matter in the Participant's possession that is necessary to prepare an adequate defense, in accordance with the requirements of applicable administrative, civil, or criminal procedures and subject to applicable legal exceptions*".

79 See the way this requirement is interpreted in case law, e.g.: *Cargill BV v Commission* (T-277/08); CJEU, case C-457/10 P, AstraZeneca (2012); GC, case T-201/04, Microsoft (2007). See also: Faull and Nikpay (2014); Whish and Bailey (2021); Wils (2008).

80 OECD (2021), § 5.

81 See: Faull and Nikpay (2014); Wils (2008); Jones and Sufrin (2019).

Alrosa v Commission[82], *Aalborg Portland v Commission*[83] and *Microsoft v Commission*[84].

Fairness requires that throughout the entire procedure the fundamental principle of presumption of innocence is upheld, also because of the substantial "criminal nature" of competition proceedings as recognised by the ECHR (see *supra*, § 1). This involves, among others, that any public notice by the competition authority of the opening of investigations and the publication of allegations against parties must not be presented as a determination of the matter[85], as it is required by the framework drafted by Regulation (EC) No 1/2003 and the Commission's Best Practices[86].

The other side of the medal of the abovesaid guarantees is that of ensuring undertakings "*meaningful opportunities at key stages to discuss with the competition authority the investigation's facts, progress, and procedural steps, as well as relevant legal and economic reasoning*"[87]. In this respect, art. 27 of Regulation (EC) No 1/2003 and the Commission's Best Practices for the Conduct of Antitrust Proceedings regulate the right to discuss key issues with the Commission at different stages of the investigation[88], a right that is further developed in cases like *Groupe Danone v Commission*[89], *Intel Corp v Commission*[90] and *AstraZeneca AB v Commission*[91].

The right of undertakings to discuss key issues with the EU Commission during the procedure must be effective. Undertakings, therefore, must be offered "*the opportunity to present an adequate defence before a final decision is made*"[92], as it is

82 CJEU, case C-441/07 P, Alrosa (2010).

83 CJEU, joined cases C-204/00 P et all., Aalborg Portland (2004).

84 GC, case T-201/04, Microsoft (2007).

85 OECD (2021), § 5.c.

86 See CJEU, case C-280/08 P, Deutsche Telekom (2010); GC, case T-7/89, Hercules Chemicals (1991), where it is stated that public notices must not suggest liability before a final decision. See also: Kerse and Khan (2012); Monti (2010); Faull and Nikpay (2014).

87 OECD (2021), § 5.e.

88 See: Faull and Nikpay (2014); Whish and Bailey (2021); Wils (2008); Gerard (2020); Forrester (2021).

89 CJEU, case C-3/06 P, Groupe Danone (2007).

90 GC, case T-286/09, Intel (2014).

91 CJEU, case C-457/10 P, AstraZeneca (2012).

92 OECD (2021), § 5.f. See ICN (2019), § h.*iii*, with reference to the need that persons subject to an administrative proceeding must be provided "*reasonable opportunities to defend, including the opportunity to be heard and to present, respond to, and challenge evidence*". Similarly, ICN (2019), § i.*iii* specifies the right conferred to enterprises to be provided a reasonable opportunity "*to present views regarding substantive and procedural issues via counsel in accordance with applicable law*", without preventing applicable law from requiring enterprises "*to provide direct evidence*".

stated in art. 27 of Regulation (EC) No 1/2003[93]. In this respect, parties must be informed of all allegations against them and granted access to the relevant evidence collected by or submitted to the competition authority or court, subject to the protection of confidential and privileged information[94]. Moreover, parties must be provided a meaningful opportunity "*to present a full response to the allegations and submit evidence in support of their arguments before the key decision makers*"[95].

Undertakings' applicable rights against self-incrimination must be respected[96], given the "criminal nature" of EU competition law (see *supra*, § 1), in compliance, within EU law, with the principle stated in general terms in art. 6 of the European Convention on Human Rights. This principle is reinforced, with specifical reference to EU competition law, by art. 19 of Regulation (EC) No 1/2003, which ensures that parties cannot be forced to admit guilt[97].

Further, the OECD expressly recognises the right of any undertaking to be represented by qualified legal counsel of its choosing, which must not be denied without due cause[98]. Privileged information exchanged with legal counsels must be protected, while taking into consideration "*the rights of defence and other legal rights, and the public interest in transparent and effective competition law enforcement*"[99]. This requires, in particular, "*developing, updating or strengthening policies regarding the handling of privileged communications between attorneys and clients and respect-*

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93 This does not limit the obligation, imposed on enterprises, to comply with investigative measures, such as providing documents or other evidence under artt. 18 and 20 of the same Regulation (EC) No 1/2003, as also highlighted in CJEU, case C-550/07 P, Akzo (2010) and GC, case T-201/04, Microsoft (2007). Relevant CJEU includes, e.g.: CJEU, case C-360/09, Pfleiderer (2011); CJEU, case C-365/12 P, EnBW Energie (2014); CJEU, case C-413/14 P, Intel (2017). See also: Kerse and Khan (2012); Faull and Nikpay (2014); Wils (2008).

94 OECD (2021), § 5.f.*i*. The right of access to file is covered, in EU competition law, in the Commission's Notice on Access to File in Competition Cases (OJ 2005 C 325/07).

95 OECD (2021), § 5.f.*ii*.

96 OECD (2021), § 5.g.

97 See the leading case on the right against self-incrimination in EU competition law CJEU, case C-374/87, Orkem (1989). See also GC, case T-135/94, Baustahlgewebe (1995) and GC, case T-112/98, Mannesmannröhren-Werke (2001). In law literature see: Wils (2003a); Faull and Nikpay (2014); Jones and Sufrin (2019).

98 ICN (2019), § i.*iii*. This fundamental right is also stated in general terms art. 6(3)(c) of the European Convention on Human Rights and, specifically with respect to EU competition law, in art. 27 of Regulation (EC) No 1/2003: See CJEU, case C-550/07 P, Akzo (2010); GC, case T-7/89, Hercules Chemicals (1991), specifically on the scope of the right to counsel in competition investigations; CJEU, case C-280/08 P, Deutsche Telekom (2010). See also: Jones and Sufrin (2019); Faull and Nikpay (2014); Wils (2017a).

99 OECD (2021), § 6.

ing applicable legal privileges"[100]. The protection of privileged communications between attorneys and clients is recognized under EU law and the CJEU has consistently upheld the principle of legal professional privilege since *AM & S Europe Ltd v Commission*[101], but has limited it to communications involving external legal counsel[102].

The OECD requires that the views of third parties with a legitimate interest in the case must be considered before a final decision is taken[103] and art. 27 of Regulation (EC) No 1/2003 allows third parties with a legitimate interest to participate in competition proceedings. This is also supported by the Commission's Best Practices, which encourage the involvement of third parties where relevant[104].

6. FORMAL REQUIREMENTS: DECISIONS IN WRITING

Under a formal point of view, the principle of fairness requires the widest possible use of written form, in order to ensure that the EU Commission's activities, initiatives, and decisions are documented and verifiable in both procedural and substantive aspects. This applies, firstly, to communications between the decision maker (e.g., competition authority or court, as applicable) and the parties and third parties, which must be "*in writing, or, if oral, recorded, to the extent possible, in written minutes that form part of the case file or record*"[105]. This is provided in art. 27 of Regulation 1/2003 and in the Commission Notice on Antitrust Best Practices, where the requirement for all significant communications to be documented in order to ensure transparency and fairness is reinforced[106].

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100 OECD (2021), § 6.b. See ICN (2019), § i.*iii*, with reference to the need to recognize applicable privileges in accordance with legal norms in each different jurisdiction governing legal privileges, "*including privileges for lawful confidential communications between Persons and their legal counsel relating to the solicitation or rendering of legal advice*". The provision of specific rules, policies, or guidelines on the treatment of privileged information is also encouraged.

101 CJEU, case 155/79, AM & S Europe (1982). See also CJEU, case C-97/08 P, Akzo (2009); GC, case T-30/89, Hilti (1991).

102 The legal and professional privilege, therefore, in EU competition law does not extend to in-house counsel: CJEU, case C-550/07 P, Akzo (2010); CJEU, case C-97/08 P, Akzo (2009). See also: Wils (2017a); Faull and Nikpay (2014); Jones and Sufrin (2019).

103 OECD (2021), § 5.h.

104 On this issue see: CJEU, case C-441/07 P, Alrosa (2010), with respect to the rights of third parties to submit observations during competition proceedings; CJEU, case C-360/09, Pfleiderer (2011); GC, Case T-873/16, Groupe Canal+ (2018), on third-party rights to intervene. See also: Kerse and Khan (2012); Faull and Nikpay (2014); Whish and Bailey (2021).

105 OECD (2021), § 3.g.

106 In case law see: CJEU, case C-67/13 P, Groupement des Cartes Bancaires (2014); GC, case T-201/04, Microsoft (2007); GC, case T-474/04, Pergan Hilfsstoffe (2007). In law literature see: Kerse and Khan (2017); Andreangeli (2010); Wils (2012c).

The same requirement of written form also applies to any final decisions or orders in which competition authorities find a violation of, or imposes a prohibition, remedy, or sanction under applicable competition law, which must be issued in writing and, as the OECD states, must be based only on matters of record, and, as appropriate, must contain details about the findings of fact, conclusions of law and related sanctions[107]. In this respect, art. 296 of the TFEU requires, in general, that all decisions by the EU Commission are reasoned and made public, subject to confidentiality rules. This is specified, as regards EU competition law, by art. 30 of Regulation (EC) No 1/2003[108]. There is a consistent interpretation of this requirement in the CJEU case law, as it is showed by cases like *Cementbouw Handel & Industrie BV v Commission*[109], *Aalborg Portland v Commission*[110] and *Deutsche Telekom AG v Commission*[111].

Also commitments accepted by the competition authority to resolve competition concerns must be in writing. Subject to confidentiality rules and applicable legal exceptions, the commitments accepted by competition authorities must be made public and describe the basis for the competition concerns or make reference public materials in which those concerns are expressed or must provide a summary explanation of the commitments and the reasons for them[112], as under art. 9 of Regulation (EC) No 1/2003[113].

7. INDEPENDENT REVIEW

Procedural safeguards extend beyond the sanctioning procedure under the competence of the EU Commission and include the tight of undertakings to access an "*impartial review by an adjudicative body (i.e. court, tribunal, or appellate body) that is independent and separate from the competition authority, of decisions, includ-*

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107 OECD (2021), § 7.b. As the ICP puts it, final decisions or orders must "*set out the findings of fact and conclusions of law on which they are based, as well as describe any remedies or sanctions*" and all final decisions must be "*publicly available, subject to confidentiality rules and applicable legal exceptions*": ICN (2019), § j.*i*.

108 See: Kerse and Khan (2012); Faull and Nikpay (2014); Jones and Sufrin (2019).

109 CJEU, case C-201/00 P, Cementbouw Handel (2002).

110 CJEU, joined cases C-204/00 P et all., Aalborg Portland (2004).

111 CJEU, case C-280/08 P, Deutsche Telekom (2010).

112 ICN (2019), § j.*ii*.

113 See GC, case T-151/05, Telefónica and Telefónica de España (2012), where it addresses the need for clear explanations of commitments, and GC, case T-201/04, Microsoft (2007), as regards the transparency of commitments and their publication. See also: Monti (2007b); Faull and Nikpay (2014); Jones and Sufrin, *EU Competition Law: Text, Cases, and Materials* (2019).

ing intermediate compulsory procedural decisions"[114]. Such a right is provided for, in general terms, also in the Charter of Fundamental Rights of the European Union, which, in art. 47, guarantees the right to an effective remedy and a fair trial before an independent and impartial tribunal.

More in particular, undertakings have the right to seek judicial review of decisions made by the EU Commission before the General Court (as court of first instance) and the Court of Justice of the European Union (as the final appellate body). This ensures that any potential errors in both procedural and substantive aspects can be corrected by an independent judiciary[115]. In this respect, it is necessary that courts are enabled to examinate facts and evidence, along with the merits of competition law enforcement decisions[116].

In particular, courts have, in principle, the obligation to procedurally verify the facts forming the basis of the final decision and must exercise a "*strong, full and effective*" review of each case, to guarantee undertakings that "fullness" of protection required by art. 47 of the Charter of Fundamental Rights, art. 263 of the TFEU[117] and the ECHR in the *Menarini* and *Grande Stevens* cases[118]. The guarantee of "fullness of protection" by European courts is one of the weaknesses that will be addressed later in this work. Therefore, further considerations on this topic will be provided in the subsequent § 7.2.

Also in jurisdictional procedures the timing has a great relevance. Therefore, the review performed by the court must be "*completed in a reasonable time, taking into account the nature and complexity of the case*"[119], as it is required, in general terms, by art. 6 of the European Convention on Human Rights and art. 47 of the Char-

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114 OECD (2021), § 7. See ICN (2019), § k, where it states that a person must not be imposed a prohibition, remedy, or sanction in a contested enforcement proceeding for violation of applicable competition laws "*unless there is an opportunity for the Person to seek review by an independent, impartial adjudicative body (e.g. court, tribunal, or appellate body)*".

115 CJEU, case C-413/14 P, Intel (2017); GC, Case T-612/17, Google Shopping (2021); CJEU, case C-550/07 P, Akzo (2010); GC, case T-64/89, BPB Industries and British Gypsum (1992); CJEU, case C-12/03 P, Tetra Laval (2005); CJEU, case C-272/09 P, KME Germany (2011); CJEU, case C-280/08 P, Deutsche Telekom (2010). See also: Gerard (2012); Lenaerts (2000a); Wils (2012b); Wils (2014a).

116 OECD (2021), § 7.a.

117 See CJEU, case C-12/03 P, Tetra Laval (2005); CJEU, case C-272/09 P, KME Germany (2011) and CJEU, case C-413/14 P, Intel (2017). See also: Wils (2014a); Faull and Nikpay (2014), Chapter 14; Monti (2016a).

118 See *supra*, § 1.

119 OECD (2021), § 7.c.

ter of Fundamental Rights, which also apply to judicial reviews of competition decisions[120].

8. EXISTING CRITICAL ISSUES AND PROPOSALS FOR FUTURE IMPROVEMENT

The aforementioned principles establish a framework that, in theory, safeguards fairness in EU competition law, encompassing both the investigative and decision-making phases before the EU Commission, as well as the judicial review by the CJEU. If one moves from theory to practice, however, this framework does not always adequately safeguard fairness.

In some cases, this occurs because the rules, while theoretically suited to achieving the intended objective and interpreted accordingly, are applied evasively or even disregarded, instead. In law literature, e.g., it is claimed that enforcement of competition law by the EU Commission sometimes evades fairness, especially in the investigatory phase[121]. Procedural fairness is occasionally disregarded in the context of economic assessments[122], also with respect to transparency and the right to be heard[123]. Flaws in the way EU competition framework is applied are imputed by some Authors to inconsistent economic assessments and a lack of due process in decision-making[124], other times to selective enforcement and lack of consistency in how rules are applied[125]. It is observed, further, that the discretionary powers granted to the EU Commission is capable to allowing an evasive application of rules meant to ensure fairness[126]. The Commission's broad discretion may at times compromise fairness, as it intermittently seems to happen in the Commission's handling of abuse of dominance cases, where economic justifications offered by dominant undertakings are not always adequately considered[127].

These problems were highlighted by the EU courts, which asserted how fairness had been occasionally compromised, e.g., by the Commission's inadequate eco-

120 See GC, case T-135/94, Baustahlgewebe (1995); CJEU, case C-280/08 P, Deutsche Telekom (2010); *L'Oréal SA v Commission* (C-536/11 P). See also: Faull and Nikpay (2014); Wils (2008); Jones and Sufrin (2019).

121 Geradin (2020); Desai and Green (2020).

122 Wils (2005).

123 Craig (2018); Ezrachi (2018).

124 Vesterdorf (2018).

125 Fox (2012).

126 Petit (2010); Jones and Sufrin (2019).

127 Bailey (2012).

nomic analysis[128], lack of consideration of the undertaking's arguments[129], violation of the voluntary nature of the commitments in a competition investigation[130], conduction of dawn raids in violation of the undertaking's procedural rights[131] and violation of the regulation on length of the proceedings and access to the Commission's file[132].

These are undoubtedly very relevant issues but cannot be addressed in this work, since they do not represent a normative or interpretative weakness, but rather the violation, in practice, of rules that are established and interpreted in a manner protective of fairness. As such, these cases do not fall within the scope of this work.

The cases of interest to be addressed here, on the other hand, are those in which it is the very current legal framework (more precisely: the interpretation of the current legal framework as reflected in the case law of the European courts) that may lead to violations of fairness in EU competition law. Specifically, two cases warrant further examination. The first case concerns the limited scrutiny of the merits of the case in judicial review, which may infringe the undertakings' right to a "*strong, full, and effective*" review of the decision, as mentioned in § 6 above. The second case relates to the reduced relevance of documents drawn up after the statement of objections, which also impairs undertakings' right to defense discussed above under § 4.

8.1. Limited scrutiny of the merit in jurisdictional review

The need to protect fairness in the application of EU competition law also necessitates an examination of the relationship between the EU Commission, as the executive body responsible for enforcing EU competition law, and the EU Courts, as the judicial authorities charged with reviewing the Commission's decisions. In particular, it is necessary to explore how such review is carried out.

Apart from the matter of fines imposed by the EU Commission, on which they have full merit review[133], under art. 263 TFEU EU Courts are entrusted with a review of

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128 GC, case T-286/09, Intel (2014).

129 CJEU, case C-413/14 P, Intel (2017).

130 CJEU, case C-441/07 P, Alrosa (2010).

131 case C-583/13 P, Deutsche Bahn (2015).

132 GC, joined cases T-25/95 et. All., Cimenteries CBR (2000).

133 The possibility of granting unlimited jurisdiction to the EU Courts with respect to "*penalties*", under art. 261 TFEU, has been introduced in EU competition law through art. 31 of Regulation 1/2003 and art. 16 of Regulation 139/2004 on the control of concentrations between undertakings. This includes the ability to review both the amount of the fine and the method used to calculate it: GC, case T-67/01, JFE Engineering (2004).

legality of the EU Commission's decisions[134]. EU legislation, however, do not specify the intensity of such a review[135] so that EU Courts have defined it through case law and developed different standards based on the specific nature of each assessment[136].

More in particular, when interpreting and applying the law, EU Courts exercise full control under art. 19 TFEU, whether the error of law is obvious or not[137] and regardless of whether this relates to procedural or substantive aspects of competition law[138].

As regards *facts*, EU Courts introduced a further distinctions. On the one hand, with respect to what one could define "*the Commission's substantive findings of fact*"[139], EU Courts established that the EU Commission has no discretion in determining whether a fact is correct. EU Courts, therefore, conduct a thorough and comprehensive review when verifying the correctness of facts[140], in order to assess "*whether the factual material on which the Commission's decision was based was accurate, reliable, consistent and complete, and whether this factual material was capable of substantiating the conclusions the Commission drew from it*"[141].

On the other hand, there are what the General Court defined, in *General Electric*, "*appraisals of an economic nature*"[142]. These consist of complex economic assessments involving value judgments that pertain not to law, but to science, technology, or economics. In these cases, since *Consten and Grundig*[143], in 1966, EU Courts only apply a "limited" (or "marginal") review on, based on the "manifest error standard"[144], which allows EU Courts to establish "*whether that evidence con-*

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134 Derenne (2010); Macgregor and Gecic (2012).

135 Reeves and Dodoot (2006); Bailey (2003); Forrester (2011); Gerard (2011); Rosch (2011); Jaeger (2011).

136 Castillo de la Torre (2009); Reeves and Dodoot (2006); Sibony and Barbier de la Serre (2007); Lenaerts (2007); Bailey (2010); Simon (2002).

137 GC, case T-41/96, Bayer (2000); CJEU, joined cases C-2/01 P et al., Bundesverband der Arzneimittel-Importeure (2004); CJEU, case 258/78, Nungesser (1982); CJEU, case 40/73, Suiker Unie (1975).

138 Geradin and Petit (2010).

139 GC, joined cases T-25/95 et. All., Cimenteries CBR (2000).

140 Castillo de la Torre (2009); Lasok (1983); Craig (2012). See also: GC, case T-66/01, Imperial Chemical Industries (2006); GC, joined cases T-68/89 et all., Società Italiana Vetro (1992).

141 AG Kokott Opinion in case C-413/06, Bertelsmann (2008); AG Tizzano Opinion in case C-12/03 P, Tetra Laval (2004).

142 GC, case T-210/01, General Electric (2005).

143 CJEU, case 56/64, Consten and Grundig (1966).

144 Nazzini (2012); Whish and Bailey (2015); Monti (2003); Venit (2010).
See also: GC, case T-168/01, GlaxoSmithKline (2006); CJEU, joined cases C-204/00 P et all., Aalborg Portland (2004); CJEU, case 42/84, Remia (1985); CJEU, joined cases 142/84 et al., British-American

tains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it"[145] [146] but without, however, entering into the merits of the case in the sense of substituting their own assessment for that of the EU Commission.

The definition of what constitutes a "complex economic assessment"[147] is crucial for determining in which cases EU Courts apply the "manifest error standard" of review. It is not easy, however, to distinguish between issues in fact and economic assessments[148] and, within the latter, economic issues that are complex, and therefore warrant limited review, and those that are simple, subject to full review[149]. A similar problem arises in relation to the definition of what constitutes "complex technical appraisals"[150], for which EU Courts have gradually extended the same standard of *limited* judicial review. Such definitions, however, are needed because these definitions determine in which cases EU Courts have a limited power of review due to the recognized wider discretion granted to the EU Commission[151].

EU Courts, however, are not consistent in their interpretation of this concept; in fact, "*[c]ette notion d'appréciation économique complexe n'est pas définie ni dans les traités, ni de façon claire dans la jurisprudence communautaire*"[152]. While in cases like *Airtours plc v. Commission*[153], *Cisco Systems Inc. and Messagenet SpA v European Commission*[154] and *Intel*[155] the EU Courts demonstrated a more thorough examination of the facts presented by the EU Commission[156], in other cases, like *Alrosa*

Tobacco (1987); GC, case T-48/04, Qualcomm (2009); CJEU, case C-12/03 P, Tetra Laval (2005); T-201/04, Microsoft v. Commission (2007); CJEU, case C-67/13 P, Groupement des Cartes Bancaires (2014); GC, case T-79/12, Cisco (2013); GC, case T-342/99, Airtours (2002).

145 CJEU, case C-12/03 P, Tetra Laval (2005); GC, case T-201/04, Microsoft (2007); CJEU, case 42/84, Remia (1985); CJEU, joined cases 142/84 et al., British-American Tobacco (1987).

146 CJEU, case C-12/03 P, Tetra Laval (2005).

147 Reeves and Dodoot (2006).

148 Geradin and Petit (2010).

149 Geradin and Petit (2010); Siragusa (2009); Bellamy (2011); Jaeger (2011); Wahl (2009); Forrester (2009); Siragusa (2010); Barbier de la Serre (2012).

150 GC, case T-201/04, Microsoft (2007). See also: Derenne (2010).

151 Jaeger (2011).

152 Vallindas (2009).

153 GC, case T-342/99, Airtours (2002).

154 GC, case T-79/12, Cisco (2013).

155 CJEU, case C-413/14 P, Intel (2017).

156 In that case the CJEU affirmed that EU Courts may re-examine all arguments, including those related to economic assessments, and did so with respect to the Intel's arguments regarding the AEC Test, which evaluates whether an equally efficient competitor could compete under the same conditions as the dominant firm: Vesterdorf (2018).

v. Commission[157] and *Intel v Commission* (before the General Court: this is the case dealt with by *Intel* before the CJEU mentioned above)[158] they showed a substantial degree of deference to the EU Commission in matters of economic assessment.

Regardless of the inconsistency in the application of this concept between the different decisions, the manifest error standard has been subject to criticism insofar as it grants the EU Commission excessive discretion and undermines the principle of fairness in competition law enforcement and the right of defense of the parties involved, which is guaranteed by art. 47 of the EU Charter of Fundamental Rights[159]. This criticism must be considered particularly relevant in cases where economic theory and methodology are pivotal to the decision, such as in merger control and abuse of dominance cases[160].

I claim, in this respect, that a more balanced approach in favour of the right of defense is needed, particularly in complex economic and technical assessments[161]. In this respect, I propose that the requirement of "complexity" should not be defined based on the subject matter or the objective difficulty of the investigations actually carried out by the Commission, as both of these criteria are too vague to define and, more importantly, appear unsuitable for rationally determining the degree of intensity of judicial review on EU Commission's decisions[162]. Moreover, there would be no reason for EU Courts to defer to the Commission's expertise in particular technical or economic controversies since EU Courts have the power, in each single case, "*to appoint experts, economic and otherwise*"[163].

Therefore, I propose adopting a functional criterion, which should be defined by addressing the question of which issues warrant granting the EU Commission a margin of discretion not subject to review, versus those on which it is necessary to allow EU Courts full review on the merits. In this perspective, I propose that "complexity" should only refer to cases where the EU Commission exercise value

157 CJEU, case C-441/07 P, Alrosa (2010).

158 GC, case T-286/09, Intel (2014).

159 Gippini-Fournier (2007); Ortiz Blanco (2010); Geradin (2018); Wils (2003b); Vesterdorf (2005). There is also a relevant part of scholars and practitioners who oppose the claim for a more rigorous scrutiny, see, e.g.: Motta (2006); Forrester (2006); Gerber (2013); Lenaerts (2000b).

160 Townley (2009); Basedow (2010); Geradin (2004); Bailey (2012); Vesterdorf (2011).

161 Jones and Sufrin (2016); Whish and Bailey (2015); Gerard (2017); Wils (2004); Monti (2003); Venit (2010); Lenaerts (2015); Eilmansberger (2006); Gippini Fournier (2005); Goyder (2009).

162 Forrester (2011); Jaeger (2011).

163 Forrester (2011).

judgments[164] to make economic policy choices[165]. In fact, the connection between limited jurisdictional review, the concept of "complexity" in economic assessments, and the extension of discretionary powers attributed to the Commission sometimes emerges in decisions such as *Remia BV and others v Commission*[166][167].

Such an interpretative evolution could be coupled with the establishment of an expert panel to advise the EU Courts on economic matters, which would enhance the Courts' capacity to engage with complex economic assessments without overstepping its judicial role[168]. Currently, EU Courts rely primarily on their own judges and the parties' expert submissions to interpret and assess the EU Commission's economic evidence. While this allows for a legal review, it may fall short in cases where deep economic expertise is required to fully understand the technicalities of the EU Commission's models or methodologies[169].

As a second-best proposal on this issue, EU Courts could exercise a review based on a proportionality test for complex economic and technical assessments similar to the test applied in relation to fines. This would ensure that the EU Commission's decisions are proportionate to the objectives pursued, not only in terms of sanctions but also in terms of the underlying economic analysis. This would allow EU Courts to engage in a more substantive review of whether the Commission's economic assessments are based on sound reasoning, while still respecting the EU Commission's expertise in competition matters.

Whatever the definition of "complexity" in economic and technical assessments, the rights of defense could be strengthened by granting parties greater access to the Commission's economic data and models, allowing them to challenge the Commission's findings more effectively before both the EU Commission and the EU Courts[170]. In fact, while the EU Commission does provide access to documents,

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164 Forwood (2009); Siragusa (2010).

165 As Jaeger (2011) put it (pp. 310 and 312): "*complex economic assessments should be understood as situations where the Commission has to make an economics-based choice of policy. It should only be in such situations that marginal review should be applied*".

166 CJEU, case 42/84, Remia (1985).

167 This discretion is grounded in the principle that the Commission is better positioned to assess complex economic realities, particularly when it comes to technical assessments requiring specialized economic expertise: Wils (2019); Wils (2005); Craig and de Búrca (2020); Röller and de la Mano (2006); Petit (2010); Hatzopoulos (2012).

168 Craig and de Búrca (2020); Röller (2016); David Bailey (2012).

169 See, e.g., CJEU, case C-413/14 P, Intel (2017), where the CJEU criticized the General Court in GC, case T-286/09, Intel (2014) for not sufficiently analysing the economic evidence related to the "as-efficient competitor" test.

170 Petit (2014); Bailey (2012); Lowe (2010); Venit (2003b).

there is limited transparency regarding the full details of the economic models or methodologies employed. Case law, in fact, appears to grant the parties access *only* to documents and not to models and methodologies[171]. Widening of the access rights would align with the principle of equality of arms and ensure that the review process is both procedurally fair and substantively robust.

8.2. Reduced relevance of documents drawn up after the statement of objections

The CJEU has established that documents created before the notification of the statement of objections by the EU Commission are highly relevant, as they tend to reflect the situation before an undertaking adapts its conduct in response to an investigation. Documents created after the procedure's initiation are not irrelevant but EU Commission and courts give post-notification documents less weight, as undertakings could be incentivized to shape such documentation to mitigate liability. In particular, the CJEU has held that while the Commission must review such evidence, it is free to attribute different levels of evidentiary weight to materials created during and after the procedure, depending on the context and credibility of the material[172].

My feeling, as a practitioner, is that this approach, while certainly acceptable in the abstract, can however sometimes determine scepticism towards *any* post-investigation documents.

On the one hand, in fact, the EU Commission and the EU Courts tend to put overemphasis on pre-investigation documents and, consequently, to unduly limit the ability of undertakings to present valid exculpatory evidence during the investigation. Under a behavioural point of view, the reduced value of post-investigation documents may induce undertakings to refrain from fully cooperating or disclosing information after an investigation has started, an attitude that could create a chilling effect on transparency and cooperation. Finally, as far as it is of most interest now, such principle potentially undermines the fairness of the procedure, particularly where exculpatory evidence emerges later in good faith, since it may deprive undertakings of a meaningful opportunity to defend themselves[173].

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171 CJEU, case C-194/99 P, Thyssen Stahl (2003).

172 CJEU, case C-194/99 P, Thyssen Stahl (2003); CJEU, joined cases C-238/99 P et all., Limburgse Vinyl Maatschappij (PVC II), (2002); GC, case T-112/07, Hitachi (2011); CJEU, case C-308/04 P, SGL Carbon (2006); case C-199/99 P, Corus (2003). See also: Wils (2012d); Bourgeois (2004); Monti (2016a); Van Bael (2017); Gippini-Fournier (2012).

173 In general a critical attitude with respect to this principle is shown in Jones and Sufrin (2016); Whish and Bailey (2015); Odudu (2014); Furse (2017).

I propose that a different standard of conduct be clearly defined depending on whether the documents in question relate to an objective analysis or mere subjective declarations. As an example: it appears evident that an email exchanged between the commercial agents of a undertaking justifying a given commercial conduct on the basis of an independent decision, taken solely on the basis of considerations of economic efficiency, must be considered to have very little value if sent after the EU Commission has contested the company for a concerted practice with a competitor. On the contrary, a report containing an analysis of the relevant market, the conditions of supply of a given good or service or the price level at a given moment does not seem to deserve less consideration just because it was drawn up after the opening of the proceeding, to the extent that it correctly processes objective data that can also be verified by the EU Commission itself[174].

9. CONCLUSIONS

The principle of fairness, rooted in the European Charter of Fundamental Rights and articulated in case law such as *Menarini* and *Grande Stevens*, ensures that defendants in competition proceedings are granted rights similar to those in criminal trials. The analysis demonstrated how the EU Commission's investigative processes, from information gathering to final decision-making, must be conducted in an impartial, transparent, and proportionate manner.

However, certain practical challenges, such as the limited scope of judicial review by the CJEU regarding the merits of complex economic assessments, were identified. Additionally, the differential treatment of documents created before and after an investigation poses challenges to fairness.

The current model of judicial review, which limits the CJEU's ability to engage in full merit review of complex economic assessments, requires further scrutiny and would benefit of limited reform. In particular, the role of economic expertise in judicial proceedings and the potential for establishing expert panels or economic

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In this perspective, one could make reference to the principle, in U.S. competition law, that less weight should be placed on the timing of document creation and more emphasis on the substance of the evidence, although they also take into account the possibility that later documents may be self-serving. See, in US law: Hovenkamp (2015); Elhauge (2004); Baker (2012); Baker (2007). In US case-law see: In re High Fructose Corn Syrup Antitrust Litigation, 295 F.3d 651 (7th Cir. 2002) it was held that "*Courts look to the totality of the evidence, and even documents created after litigation has commenced can be probative if they shed light on the parties' intent and conduct*". See also *United States v. AT&T*, 310 F. Supp. 3d 161 (D.D.C. 2018) and *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

174 In this sense see also: Albors-Llorens (2016); Whish and Bailey (2018); Petit (2014); Röller (2016); Geradin (2011).

advisory bodies could enhance the CJEU's capacity to assess complex cases more thoroughly.

Finally further study into the treatment of post-investigation documents is required. A distinction between objective analyses and self-serving statements could improve fairness in competition law proceedings in this respect.

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