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THE IMPACT OF THE RIGHT TO A FAIR TRIAL ON THE ENFORCEMENT OF EU COMPETITION LAW

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Abstract

EU competition law is one of the most important fields of the internal market's development and a key aspect of the European economic integration. Indeed, free competition may be an important element of an open market economy, but its safeguarding through regulatory supervision and intervention has been a fundamental economic and political choice made quite early by the founders of the EEC Treaty. Despite decentralization of the enforcement system achieved by Regulation 1/2003, the Commission continues playing an important role in the enforcement of EU competition law. Nevertheless, , the exercise of its strengthened investigative powers is subject to EU fundamental rights, whose protection is embedded in the EU Charter of Fundamental Rights. Additionally, national competition authorities are also obliged to respect the same EU fundamental rights when enforcing EU law, as is provided by art. 51 Charter and settled case-law of the Court of Justice of the EU. The paper will aim at elucidating the limits of the legal and administrative enforcement of competition rules imposed by human rights, as well as the function of the EU judicial system in competition law, emphasizing the distinction between the partly limited review of legality of the Commission's acts and the unlimited review of the amount of fines imposed. The ultimate goal is to measure the influence of the right to a fair trial in its efficiency

Key words: *EU, EU Law, ECHR, Competition Law enforcement, Right to a fair trial, EU Charter of Fundamental Rights, Review of Community Acts.*

1. INTRODUCTION

EU competition law is one of the most important fields of the internal market's development and a key aspect of the European economic integration. Indeed, free competition may be an important element of an open market economy, but its safeguarding through regulatory supervision and intervention has been a fundamental economic and political choice made quite early by the founders of the EEC Treaty.

Despite the decentralization of the enforcement system achieved by Regulation 1/2003[1], the Commission continues playing an important role in the enforcement of EU competition law. That instigates the necessity for its strengthened investigative powers to be subject to the observance of human rights, whose protection is embedded in the EU Charter of Fundamental Rights (CFR). Additionally, national competition authorities are also obliged to respect the same EU fundamental rights when enforcing EU law, as is provided by Article 51 CFR and settled case-law of the Court of Justice of the EU (CJEU).

Indeed, the importance of the observation of human rights in EU competition law is an issue of not only European but also international importance, as the EU competition authorities apply the relevant rules not only to European economic actors, but also to those from all over the world doing business within the Internal Market as illustrated by cases such as "Microsoft"[2] and "Intel"[3].

The paper will aim at elucidating the limits of the legal and administrative enforcement of competition rules imposed by human rights, as well as the judicial protection of the latter in the EU judicial system. The ultimate goal is to locate and measure the influence of the right to a fair trial exercised by the persons under investigation on the efficiency of this protection. One cannot overlook the fact that Article 47 of the CFR as interpreted by the EU Courts in line with the respective case law of the ECHR Court on Article 6 of the Convention remains, today, particularly relevant in the efficiency but, also, the legal orthodoxy of the EU competition law's enforcement.

To achieve the most comprehensive possible analysis of the legal regime and the issues arising to the limited extent that a conference paper can reach, the present study is divided into three parts. In the first, the necessity of judicial scrutiny of the Commission's activity in the area of competition law is explained and the role of the right to a fair trial as a parameter of this scrutiny is analyzed (I). In the second part, the procedural guarantees and the rights protected during the investigation and enforcement phases in EU competition law are outlined both for the complainant and the individual under investigation (II). The third part analyzes the function of the EU judicial system in competition law, emphasizing the distinction between the partly limited review of legality of the Commission's acts and the unlimited review of the amount of fines imposed (III). In both the second and third part it is attempted to measure the influence of the right to a fair trial

1 Council Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L 1/1 (Regulation 1/2003).

2 Case T-201/04, *Microsoft v Commission*, ECLI:EU:T:2007:289.

3 Case C-413/14 P, *Intel v Commission*, ECLI:EU:C:2017:632.

in its efficiency. Finally, at the end of the study, thoughts and conclusions of the writer are formulated.

2. THE RIGHT TO A FAIR TRIAL AND JUDICIAL REVIEW IN THE AREA OF COMPETITION LAW

2.1. The need for scrutiny of the Commission's actions

Introductively it is important to note that the traditional, Montesquian approach to the separation of the Westphalian state powers is not adequate in order to analyze the balance of the EU institutions' powers when it comes to supervision and decision making. More specifically, with regard comes to competition law enforcement the European Commission cumulates elements of all three forms of power, namely legislative, executive and judicial, regardless of whether it shares these functions with other EU institutions or exercises them individually.

Indeed, the Commission participates in the rulemaking by submitting proposals for legislative action to the Council and to the European Parliament, while it can also act as a "solo" legislator when it either adopts implementing Regulations when empowered so by the EU legislative institutions[4] or when adopting the "block exemption regulations", which are used to declare certain categories of state aid compatible with the Treaties[5].

Moreover, EU law[6] designates the Commission as the main executive body of the EU regarding competition law, as in the context of its role as the "Guardian of the Treaties" it is called upon to ensure that the Treaty provisions, Regulations, Directives and Decisions related to competition law are implemented in accordance with the fundamental EU legal principles and policy interests. Its functions that fall within the executive power's ambit also include its responsibility to achieve international cooperation in competition matters. Indeed, 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[7], while it also coordinates its approach to this particular law field with the

4 A typical example is Commission Regulation (EC) 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, [2004] OJ L123/18.

5 Namely Commission Regulation (EU) 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, [2014] OJ L 187/1) as it applies today after numerous amendments.

6 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.

7 United States, Canada, Japan, South Korea and Switzerland among many others.

International Competition Network, the OECD, the UNCTAD and the WTO. Besides, it cannot be disregarded that, in addition to its pivotal role in the allocation of cases, the Commission also retains further control over the proceedings taking place before the national competition authorities and the national courts[8].

Finally, the Commission is also partly exercising judicial functions, albeit restricted, during the enforcement procedures of arts. 101 and 102 TFEU. In effect, it decides which cases to investigate from those that are notified and which cases not to pursue, which investigative measures to order, which facts to support with evidence, which questions to ask about the relevant undertakings and what sanctioning measures to employ in order to oblige the violators to seize the illegal behaviour.

It becomes obvious from the above that the Commission's role in the field of competition law is multi-layered and particularly strong. For this reason, it is necessary to ensure the establishment and efficiency of judicial control of its action, which is carried out through the EU judicial system. Indeed, any Commission's Decision can be challenged by individuals before the EU General Court, which rules at the first instance in actions brought pursuant to Articles 263 (action for annulment), 265 (failure to act) and 340 TFEU (compensation), while this court's rulings can be appealed before the CJEU. In addition, the CJEU's jurisdiction, pursuant to Article 267 TFEU, to give preliminary rulings at the request of domestic courts concerning the interpretation or the validity of EU competition law provisions cannot be stressed enough as to its importance for the development of EU law and, most importantly, the supervision of the Commission's rulemaking and enforcement activity.

2.2. The right to a fair trial in the Charter and the CJEU's case-law

As it was argued, the Commission may be embedded with a *sui generis* judicial competence, in the sense that it investigates law violations and imposes penalties, but it cannot possibly be considered as falling within the ECHR's autonomous concept of "independent and impartial tribunal" as was also developed by the EU Courts in the context of interpreting Article 47 CFR. In other words, the EU Commission cannot be deemed to be the independent adjudicator that must necessarily exist in order for the individuals' rights to be protected in the field of EU competition law[9].

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8 Van Bael, I., *Due Process in European Competition Proceedings*, Kluwer Law International, 2011, p. 85.

9 See Teleki, C., *Due Process and Fair Trial in EU Competition Law*, Brill, 2021, p. 143 et seq.

Indeed, the strictly defined and pure overseers of the protection of fundamental rights and the application of the primary EU law principles in the field of competition law were always the courts forming the decentralized EU judicial system in its more extensive sense, ergo in the network formed by all national and EU courts applying EU law with the CJEU as the final adjudicator.

In effect, Article 47 (1) CFR guarantees the rights to an effective remedy and to a fair trial and 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. Moreover, the second paragraph of the same provision 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.

Even before the legally binding character of the Charter, which was established through the Treaty of Lisbon[10], the EU courts recognized the importance of protecting the right to a fair trial in the EU, both in a general context and in competition law in particular[11]. Indeed, in the crucial *Kadi*[12] judgment, the Court declared that "*The Community is based on the rule of law, inasmuch as neither its member states nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the EC Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions*".

The reaffirmation by Article 47 CFR of the general principle of EU law, according to which everyone is entitled to a fair legal process, a provision which – like most of the rights guaranteed in the CFR – codified the EU courts' case-law, provided an explicit and systemic legal base for further development of this particular right's protection.

With regard to the scope and the extent of the right to fair trial, the CJEU is always interpreting the right guaranteed in Article 47 CFR by taking into account not only its previous and long-standing case-law, but also the ECtHR's interpretation of Article 6 ECHR and the constitutional traditions of the EU's member states. In effect, it has ruled that the right to a fair trial comprises the right to effective remedies, to have access to a tribunal that is independent of the executive power

10 Article 6 TEU.

11 See, *inter alia*, Case C-185/95, *Baustahlgewebe GmbH v Commission*, ECLI:EU:C:1998:608, par. 21.

12 Case C-402/05 P and 415/05 P, *Kadi and Al Barakaat International Foundation v Council and Commission*, ECLI:EU:C:2008:461, par. 81.

in particular[13], to a legal process which lasts a reasonable time[14], and the rights to be notified of procedural documents and to be heard[15].

Overall, the CJEU has consolidated the view that the effectiveness of the judicial review guaranteed by Article 47 CFR requires that, as part of the review of the lawfulness of the grounds which are the basis of an EU act imposing penalties to any individual, the EU courts are to ensure that this act, which affects these persons 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 them, deemed sufficient in itself to support that decision, are substantiated[16].

As is the case with all the Charter's guaranteed rights, the interpretation of the corresponding provisions is guided by specific criteria mentioned in the Charter itself, which constitute a codification of the long-standing case-law of the Court. More specifically, the first sentence of Article 52 (3) CFR 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 Convention. Moreover, according to the not legally binding but extremely useful explanation of Article 47 CFR added by the Commission, the meaning and the scope of the guaranteed rights are to be determined not only by reference to the text of the ECHR and particularly to the corresponding Article 6 ECHR, but also, *inter alia*, by reference to the case-law of the ECtHR.

Indeed, in the *Unectef v Heylens*[17] judgment in the 80s the Court found that effective judicial review, which must be able to cover the legality of the reasons for a contested decision of an EU institution, presupposes in general that the court to which the matter is referred may require the competent authority to notify its reasons. It also held that where it is more particularly a question of securing the effective protection of a fundamental right conferred by the Treaty on EU workers,

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13 See, *inter alia*, Case C-174/98 P, *Kingdom of the Netherlands and Gerard van der Wal v Commission*, ECLI:EU:C:2000:1, par. 17.

14 Case C-185/95, *Baustahlgewebe GmbH v Commission*, ECLI:EU:C:1998:608, par. 21.

15 Case C-341/04, *Eurofood ifsc Ltd.*, ECLI:EU:C:2006:281. Nevertheless, in par. 66 of the judgment the Court clarified that 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.

16 Case C-530/17, *Mykola Yanovych Azarov v Council*, ECLI:EU:C:2018:1031, par. 22.

17 Case 222/86, *Unectef v Heylens*, ECLI:EU:C:1987:442.

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 authorities are under a duty to inform them of the reasons on which the refusal is based, either in the decision itself or in a subsequent communication made at their request.

A few years later, in the case *Oleificio Borelli v Commission*[18], the Court used a linear analysis for the interpretation of the principle of judicial protection and found that judicial scrutiny reflects a general principle of EU law stemming from the constitutional traditions common to the member states and enshrined in Articles 6 and 13 ECHR. Moreover, in case *DEB*[19] 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.

When it comes to competition law in particular, judicial review on EU level cases is primarily a matter of constitutional design, because its tenets are laid down in the TFEU and Regulation 1/2003. More specifically, the review of legality of the Commission's acts and decisions is limited in the context of the annulment action, but unlimited in the case of fines as 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 EU unlimited jurisdiction with regard to the penalties provided for in such regulations*". Indeed, Article 31 of 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*".

3. THE RIGHTS PROTECTED DURING THE SUPERVISION AND ENFORCEMENT PHASE

3.1. The respect for the complainant's rights

Even though the proceedings of the Commission in competition cases are not adversarial in nature between the complainant on the one hand and the companies under investigation on the other, and thus the procedural rights of complainants are less far - reaching than the right to a fair hearing of the subjects of an infringement procedure, there is no doubt that according to EU law the former also benefit from procedural rights.

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18 Case C-97/91, *Oleificio Borelli v Commission*, ECLI:EU:C:1992:491.

19 Case C-279/09, *DEB*, ECLI:EU:C:2010:811.

Indeed, according to the General Court the Commission is obliged, pursuant to EU legislation, "*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*"[20].

Turning to the judicial approach used by the EU courts in order to ascertain that the Commission has, indeed, respected the complainant's administrative rights, three levels of review have always been identified which have also been gradually incorporated into the legislation.

First, the courts examine whether, following the submission of a complaint, the Commission has collected all the necessary and useful information that will serve as the basis for the decision that later adopts. 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 him an opportunity to expand on his allegations in the light of any initial reaction from the Commission[21]. At this stage, the institution may give an initial reaction to the complainant giving the latter an opportunity to understand the institution's point of view and allowing him to expand on the allegations and enrich the documentation.

During the second stage of review, the EU courts scrutinize the way that the Commission has investigated the case further with a view to initiating proceedings. Indeed, it must be ascertained that, if the Commission considers that there are insufficient grounds for acting on the complaint, it will inform the complainant of the reasons and offer him the opportunity to submit any further comments within a time limit which it defines[22].

In that context it is settled case law[23] that, even though the above notification is similar to a statement of objections, its goal however is the defense of the procedural rights of the complainants which are not as far-reaching as the right to a fair hearing of the individuals which are the subject of the Commission's investigation. This approach demonstrates the importance that the EU courts attach to the rights of defense of the subject of the alleged infringement and also emphasizes the fact that the statement of objections is not a decision whose validity can be contested before the courts, but merely a procedural measure preparatory to the final decision.

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20 Case T-24/90, *Automec v Commission*, ECLI:EU:T:1992:97, par. 79.

21 *Ibid*, par. 45.

22 *Ibid*, par. 46.

23 See Case 60/81, *IBM v Commission*, ECLI:EU:C:1981:264.

Lastly, the third stage of the review, which takes place if the complainant has submitted observations, consists of the examination of whether the Commission has taken cognisance of the observations submitted by the complainant and either initiated a procedure against the subject of the complaint or adopted a reasoned[24] decision rejecting the complaint[25].

3.2. Procedural guarantees during the enforcement process

When an initial assessment performed by the Commission leads to a conclusion that there is a case that warrants further investigation, it will formally open the proceedings pursuant to Article 11 (6) of the Regulation 1/2003 triggering the procedural rights of the companies under investigation. Furthermore, in the case of cartel investigations, the opening of the proceedings coincides with the formulation of the "statement of objections".

In effect, in order for the procedural rights of the investigated company to be respected, the opening of the proceedings must clearly situate the case in time and identify the persons affected, describe the scope of the investigation, the territory and the sectors investigated and the behaviour that constitutes the alleged infringement. Access to all evidence gathered by the Commission which led to the drafting of the statement of objections is also provided to the company in question. Moreover, due to the important consequences of publishing the relevant information in the press, the Commission always emphasises that the opening of proceedings does not prejudge in any way the existence of an infringement.

Similarly to the principle of criminal law dictating that the accused must be aware of the penalty that will be imposed to him / her in case of conviction, the statement of objections must 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"[26], whose soft – law nature has been recognized by the EU Courts[27].

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[24] That does not entail an obligation of the Commission to respond to all arguments raised by the complainant.

[25] See also the Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, [2004] OJ C 101/65, 71.

[26] Commission Guidelines on the method of setting fines imposed pursuant to Article 23 (2) (a) of Regulation No 1/2003, [2006] OJ C 210/2.

[27] See, *inter alia*, Case C-189/02 P, *Dansk Rørindustri and others v Commission*, ECLI:EU:C:2005:408, par. 212.

More specifically, 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.

Furthermore, language is an important aspect of the legal procedure. Indeed, EU competition law legislation contains extensive provisions concerning the language of the proceedings, which seek to safeguard the procedural rights of the investigated. First, the documents which the Commission sends to an undertaking based in the EU 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 EU selected by the sender. The reply and subsequent correspondence should be drafted in the same language.

In the later stages of the procedure 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 arts. 7, 9 and 23 (2) of Regulation 1/2003 should be notified in the authentic language of the addressee[28]. Similarly, the reply and all subsequent correspondence addressed to the complainant should be in the language of their complaint. 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.

Beyond the above, the most important and judicially reviewed limit of the Commission's means and extent of investigation is without a doubt the principle of proportionality, which corresponds to the rule of law principle. Indeed, proportionality is a general principle of EU law, expressly worded not only as a fundamental barrier to the EU's exercise of competences in Article 5 (4) TEU, but also as a reflection of the individual's right to a fair trial in Article 49 (3) of the CFR, requiring that the measures adopted by EU institutions must not exceed what is appropriate and necessary for attaining the objective pursued. In other words, when there is a choice between several appropriate measures, the least onerous

[28] 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 authorized language waivers can be given for some specific documents or for the whole procedure.

must be chosen, and the disadvantages caused must not be disproportionate to the aims pursued.

In effect, in the field of means used by the Commission for the investigation of possible competition law breaches the EU courts have always emphasised that in the EU legal system any intervention by the 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, 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"[29].

Subsequently, the principle of proportionality establishes secondary obligations of the Commission in the stage of investigation. More specifically, the latter must not disregard its duty to act within a reasonable time as an outcome of the principle of sound administration, which is expressly mentioned in Article 41 (1) CFR and is judicially reviewed on a case-by-case basis[30], as well as its legal obligation to state reasons for both its findings and the penalties imposed, which is enshrined in Article 296 TFEU and Article 41 (2) CFR. According to CJEU's settled case-law, 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 courts to exercise its power of judicial review[31].

3.3. The rights of the individual under investigation

The importance of the so called "rights of the defense" has been repeatedly stressed by the EU Courts in various legal environments, and in particular in the context of competition law[32], where enforcement takes place mainly against individual violators.

The crown jewel of the rights of the defense is undoubtedly the right to be heard, and its efficient and unimpeded exercise creates the base for the judicial review of the Commission's actions. When it comes to EU competition law, this particular right can be exercised in both the written comments and the oral hearing of the individual under investigation. Indeed, Regulation 1/2003 ensures that before taking decisions as provided for in Articles 7, 8, 23 and 24 (2), the Commission must

29 Case C-94/00, *Roquette Freres*, ECLI:EU:C:2002:603, par. 76.

30 Case C-238/12 P, *FLSmidth v Commission*, ECLI:EU:C:2014:284.

31 See, *inter alia*, Case T-213/00, *CMA CGM* and *Others v Commission*, ECLI:EU:T:2003:76, par. 317.

32 Case 322/81, *Michelin*, ECLI:EU:C:1983:313, par. 7.

give the undertakings or associations of undertakings which are the subject of the proceedings the opportunity to be heard on the matters to which it 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[33].

In particular, 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. Moreover, the Commission must set a time limit within which they can react to these objections. The concerned parties should prepare and send their reply, in which they can present facts supporting or rejecting the Commission's assertions. They can also attach evidence in support of their allegations, and finally, they can propose that the Commission hears persons who may corroborate the facts set out in their submission.

Aside from the parties concerned, the Commission also takes into account the documents submitted by the complainants and other 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. Besides, third parties may themselves request to be heard when they have an interest in the proceedings.

Furthermore, the efficient exercise of the right to be heard requires that certain conditions are fulfilled, one of which corresponds to another fundamental, procedural right, namely the right to access to file. This is one of the most important rights in EU competition law proceedings and also an example of how fundamental rights have developed in the field of competition law through the common work of the EU courts' case-law and the Commission's practice[34].

Indeed, access to file was initially construed to encompass only access to inculpatory evidence. However, from 1982 the Commission started granting access to the entire file when investigating Articles 101 and 102 TFEU, a practice that was recognized as a legal principle by the EU courts, which ruled[35] that by establishing a procedure for providing access to file in competition cases, the Commission imposed on itself rules from which it can no longer depart. It follows that the Commission has an obligation to make available to the undertakings involved in competition enforcement proceedings all documents and other materials, which

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33 Article 11 of the Commission Regulation (EC) 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, [2004] OJ L123/18, as modified by the Commission Regulation (EC) 622/2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases, [2008] OJ L171/3.

34 See for more Neves, I.; Steffens, K., *Right(s) of Defence, Access to the File and Fairness in Competition Procedures*, European Competition and Regulatory Law Review, Vol. 4 (2020), pp. 260-272.

35 See, *inter alia*, Case T-7/89, *Hercules Chemicals v Commission*, ECLI:EU:T:1991:75, par. 53– 54.

it has obtained during the course of the investigation[36]. Furthermore, it cannot decide alone which documents are of use for the defence, but it must give the advisers of the undertaking concerned the opportunity to examine documents which may be relevant so that they it can assess their probative value for itself[37].

It is worth noting that in 1997 the Commission published guidelines on the right of access to file, aiming to bring its practice in line with the EU courts' jurisprudence, while in 2005 it issued a "Notice on Access to File"[38] replacing the above guidelines. In addition, Regulation on Procedure, the Implementing Regulation and the CFR provide for the right to have access to the Commission's file but only to the addressees of the statement of objections.

Furthermore, of particular importance are the rights against intervention to the business premises by the public authorities[39] and against any disclosure of business secrets to the public, namely information whose merely the transmission to a person other than the one that provided it may seriously harm the company's interests[40].

Finally, a substantial presentation of the most important rights of the defense cannot be considered as complete without mention to a right with a particular history of evolution, namely the right to remain silent. According to its content, which was initially developed as a legal principle, 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.

It is worth noting that, even though the EU competition law contains no express provision concerning the right to remain silent and, on the contrary, the EU legislator has been thorough in imposing on the undertakings the obligation of cooperation with the supervisory authorities, the Court of Justice developed an exception to the above obligation. Indeed, it argued that an undertaking has the right to remain silent when faced with questions or demands that can be viewed as possibly requiring the company to admit the existence of an infringement[41].

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36 See recent Case C-607/18 P, *NKT Verwaltungs GmbH and NKT AS v Commission*, ECLI:EU:C:2020:385.

37 Case T-30/91, *Solvay v Commission*, ECLI:EU:T:1995:115, par. 81.

38 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 (2005/C 325/07).

39 See, *inter alia*, Case 85/87, *Dow Benelux*, ECLI:EU:C:1989:379.

40 See, *inter alia*, Case T-353/94, *Postbank v Commission*, ECLI:EU:T:1996:119.

41 Case C-374/87, *Orkem v Commission*, ECLI:EU:C:1989:387, par. 35.

Moreover, it is worth noting that in the past the EU courts ruled 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[42], not on the part of others, and the right does not cover the provision of documents or other means of proof. With the above reasoning the EU judge established a balance between a necessary right and the preservation of the efficiency of the Commission's enforcement powers.

Indeed, this approach was 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.

Despite this previous interpretation, it is of particular interest that today the Court of Justice follows a more extensive approach to the right to silence for individuals during administrative market abuse proceedings, emphasizing that the said right cannot reasonably be confined to statements of admission of wrongdoing or to remarks which directly incriminate the person questioned, but rather also covers information on questions of fact which may subsequently be used in support of the prosecution and may thus have a bearing on the conviction or the penalty imposed on that person[43].

4. THE DEPTH OF JUDICIAL REVIEW IN THE FIELD OF EU COMPETITION LAW

4.1. The limited review of legality

The limited character of the legality review exercised by the EU Courts in the Commission's decisions concerning competition law in the framework of Article 263 TFEU was analyzed and summarized by the CJEU in its *Chalkor v Commission*[44] judgment, where it started its analysis concerning judicial review in competition law disputes by highlighting that, in addition to the review of legality provided for under Article 263 TFEU, a review with unlimited jurisdiction was envisaged regarding the penalties laid down by Regulations. In light of this, the

42 Case T-236/01, *Tokai Carbon v Commission*, ECLI:EU:T:2004:118, par. 402.

43 Case C-481/19, *Consob*, ECLI:EU:C:2021:84, par. 40.

44 Case C-386/10 P, *Chalkor v Commission*, ECLI:EU:C:2011:815, par. 53.

CJEU ruled that 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. More specifically, 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 their own motion a new and comprehensive investigation of the file.

As it happens, in the area of competition law the CJEU follows the same approach of self-restraint that it also adopts in other high-level and critical policy areas, such as the Economic and Monetary Union and the Common Foreign and Security Policy[45]. That approach is based on two reasonings, the first being the complex character of the information and data on which decision-making is based in these particular policy areas, and the second being the sensitive balance of powers that must be achieved due to their importance for sovereignty and policy making.

With regard to the first parameter, as early as in the 60s the Court emphasized that judicial review of complex economic evaluations made by the Commission must take account of their nature by confining itself to an examination of the relevance of the facts and the legal circumstances which the Commission deduces therefrom, and 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[46]. Later on, it clarified 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[47].

On the other hand, the EU Courts were always persistent in stressing out that no complexity or technocracy of evidence and information can ever lead to lack of judicial review and effective judicial protection[48]. More specifically, in the *Laval* judgment the CJEU noted that, even though the Commission's margin of appreciation in economic and technical matters must be respected and safeguarded, that cannot lead to any form or level of judicial review of the Commission's interpreta-

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45 See also Perakis, M., *The Passive Form of Judicial Activism: Judicial Self-Restraint while Balancing Fundamental Rights and Public Interest in the Age of Economic Crisis*, European Politeia, Vol. 2 (2015), pp. 321-346.

46 Case 58/64, *Grundig v Commission*, ECLI:EU:C:1965:60.

47 Case 42/84, *Remia v Commission*, ECLI:EU:C:1985:327.

48 See also Bailey, D., *Standard of Judicial Review under Articles 101 and 102 TFEU* in: Merola, M.; Derenne, J. (eds), The Role of the Court of Justice of the European Union in Competition Law Cases, Bruylant, 2012, p. 106.

tion of economic and technical data being excluded. Indeed, 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 can substantiate the conclusions drawn from it[49].

When it comes to the second parameter, namely the sensitive character of certain policy areas and the necessary separation of powers and competences[50] which imposes an efficient albeit limited capacity for judicial review of the EU institutions' acts, the well-known judgment of the Court in the case *Les Verts v European Parliament*[51] is of particular relevance. In this case, which was the starting point for a long line of case-law concerning effective judicial protection balanced with the separation of the EU institutions' competence, the ECJ declared that the EEC is a "Community based on the rule of law", inasmuch as neither its member states nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic "constitutional charter", the Treaties. One the contrary, it cannot be disregarded that it is those same Treaties that establish the system of remedies, the procedures and the requirements permitting the Court of Justice to review the legality of measures adopted by the EU institutions[52].

4.2. The unlimited review of fines

Unlike the review of legality, which touches upon critical political and institutional issues that lead the EU Courts to exhibit a touch of self-restraint established by the wording of the relevant EU law provisions, the explicitly limitless character of the review of fines predicted in competition law cases led the CJEU to construe its own powers in a much broader way. More specifically, according to the Court 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*"[53].

Indeed, in the eyes of the EU judge this unlimited jurisdiction empowers him, in addition to carrying out a limited review of the lawfulness of the penalty, to

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49 Case C-12/03 P, *Commission v Tetra Laval*, ECLI:EU:C:2005:87, par. 39.

50 In other words, the principle "institutional balance" as developed by the Court in the first years of the European Community's life, and more specifically in the *Meroni* judgment (Case 9/56, *Meroni v High Authority*, par. 133).

51 Case 294/83, *Les Verts v European Parliament*, ECLI:EU:C:1986:166.

52 *Ibid*, par. 23.

53 Case C-534/07 P, *Prym and Prym Consumer v Commission*, ECLI:EU:C:2009:505, par. 86.

substitute his own appraisal for the appraisal provided by the Commission and, consequently, to cancel, reduce or increase the fine or penalty payment imposed, supplements and completes the review of legality[54] and thus covers any gaps in the protection of the right to a fair trial.

In effect, while conducting judicial review on this level, the EU courts repeatedly seized the opportunity to rule on claims related to the Fining Guidelines that the Commission is using when calculating the penalties, especially since the plaintiffs often invoke as an argument the misapplication by the Commission of its own, self-imposed criteria. In general terms, the Union courts praise, *inter alia*, the resulting increase in legal certainty and transparency that those Guidelines provide[55]. The relevant settled case-law of the General Court is of particular importance in this issue.

More specifically, the EU court of first instance has repeatedly stressed that its role when reviewing the legality of the fines imposed by the Commission is twofold: to assess whether the discretion exercised by the EU institution is in line with the Guidelines and, if a deviation is observed, to verify whether the latter is justified and supported by a clear, well-developed and convincing legal reasoning[56]. It has also added the important clarification that "*the self-limitation on the Commission's discretion arising from the adoption of the Guidelines is not incompatible with the Commission's maintaining a substantial margin of discretion*"[57].

Furthermore, the already mentioned fundamental principle of proportionality is of paramount importance when it comes to the judicial review of the competition law fines. Indeed, according to settled case-law, the gravity of an infringement which defines the amount of the fine must be determined by reference to numerous factors, such as the particular circumstances of the case and its context. The EU Courts always emphasize that there is no binding or exhaustive list of the criteria which must be applied[58], but these may include, *inter alia*, the volume and value of the goods in respect of which the infringement was committed, the size and economic power of the undertaking and, consequently, the influence which it is able to exert on the relevant market.

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54 Case C-99/17, *Infineon Technologies v Commission*, ECLI:EU:C:2018:773, par. 47, and Case C-386/10 P, *Chalkor v Commission*, ECLI:EU:C:2011:815, par. 63.

55 Case C-3/06 P, *Group Danone*, ECLI:EU:C:2007:88, par. 23.

56 Case T-127/04, KME *Germany and Others v Commission*, ECLI:EU:T:2009:142.

57 *Ibid*, paras 34-35.

58 See, *inter alia*, Order in Case C-137/95 P, *SPO and Others v Commission*, ECLI:EU:C:1996:130, par. 54, Case C-219/95 P, *Ferriere Nord v Commission*, ECLI:EU:C:1997:375, par. 33, and Case T-9/99, *HFB and Others v Commission*, ECLI:EU:T:2002:70, par. 443.

In this context, it is important to note that, even though there is no EU level harmonization of how the calculation of fines is carried out, nor of the relevant factors to be taken into account in performing this task, and accordingly the National Competition Authorities may differ in their approaches when calculating the basic amounts of fines, the main principles governing the necessary protection that judicial review must offer also apply to fines imposed on the national level when reviewed by national courts[59].

It is worth noting that, despite the mathematical and complex character of the criteria and data used to calculate a fine in the area of competition law, in the process of judicial review the EU courts on one hand always focus on the goals that must be achieved in this policy area, and by doing so they may "substitute their own appraisal for the Commission's"[60], but at the same time they display care to safeguard the particular institution's essential role in this context[61]. Indeed, it is settled case-law that the Commission's duty is 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*"[62] while at the same time avoiding resorting to baseless assumptions[63].

Moreover, the concept that competition is a field of policy exercise and that is why the Commission has such an important role to play in it, can be reflected in the EU courts' case-law with regard to the institution's margin of appreciation in the area of fines' imposition. More specifically, the EU judge perceives the Commission's unreviewable discretion as extending to the seriousness of the infringement and its composing elements[64], to the application of aggravating and attenuating circumstances[65], and to the cooperation offered by the members of a cartel dur-

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59 See also Dunne, N., *Convergence in Competition Fining Practices in the EU*, Common Market Law Review, Vol. 53 (2016), pp. 453-492, 458.

60 Case C-199/11, *Europese Gemeenschap v Otis NV and Others*, ECLI:EU:C:2012:684, par. 62.

61 See Opinion of Advocate General Poiares Maduro, in Case C-141/02 P, *Commission v Max Mobil*, ECLI:EU:C:2004:646, paras 77–78. Hence, judicial review covers, apart from any question of interpretation of law, the questions of whether the facts have been correctly stated, whether the evidence relied on is factually not only accurate, reliable, and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it, whether the formal and procedural rules have been complied with and whether there has been any manifest error of assessment or misuse of powers.

62 Case T-241/01, *Scandinavian Airlines System v Commission*, ECLI:EU:T:2005:296, par. 122.

63 Case T-59/02, *Archer Daniels Midland v Commission*, ECLI:EU:T:2006:272, paras 160– 161.

64 Case T-101/05 and T-111/05, *BASF v Commission*, ECLI:EU:T:2007:290, par. 65.

65 Case T-44/00, *Mannesmannrohren- Werke AG v Commission*, ECLI:EU:T:2004:218, par. 307.

ing the proceedings[66], factors that can only be examined by the courts only for a manifest error.

5. CONCLUSIONS

From what was presented and analyzed in this paper, certain conclusions can be drawn regarding the influence of the right to fair trial in the context of EU competition law.

The first is that the goals pursued by EU competition law justify an emphasis on efficiency over accuracy[67] when it comes to the implementation of the respective rules and the judicial review of the Commission's acts, and that is evident in the EU judge's case-law regarding the concept of "fair trial". In particular, it becomes obvious by the reasoning of the EU courts' judgments that a balance between safeguarding the essence of the protection of rights and the achievement of ensuring undistorted competition is always sought, with the consequence that the EU judge does not adhere to formulas or details when reviewing the actions of the Commission but to the diagnosis of whether there has actually been violation of the respective right. This quest for balance is made more evident by the fact that the EU courts favor a case-by-case review rather than being complacent in the general guidelines issued from time to time by the Commission.

The second conclusion regards the somehow limited jurisdiction of the EU courts when it comes to the scrutiny of the Commission acts' legality in the area of competition law in comparison to other areas of EU law. It should be remembered that in the field of the enforcement of EU competition law the Commission is equipped and exercises not only a wide discretion in its decision-making, but also extended policing powers by investigating, searching, seizing and interrogating. To that it must be added that the Commission has largely interpreted the breadth of its own powers[68], something which would normally make even more imperative the need for a comprehensive, full and constant judicial review of its actions.

Still, it is evident that, with the exception of the amount of fines, the Court does not appear to have jurisdiction to exercise a thorough and efficient review under the present legal regime, or at least it is reluctant to derive such a competence from the wording and the purpose of Articles 261 and 263 TFEU. Indeed, this

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66 Case C-328/05, *SGL Carbon AG v Commission*, ECLI:EU:C:2007:277, par. 88.

67 See Tonna-Barthet, C., *Procedural justice in the age of tech giants – justifying the EU Commission's approach to competition law enforcement*, European Competition Journal, Vol. 16 (2020), pp. 264-280, 280.

68 See Teleki, C., *op. cit.*, note 33, p. 340.

weakness may give rise to the criticism that the right to a fair trial is not fully guaranteed when it comes to the judicial protection of the individual in the area of EU competition law.

Despite the above impression, the Court itself sees things differently when it comes to the efficiency of its review. As it was shown in the present study, in the eyes of the EU judge his unlimited power for judicial review of imposed fines supplements and completes the review of legality, guaranteeing the right to a fair trial and perfectioning the efficiency of judicial protection.

Besides, it cannot be disregarded that, although effectiveness is an issue of major concern for the competition authorities, largely as result of the secrecy of some of the most typical infringements, such as cartels, EU competition law must not be and is obviously not "immune to fundamental rights' protection" by the EU courts, and that seems to be a direct consequence of the importance that the latter give to the right to a fair trial. It has always been their solid approach that it is incumbent on the Commission, on the national competition authorities, and, ultimately, on themselves to ensure a fair balance between the rights and interests at stake, without scarifying the core of any of them.

Indeed, in recent years it seems that the CJEU has begun to move more vigorously in this direction[69], an approach which cannot be perceived out of the wider context of the need to empower the rule of law and one of its most fundamental aspects, which is the right to a fair trial. Nevertheless, and rightly so, the EU judge proceeds slowly and steadily with careful steps as he is taking due care not to overturn the balance to the detriment of the only EU institution that has the competence as well as the ability to ensure the competition law in the Union, namely the European Commission, and to leave the main initiative to the EU legislator to whom it belongs.

Overall, the final conclusion of this study unifying the two previous ones is that in the field of competition law the CJEU follows the current tendency of all courts, both national and international[70], to acknowledge a wide margin of discretion and appreciation of the executive in policy areas that are politically and economically crucial and sensitive. Indeed, even when courts apply the balancing legal principles of necessity and proportionality in these policy areas, they do so with respect to the governmental policy, which is evidence of a reluctance to "invade" the territory of the executive and the lawmaker.

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69 A very good example of that path is the recent judgment in the Case C-607/18 P, *NKT Verwaltungs GmbH and NKT AS v Commission*, ECLI:EU:C:2020:385.

70 For the ECtHR see ECtHR, *Koufaki and ADEDY v Greece* (2013), appl. no. 57665/12 and 57657/12.

In all fairness, it should be emphasized that, while adopting this particular approach and judicial thinking, namely limiting their role in safeguarding the "outer boundaries" of the necessity of the governmental policy and the "absolute core" of the rights infringed, the judiciary neither denies justice, nor puts itself in the service of the executive. On the contrary, it shows legal and pragmatic respect to one of the most fundamental principles permeating the national constitutions, the international legal order and generally the western civilization, which is Democracy.

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