

THE INTERFACE BETWEEN COMPANIES' FUNDAMENTAL  
RIGHTS AND COMPETITION LAW ENFORCEMENT IN THE EU:  
PAST, PRESENT AND FUTURE

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*Since the EU is bound by the EU Charter of fundamental rights due to the amended Treaty of the European Union, the critical points of companies' fundamental rights in competition proceeding has generated a large number of legal debates. This article evaluates whether changes to the current competition enforcement are necessary as to comply with EU fundamental rights standards. This article discusses the paradox between the EU competition enforcement and companies' fundamental rights protection. In author's view, the EU should comply with EU fundamental rights law, particularly due to the Charter's binding effects on the EU. The case law concerning EU competition law has reflected compliance with the European Convention on Human Rights. Nevertheless, the effective competition enforcement is still necessary for an undistorted market and will ultimately maintain a well-functioning market. This brings a result to consumer welfare, which is another kind of protection of fundamental rights.*

**I. Introduction**

Fundamental rights' compliance of public enforcement in European Union (EU) competition law is a particularly complicated issue.<sup>1</sup> Competition public enforcement in the EU may considerably affect the protection of suspected companies' fundamental rights, and reasons underlying include that the

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<sup>1</sup> Arianna Andreangeli, 'Competition Law and the Opinion 2/13 on the Accession of the EU to the European Convention on Human Rights: Back to Square One?' (2015) *Journal of European Competition Law and Practice* Advance Access 1.

European Commission (Commission) holds investigation and first-instance decision-making powers to sanction penalties to companies' illegal antitrust infringements. Procedural rules dictating the competition enforcement by the Commission are in Regulation 1/2003 and Regulation 773/2004, together with abundant notices or guidelines, such as: Guidelines on setting fines and the Leniency Notice.<sup>2</sup> Among all these norms, Regulation 1/2003 plays a key role in providing various kinds of powers that the Commission carries. Pursuant to this Regulation, for the purpose of applying Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), which prohibit cartels and the abuse of a dominant market position respectively, the Commission holds the power to deal with the antitrust cases in the EU.

Articles 17 to 21 of Regulation 1/2003 stipulate the Commission's investigation powers. These provisions regulate the power of the Commission's request for information that is necessary for determining antitrust cases,<sup>3</sup> and the Commission may also interrogate natural or legal person as to collect the information.<sup>4</sup> Moreover, the Commission is able to exercise its powers of inspection by means of entering and sealing any premises according to the Regulation. On the condition that undertakings are found to be illegal after the Commission's inspection, they might face fines as penalties. Due to this, the Commission's investigative, prosecutorial and adjudicative powers which are highly related to companies' legal and financial status, such as the interest of property and the freedom to conduct commercial activities. Thus, they may violate companies' fundamental rights, which are fundamental values of the EU.

While the Commission makes decisions on higher fines, the situation becomes that it is not judges but administrative body decides to impose fines.<sup>5</sup> Consequently, because this kind of sanction has the deterrent and punitive effects, the competition proceedings are an administrative process, yet they contain criminal charges. Accordingly, since Article 6 of the European

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<sup>2</sup> Wouter Wils, 'The Increased Level of EU Antitrust Fines, Judicial Review, and the European Convention on Fundamental Rights' (2010) 33(1) *World Competition* 5, <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1492736](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1492736)> accessed 23 September 2016.

<sup>3</sup> Articles 17 and 18 Regulation 1/2003.

<sup>4</sup> Articles 19, 20 and 21 Regulation 1/2003.

<sup>5</sup> Denis Waelbroeck, 'The Development of a New "Settlement Culture" in Competition Cases- What is Left to the Courts?' in Charles Gheur and Nicolas Petit (eds) *Alternative Enforcement Techniques in EC Competition Law* (Bruylant 2009) 256.

Convention on Human Rights and Fundamental Freedoms (ECHR) provides that “in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing [...] by an independent and impartial tribunal”, the standard under Article 6 of the ECHR becomes the judicial remedy for antitrust defendants.

Having regard to the tension between the competition enforcement and companies' fundamental rights, the crucial issue is to what extent the suspected companies' fundamental rights are respected by the Commission in its investigation processes and whether the Commission's implementation is consistent with the fundamental rights within the EU legal order. This critical issue has arisen from two developments in the EU. First of all, one must consider the increased importance of fundamental rights protection after the implementation of the Treaty of Lisbon: the Charter of Fundamental Rights of the European Union (EUCFR) became legally binding on the EU, when the Treaty of Lisbon entered into force in 2009.<sup>6</sup> Although the EU is not yet bound by the ECHR, both the Convention and the Charter are instruments that establish the fundamental rights legal order, because of Article 52(3) of the EUCFR.<sup>7</sup> Accordingly, since Article 6 of the ECHR corresponds to Article 47 of the EUCFR, the right to a fair trial and effective judicial remedy provided by Article 6 of the ECHR is applicable in the EU. Moreover, recital 37 in Regulation 1/2003 implies that this Regulation has to be applied with respect to those principles and rights stated in the EUCFR. Therefore, it could be concluded that the Commission's competition enforcement must be compliant with the Convention and the Charter.

Secondly, pursuant to Article 23(2) Regulation 1/2003, the Commission carries the discretionary power to impose fines on undertakings and associations of undertakings. As a consequence, there are increased sanctions imposed on companies, when the Commission deals with antitrust cases relating to Articles 101 and 102 of the TFEU. Looking at the Commission's statistics, the total amount of fines imposed on illegal cartels between 2000

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<sup>6</sup> David Anderson and Cian Murphy, 'The Charter of Fundamental Rights' in Andrea Biondi, Piet Eeckhout and Stefanie Ripley (eds) *EU Law After Lisbon* (OUP 2012) 161.

<sup>7</sup> The provision stipulates: "...this Charter contains rights which correspond to rights guaranteed by the ECHR [...]".

and 2014 has increased approximately three-fold to 8.7 billion euros.<sup>8</sup> The fines of the truck producers case<sup>9</sup> levied for infringing Article 101 of the TFEU appears to be the highest individual monetary sanction.

The requirements of fundamental rights protection in competition proceedings include the right to a fair trial and a fair administrative process stated in Articles 41 and 47 of the EUCFR.<sup>10</sup> The procedural rights standards guaranteed by Article 6 of the ECHR focus on a person's civil rights or defence of criminal charge against him by way of a fair and public hearing within a reasonable time by an independent and impartial tribunal. In the case law of the Court of Justice in the European Union (CJEU) concerning the competition enforcement, the CJEU upheld the essence of fundamental rights protection in, for example, the *Alrosa* judgment,<sup>11</sup> which affirmed that companies' fundamental rights should be heard during the commitment proceeding. In addition to that case, there are increased cases demonstrating the tension between the fundamental rights of companies and the Commission's enforcement procedure, such as the *KME*<sup>12</sup> and the *Chalkor* cases.<sup>13</sup> These cases imply that the Commission's decisions on fines fall within the control of a judicial body, which has the full jurisdiction. Accordingly, there is compliance with a fair trial required by Article 6 of the ECHR.

This article aims to analyse the case law concerning the companies' fundamental rights in EU competition law before the EU Courts and the European Court of Human Rights (ECtHR) from two essential aspects: the right to a fair trial from the General Court (GC) when reviewing the Commission's decisions on fines, as well as the companies' rights to be heard. Subsequently, this work will evaluate whether changes to the current competition enforcement are necessary, in order to comply with fundamental

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<sup>8</sup> DG Competition, 'Cartel Statistics' <<http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>> accessed 23 September 2016.

<sup>9</sup> European Commission, 'Antitrust: Commission fines truck producers € 2.93 billion for participating in a cartel' (Press release, 19 July 2016) <[http://europa.eu/rapid/press-release\\_IP-16-2582\\_en.htm](http://europa.eu/rapid/press-release_IP-16-2582_en.htm)> accessed 23 September 2016.

<sup>10</sup> Takis Tridimas, *The General Principles of EU Law* (OUP 2006) 360.

<sup>11</sup> C-441/07 P *Commission v Alrosa* para 88

<sup>12</sup> C-389/10 P *KME Germany AG & Others v Commission*.

<sup>13</sup> C-386/10 P, *Chalkor v Commission*.

rights standards in the EU. Section II explores the background of the EU fundamental rights protection scheme, i.e. the ECHR and the EUCFR, followed by the necessity of companies' fundamental rights protection brought by the discussion of the EU's accession to the ECHR. Section III depicts the critical points by means of case law from the fairness of rights to a fair trial and a fair hearing, and Section IV will declare that current enforcement system may be compatible with effective fundamental rights protection.<sup>14</sup> This article, however, discusses a balance between the effective EU competition enforcement and companies' fundamental rights protection.

## II. EU Law and Companies' Fundamental Rights Protection

### 1. Fundamental Rights Protection after the Treaty of Lisbon

The development of embedding of fundamental rights norms in EU law is prosperous after the Treaty of Lisbon.<sup>15</sup> The position before the Treaty of Lisbon was that the EU should respect fundamental rights as enshrined by the ECHR, and as they were derived from the constitutional traditions common to the Member States as EU law foundational general principles, pursuant to Article 6(2) of the TEU.<sup>16</sup> To a further extent, the EU Courts must take into account the case law of the ECtHR according to Article 6(3) of the TEU. In this regard, EU fundamental rights norms develop to a greater extent acquiring a positive function, alongside their more disciplinary and traditional role.<sup>17</sup>

Initially in *Stauder*, the CJEU stated that it had the competence to rule on the case of fundamental rights protection in the EU. This case indicated that the respect for fundamental rights is included in the general principles of EU law.<sup>18</sup> This ruling was subsequently upheld in the *Internationale*

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<sup>14</sup> This protection scheme is guaranteed by Articles 41 and 47 of the EUCFR, which are afforded by Article 6(1) of the ECHR.

<sup>15</sup> Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (5<sup>th</sup> edn OUP 2011) 364.

<sup>16</sup> Piet Eeckhout, 'Human Rights and the Autonomy of EU Law: Pluralism or Integration?' (2013) 66(1) *Current Legal Problems* 174.

<sup>17</sup> *Ibid* 177.

<sup>18</sup> Case 29/69 *Stauder* para 7.

*Handelsgesellschaft* case, in which the CJEU declared that respect for fundamental rights constitutes a component of the general principles protected by the Court. In addition, the judgment emphasised the importance of the protection, which was derived from the constitutional traditions of the Member States and must be guaranteed within the framework and objectives of the EU.<sup>19</sup> Furthermore, in the *Nold* case, the CJEU confirmed and added that international treaties for the protection of fundamental rights collaborated on or signed by the Member States should also be secured in EU law.<sup>20</sup> Finally, the importance of the ECHR is explicitly recognised in *Rutili*, and the judgment stated that the general fundamental principles of EU law could be found in the ECHR.<sup>21</sup> These CJEU's judgments concerning the respect for fundamental rights led to a debate on whether or not the EU should accede to the ECHR.<sup>22</sup> Later in 1994, the Council sought the opinion of the CJEU (then the ECJ) dealing with the accession of the EU (then the EC) to the ECHR.<sup>23</sup>

In Opinion 2/94, the CJEU confirmed the ECHR's particular position among international fundamental rights treaties. Yet it also indicated that the EU's accession to the ECHR was impossible, on the grounds that the EU had no competence to accede without amending the EU Treaty.<sup>24</sup>

With respect to the EU's pending accession to the ECHR, the issue concerning the relationship between EU law and the Convention has been continuously discussed and remains open. The prominent *Bosphorus*<sup>25</sup> case stated that the Member States, according to their obligations of EU law, may have a defence against the violation of fundamental rights, because the CJEU carries the identical system of protection as the ECtHR. This outcome could

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<sup>19</sup> Case 11/70 *Internationale Handelsgesellschaft v Einfuhr-und Vorratsstelle Für Getreide Und Futtermittel*, para 4.

<sup>20</sup> Case 4/73 *J Nold, Kohlen-und Baustoffgrosshandlung v Commission* para 13.

<sup>21</sup> Case 36/75 *Roland Rutili v The Minister for The Interior* para 32.

<sup>22</sup> See Jean-Paul Jacqué, 'The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms' (2011) 48 *Common Market Law Review* 995; Tobias Lock, 'Walking on a Tightrope: The Draft ECHR Accession Agreement and the Autonomy of the EU Legal Order' (2011) 48 *Common Market Law Review* 1025; Giorgio Gaja, 'Accession to the ECHR', in Andrea Biondi, Piet Eeckhout and Stephanie Ripley (eds) *EU Law After Lisbon* (OUP 2012).

<sup>23</sup> Further comments on Opinion 2/94, see Giorgio Gaja, 'Opinion 2/94, Accession by the Community to the European Convention on Human Rights and Fundamental Freedoms', (1996) 33 *Common Market Law Review* 973.

<sup>24</sup> Opinion 2/94 paras 27 and 35.

<sup>25</sup> *Bosphorus Hava Yollan Turizm ve Ticaret Anonim Sirketi v Ireland*, No 45036.

be interpreted as a consequence of the consolidation of the EU fundamental rights discourse achieved in past years and of the important role played by the ECtHR itself in setting up the principles applied in this context by the CJEU.<sup>26</sup> The most recent development arose from the Opinion 2/13, in which a draft accession agreement was submitted to the CJEU as to obtain an opinion pursuant to Article 218(11) of the TFEU.<sup>27</sup>

The draft agreement had envisaged arrangements that were made to address issues of the EU's inactive position before the ECtHR and the possible participation of the EU judiciary with respect to claims involving the EU and addressed before the ECtHR.<sup>28</sup> According to Advocate General Kokott's opinion regarding the Opinion 2/13, she supported the standing claimed by both of the Commission and the Council that such an accession is unlikely to have an impact on the competition enforcement of Articles 101 and 102 of the TFEU.<sup>29</sup> She particularly examined three issues. First of all, she reaffirmed that sanction scheme of a competition authority that is entitled to judicial review has been upheld by the ECtHR.<sup>30</sup> Secondly, the draft accession agreement does not contain rules against double jeopardy, since under the draft accession agreement, the EU was established to accede only to the ECHR and the first Protocol.<sup>31</sup> The third issue concerned the principle enshrined in Article 6 of the ECHR, which equally proves the principles of Article 41 and 47 of the EUCFR. AG Kokott addressed that the draft accession agreement would not necessitate institutional changes, irrespective of the breach of this principle by the Commission and the GC. To conclude, in AG Kokott's view, the draft accession agreement is compatible with the EU treaties with a certain number of safeguards.<sup>32</sup>

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<sup>26</sup> Joseph Phelps, 'Reflections on Bosphorus and Human Rights in Europe' (2006) 81 *Tulane Law Review* 275-276.

<sup>27</sup> Opinion 2/13 re ECHR Accession EU:C:2014:2454.

<sup>28</sup> Arianna Andreangeli, 'EU Competition Enforcement and Compliance with Fundamental Rights' Standards: The Challenge and the Promise of Accession to the ECHR <<https://www.competitionpolicyinternational.com/eu-competition-enforcement-and-compliance-with-fundamental-rights-standards-the-challenge-and-the-promise-of-accession-to-the-echreu-competition-enforcement-and-compliance-with-fundamental-rights-standards/>> accessed 23 September 2016.

<sup>29</sup> Paras 146-156 in AG Kokott's Opinion re Opinion 2/13, 13 June 2014, EU:C:2014:2475.

<sup>30</sup> *Menarini Diagnostics v Italy* No 43509/09 [2011].

<sup>31</sup> See Article 4 of Protocol 7.

<sup>32</sup> Peter Oliver and Thomas Bombois, 'Competition and Fundamental Rights' (2015) *Journal of European Competition Law and Practice* 1-2.

## 2. The EU Charter of Fundamental Rights

Prior to the Treaty of Lisbon, the EUCFR was enacted according to the fundamental rights outlined in European and international agreements (for example the ECHR), and the Member States' national constitutions, which the CJEU drew upon when formulating the general principles of law and fundamental rights in EU law since the 1970s.<sup>33</sup>

The EUCFR has become legally binding because of the amended Article 6(1) of the TEU. The provision stipulates that the Charter, which establishes the political, social and economic rights of EU citizens, has equal legal value to the TEU and TFEU.<sup>34</sup> The EUCFR creates the obligation for the EU to provide full respect to enshrined fundamental rights. For example, the right to a fair hearing stipulated in Article 41 of the EUCFR as well as the right to a fair judicial review in Article 47 of the EUCFR. Due to this, the EU courts must resolve the question of whether or not the competition proceedings are compliant with the standard of Article 6(1) of the ECHR, incorporated in both Articles 41 and 47 of the EUCFR, with the reference to the ECtHR's case law. The EUCFR does not truly contain any definition of the criminal charge. However, due to the intensive relationship between the EUCFR and the ECHR, the clearest approach would be to use the definition of the term "criminal" outlined in the ECHR as the notion of this term in the EUCFR.<sup>35</sup>

## 3. Companies' Fundamental Rights Protection in the EU

This article will not extensively focus on companies' fundamental rights protection under the EU fundamental rights legal order. Instead, this article

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<sup>33</sup> Paul Craig, 'EU Accession to the ECHR: Competence, Procedure and Substance' (2013) 36 *Fordham International Law Journal* 1141-1142.

<sup>34</sup> David Anderson and Cian Murphy 'The Charter of Fundamental Rights' in Andrea Biondi, Piet Eeckhout and Stephanie Ripley (eds) *EU Law After Lisbon* (OUP 2012) 161-162.

<sup>35</sup> Wouter Wils, *Principles of European Antitrust Enforcement* (Hart Publishing, 2005) 77.

examines more specifically the EU competition law enforcement system and its compliance with Article 6(1) of the ECHR.

In *Niemitz*, the ECtHR has stated that, among the entire ECHR, Article 6 can apply to both natural and legal persons, such as companies.<sup>36</sup> The ECHR has recognised the business freedom, such as the right to receive and impart information, and the right to peaceful enjoyment of the property. This recognition demonstrates the importance of business freedom as a perspective of the democratic society on which the ECHR is established. In this context, there is a critical issue relating to the control of companies in the commercial field in which economic rights and freedoms are not unrestricted, thus giving rise to the complex legal system for regulating the commercial activities of private enterprises.<sup>37</sup> Consequently, because of the objectives of the ECHR, according to which companies are subject to seek protection of the right to a fair and impartial trial, the companies' fundamental rights should be put into understanding and implementation in the EU.

It is also clear that according to the ECHR's text, not every protection of the ECHR is equally applicable to legal entities.<sup>38</sup> There is indeed a distinction between companies' fundamental rights protection derived from its due process rights and the individual's human rights. This difference justifies a restriction on the companies' fundamental rights protection on the requirements concerning the scope and intensity of judicial review of competition enforcement decisions.<sup>39</sup>

Pursuant to scholars' observations, the ECHR becomes a legal instrument to protect 'everyone' from the arbitrary and excessive exercise of authorities' public power, and this implication illustrates a sound justification for the application of the ECHR to the advantage of private enterprises, in the relevant regulatory scheme.<sup>40</sup> The ECHR is indeed inherently applicable to companies (and more generally, legal entities) in a limited scope. In view of

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<sup>36</sup> *Niemitz v Germany* No 13710/88 [1993]

<sup>37</sup> Arianna Andreangeli *EU Competition Enforcement and Human Rights* (Edward Elgar, 2008) 17.

<sup>38</sup> *Ibid.*

<sup>39</sup> Albert Graells, 'The EU's Accession to the ECHR and Due Process Rights in EU Competition Law Matters: Nothing New Under the Sun?' 12 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2156904](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2156904)> accessed 23 September 2016.

<sup>40</sup> Wolfgang Weiß, 'The EU Competition Policy as an International Human Rights Issue' in Jan Wetzel (eds) *The EU as a "Global Player" in Human Rights?* (Routledge, 2011) 174.

advocating that corporate fundamental rights exist in the ECHR, it has been argued that a number of rights have always and without discussion been considered as applicable to legal entities, principally the right to the enjoyment of procedural rights guarantees in Article 6(1) of the ECHR.<sup>41</sup> Even having contested as such by some authors, Graells claimed that such maximalist position requires further review in light of the possible de facto configuration of the ECtHR as a third appellate instance in EU competition law.<sup>42</sup> In other words, if judicial reviews applied by both the GC and the CJEU are deemed insufficient, all EU competition law cases could be appealed before the ECtHR pursuant to Article 6(1) of the ECHR and possibly Article 13 of the ECHR as well.<sup>43</sup>

Overall, it would be predictable that the EU shall accede into the ECHR. Hence, the issue of companies' fundamental rights in the competition enforcement is reflected in recent developments in the case law. Section III will subsequently examine whether the competition enforcement system is compatible with Article 6 (1) of the ECHR, by means of case law before the EU Courts and the ECtHR.

### **III. EU Competition Law Enforcement and Companies' Fundamental Rights Protection**

#### **1. Overview of EU Competition Enforcement System**

EU competition law provides a broad variety of institutional schemes for the public enforcement of Articles 101 and 102 of the TFEU at the levels of both the EU and the Member States.<sup>44</sup> The Commission has provided Guidelines outlining the methodology for setting the amount of fines.<sup>45</sup> Additionally, the Commission has published a Leniency Notice<sup>46</sup>, where it has commitments to give immunity from fines or reduction of fines in cartel cases to companies that provide cooperation with the Commission in voluntarily offering

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<sup>41</sup> Graells (n 39) 10.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

<sup>44</sup> Alison Jones and Brenda Sufrin, *EU Competition Law: Text, Cases and Materials* (4<sup>th</sup> edn OUP, 2011) 1026.

<sup>45</sup> Guideline on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003, [2006] OJ C 210/2.

<sup>46</sup> Notice on immunity from fines and reduction of fines in cartel cases [2006] OJ C298/17.

intelligence and/or evidence of antitrust infringements, according to the criteria stated in the Notice.

Pursuant to Article 23(2) of Regulation 1/2003, the Commission is able to make a decision on imposing fines on undertakings, which breach Articles 101 and 102 of the TFEU either intentionally or negligently. Article 23(3) of Regulation 1/2003 stipulates that in deciding the amount of fines, it is necessary to have regard to the gravity and the duration of the antitrust infringement. Owing to the wide discretion power of the Commission in complex economic assessments and the consequent inability of an appellant to engage in the Court's discussion on the merits of its economic arguments, it appears somehow questionable to assume that an investigative undertaking can possibly give an effective remedy for the injustice caused after the Commission's final decision.<sup>47</sup> However, in accordance with Article 263 of the TFEU stipulating that the legality of acts of the Commission shall be amenable to judicial review, while the Commission's decision is binding on the suspected undertakings, the undertakings are able to request an annulment of the decision before the GC.

The Commission carries out a combination of investigative, prosecutorial and adjudicative functions and acts as 'police, prosecutor and judge'.<sup>48</sup> All of these powers have led to a legal dispute in relation to Article 6(1) of the ECHR. The Commission's discretion powers, particularly in imposing fines, may constitute the notion of a 'criminal charge' as defined in that provision, and then would violate company defendants' procedural rights protection in EU antitrust proceedings. Accordingly, since the Commission is not an 'independent and impartial tribunal' and the ECtHR acknowledges that the Commission's decisions are subject to subsequent judicial control by a court that has full jurisdiction and provides the guarantees of Article 6 of the ECHR.<sup>49</sup>

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<sup>47</sup> Adrianna (n 37) 177.

<sup>48</sup> Ioannis Lianos and Arianna Andreangeli, 'Chapter 9: The European Union: The Competition Law System and the Union's Norms' in Eleanor Fox & Michael Trebilcock (eds) *The Design of Competition Law Institutions*, (OUP, 2012) 390.

<sup>49</sup> *Menarini Diagnostics v Italy* No 43509/09 [2011] paras 38-44 and 58-59.

## 2. Companies' Fundamental Rights to a Fair Trial

The nature of the competition proceeding has been broadly disputed. It is remarkable that this controversy was probed by the Opinion of the Commission on Human Rights in the *Stenuit* case.<sup>50</sup> The Opinion declared that fines imposed on undertakings by the administrative authority were criminal in nature, because of the nature and severity of the sanction.<sup>51</sup> Some studies at the 1990s had discussed the assessment of the nature and its compliance with the ECHR.<sup>52</sup> The debate explored the disputed competition proceedings in view of: firstly, how EU competition enforcement involving the imposition of a fine would relate to criminal charges within the broader autonomous concept in Article 6 of the ECHR, regardless of whether this proceeding is or is not categorised as criminal under EU law. Secondly, as the Commission is not an independent and impartial trial, its decisions are entitled to subsequent control by a judicial body that has full jurisdiction. The critical issue is therefore focused on whether the GC exercises full jurisdiction when reviewing the Commission's decisions.<sup>53</sup> In this section, this issue will be analysed based on these two streams delineated in the debate.

On the intention of the application of Article 6 of the ECHR, it is essential to understand whether or not the Commission's competition enforcement related to Articles 101 and 102 of the TFEU is criminal in nature. Although Article 23(5) of the Regulation 1/2003 indicates that decisions in which the Commission imposes fines on undertakings based on that regulation 'shall not be of a criminal law nature', this provision is not decisive in determining whether procedures pursuant to that regulation are of a criminal nature under the ECHR.

The ECtHR has developed the notion of a criminal charge as an autonomous concept that actually belongs to treaty law. Regarding the notion of 'criminal charge', the ECtHR implicated that the examination of a criminal charge relies on substantive factors, which are: 'the nature and severity of the offence

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<sup>50</sup> *Société Stenuit v France* No 11598/85 [1992].

<sup>51</sup> *Ibid.*

<sup>52</sup> Denis Waelbroeck and Denis Fosselard, 'Should the Decision-Making Power in EC Antitrust Procedures be left to an Independent Judge- The Impact of the European Convention of Human Rights on EC Antitrust Procedures?' in A Barav and D A Wyatt (eds) *1994 Yearbook of European Law* (Clarendon, 1995).

<sup>53</sup> *Ibid.*

and the penalty’ and ‘the purpose of the fine, for example, the intentions of sanctions are both deterrent and punitive’.<sup>54</sup> The *Engel* judgment established the ‘Engel Criteria’ - the classification of the offence under national law, the nature of the offence, and the nature and severity of the potential penalty. There is no implication of any specific degree of seriousness when assessing a criminal charge. However, the Engel Criteria provides a distinction between a serious and a minor criminal offence (such as tax surcharges or traffic offences).<sup>55</sup>

Additionally, from the *Le Compte, Van Leuven and de Meyere* judgment, the ECtHR has frequently upheld that the determination of civil rights and obligations or criminal offences within the meaning of Article 6 of the ECHR can be authorised by administrative proceedings.<sup>56</sup> The approach adopted in *Le Compte Van Leuven and de Meyere* stated that the concept of a determination of civil rights and obligations and the criminal offences should be given a substantive meaning.<sup>57</sup> Following this approach, the judgment concluded that Article 6(1) of the ECHR should be applicable to all proceedings, be they judicial or administrative.<sup>58</sup> Moreover, the stand adopted in *Stenuit* supports the argument that the Commission’s proceeding for the enforcement of antitrust cases can be assessed to be criminal in nature. It can therefore be concluded that the adoption of the ‘substantive’ test and its expansion to administrative processes in the area of minor criminal offence has allowed the ECtHR to extend the reach of Article 6(1) of the ECHR to a diversification of administrative proceedings.<sup>59</sup> As a result, when the Commission makes the decision to impose fines on companies, it becomes important to assure the companies’ rights of defence in administrative proceedings, as the rights are the standards of administrative fairness in the ECHR.<sup>60</sup> This significance can be exemplified by both of the *Jussila*<sup>61</sup> and *Menarini*<sup>62</sup> cases.

#### **a. Case Law**

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<sup>54</sup> *Schmautzer v Austria* No 15523/89 [1996].

<sup>55</sup> *Engel v Netherlands* No 5100/71, 5101/71, 5102/71, 5354/72, 5370/72 [1979-1980].

<sup>56</sup> *Le Compte, Van Leuven and de Meyere v Belgium* No 6878/75; 7238/75 [1982].

<sup>57</sup> *Ibid* para 45.

<sup>58</sup> *Ibid* para 47.

<sup>59</sup> *Arianna* (n 37) 30.

<sup>60</sup> *Ibid*.

<sup>61</sup> *Jussila v Finland* No 73053/01 [2011].

<sup>62</sup> *Menarini* (n 49).

The *Jussila* and *Menarini* cases are both prominent in respect of the interface between fines imposed by the Commission in competition proceedings and companies' fundamental rights protection. The *Jussila* judgment concerns with the field of companies' fundamental rights and its interplay with the EU competition enforcement. Therefore, it has an essential meaning. This is not only due to the facts of the case, but also because of the levying of fines, which relates to the discussion of competition law and the imposition of criminal penalties in the first instance by the Commission. The judgment of *Jussila* indicated that 'the autonomous interpretation adopted by the [ECHR] of the notion of a "criminal charge" by applying the *Engel* criteria have underpinned a gradual broadening of the criminal head to cases not strictly belonging to the traditional categories of the criminal law, for example administrative penalties [...]'.<sup>63</sup> Through this statement, the ECtHR reassured that fines levied on companies for infringements of competition law came within the broader and autonomous concept of 'criminal charge', yet the imposition does not fall under the hardcore criminal law. Accordingly, penalties infringing competition law are criminal within the wider autonomous meaning of Article 6 of the ECHR but differ from the hard-core criminal offences. The criminal-head guarantees provided by Article 6 of the ECHR do not necessarily apply with its full stringency outside the hard-core of criminal law.

In that regard, the matter that the Commission, which is not an independent and impartial tribunal, has the competence to make decisions and impose fines of criminal law nature may be inconsistent with the ECHR.<sup>64</sup> By contrast, according to *Öztürk*, it is compatible with Article 6 of the ECHR for criminal penalties to be imposed in the first instance by an administrative or non-judicial body that has both investigative and decision-making powers.<sup>65</sup> This is because there is a possibility of a judicial review that has full jurisdiction and the power to annul an administrative body's decisions, in all perspectives of facts and of law.<sup>66</sup>

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<sup>63</sup> *Jussila* (n 61) para 43.

<sup>64</sup> Themistoklis Giannakopoulos, *Safeguarding Companies' Rights in Competition and Anti-Dumping/ Anti-Subsidies Proceedings* (Kluwer International Law 2011) 25.

<sup>65</sup> *Öztürk v Germany* No 26138/95 recital 56.

<sup>66</sup> *Ibid.*

It is worth noting that, from the view of the compatibility of Article 6(1) of the ECHR with a decision by an administrative body that has integrated powers, the *Jussila* case takes the *Bendenoun* and *Janosevic* judgments as a reference. In both the *Bendenoun*<sup>67</sup> and *Janosevic*<sup>68</sup> cases, the ECtHR put a further extent than *Öztürk*. The Court declared that the authorization of prosecution and punishment to an administrative body is compatible with the ECHR, even the imposition of criminal penalties lead to a substantial amount of fines.<sup>69</sup> Nonetheless, this implication contradicts the argument provided by some scholars that an administrative first-instance decision would merely be acceptable for minor infringements.<sup>70</sup>

With regard to the judgment in *Menarini*, it also directly concerns companies' right to a fair trial in the competition enforcement system in Italy. *Menarini* is a company that was sanctioned for an infringement of Italian competition law. The Italian competition authority, acting in a similar manner to the Commission, holds both investigatory and first-instance decision-making powers. *Menarini* complained that the Italian administrative courts, which had heard its appeal against the Italian competition authority had not exercised full jurisdiction.

As in the ruling of the *Jussila* judgment, the ECtHR confirmed that the challenged competition proceedings concerning fines in *Menarini* fell under the criminal head of Article 6 of the ECHR. The provision does not reject a first-instance decision on fines by an administrative body, although the authority is not an independent and impartial tribunal established by law. This is because there is a potential for appeal before a judicial body that has full jurisdiction to quash in various perspectives of the decisions of an administrative body, such as on questions of facts and law. As a consequence, the ECtHR indicated in the judgment that the Italian administrative courts had exercised such full jurisdiction.

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<sup>67</sup> *Bendenoun v France* (Application no. 12547/86).

<sup>68</sup> *Janosevic v Sweden* (Application no. 34619/97).

<sup>69</sup> See *Ibid* recital 81, and *Bendenoun* (n 67) recital 46.

<sup>70</sup> For instance, Arianna Andreangeli, Onno Brouwer et al, 'Chapter 3: Enforcement by the Commission- The Decisional and Enforcement Structure in Antitrust Cases and the Commission's Fining System' in Massimo Merola and Denis Waelbroeck (eds) *Towards an Optimal Enforcement of Competition Rules in Europe- Time for a Revision of Regulation I/2003?* (Bruylant 2010).

To conclude, it is clear that Article 6(1) of the ECHR, as interpreted by the ECtHR in both the *Jussila* and *Menarini* cases, does not require amending the EU enforcement system. However, it is essential to examine the scope and intensity of the GC's jurisdiction in the cases of fines in the competition enforcement, on the grounds that this kind of case involves complex economic assessments, which belong to the Commission's discretionary powers.

### **b. Judicial Review as the Right to a Fair Trial**

Jurisprudence of the ECtHR as aforementioned has established that the right to a fair trial and due process before an impartial and independent tribunal in civil procedures does not preclude some cases of an administrative or professional disciplinary nature from being determined by an administrative body at the first instance, as long as they are ultimately subject to judicial review.<sup>71</sup>

Most arguments have been established on the basis of the first paragraph of Article 6 of the ECHR.<sup>72</sup> The frequent claims are that competition decisions involve the determination of civil rights and obligations, and that due to the combination of its functions, the Commission is not an “independent and impartial tribunal” as Article 6 of the ECHR clearly requires.<sup>73</sup> The allegation continues on that, although the Commission does not meet the meaning of ‘independent and impartial tribunal’, it is a *de facto* tribunal since its decisions are binding even if appealed before the GC.

This outcome can firstly be evaluated by means of the rulings of the *KME*<sup>74</sup> and *Chalkor*<sup>75</sup> cases. The KME was sanctioned approximately 40 million

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<sup>71</sup> See the case study of *Menarini* and *Jussila* in Section III. 2. a.

<sup>72</sup> See in general, Ian Forrester, ‘Due Process in EC Competition Cases: A Distinguished Institution with Flawed Procedure’ (2009) 34 *European Law Review* 817, and ‘A Challenge for Europe’s Judges: The Review of Fines in Competition Cases’ (2011) 36 *European Law Review* 185.

<sup>73</sup> Nicolo Zingales, ‘The Hearing Officer in EU Competition Law Proceedings: Ensuring Full Respects for the Right to be Heard?’ 2010 7(1) *The Competition Law Review* 130.

<sup>74</sup> KME (n 12).

<sup>75</sup> Chalkor (n 13).

Euros for its participation in a copper tubes cartel. On its appeal to the CJEU, KME complained that the GC permitted excessive discretion to the Commission. Advocate-General Sharpton pointed out that KME's appeal was in fact focused on challenging the scope of judicial review, and it argued that the amount of fine was too high. Following this claim, she had examined whether or not the EU Courts had 'unlimited jurisdiction' in reviewing fines. She concluded that the scope and intensity of jurisdiction that the EU Courts exercised were compatible with the full jurisdiction required under Article 6 of the ECHR.<sup>76</sup>

In *KME*, the CJEU held that there indeed is a judicial review under Article 263 of the TFEU. The unlimited jurisdiction of the Court to review the Commission's penalties in respect of Article 261 of the TFEU is consistent with the requirements of the principle of effective judicial protection in Article 47 of the EUCFR.<sup>77</sup> The CJEU followed and adopted a similar approach in *Chalkor*. The judgment of *Chalkor* stated that even though the GC had mentioned that the Commission's discretion was wide or substantial, this did not prevent the GC from exercising an unlimited and unrestricted review of the law and facts.<sup>78</sup>

However in *Otis and Others*<sup>79</sup>, the CJEU considered the judicial review of legality under Article 263 of the TFEU in the sphere of competition law to be insufficient, owing to the margin discretion that the EU Courts leave to the Commission in dealing with economic matters.<sup>80</sup> The Court concluded that the kind of judicial review outlined by the TFEU still complies with the principle of effective judicial protection in Article 47 of the EUCFR.<sup>81</sup> In such a conclusion, the Court confirmed that in areas of complex economic assessments, the Commission has a margin of discretion with regard to economic matters. The EU Courts cannot carry out the Commission's margin of discretion, as the method and criteria delineating the powers are mentioned in the Commission's fining guidelines.<sup>82</sup> It also added that this respect for the Commission's discretion does not mean that the EU Courts must be

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<sup>76</sup> KME AG Sharpton Opinion.

<sup>77</sup> KME (n 12) para 133.

<sup>78</sup> Chalkor (n 13) para 109.

<sup>79</sup> C 199/11 *Europese Gemeenschap v Otis and Others*.

<sup>80</sup> Ibid para 58.

<sup>81</sup> Otis and Others (n 79) para 59.

<sup>82</sup> Otis and Others (n 79) para 61.

prohibited from reviewing the Commission's interpretation when assessing economic matters. The EU Courts must examine not only whether the reliance of economic evidence is accurate and reliable, but also whether the evidence contains all the information in order to assess a complex situation. It is therefore capable of substantiating the conclusion.<sup>83</sup>

In view of effective judicial protection in competition enforcement, EU competition law has provided for the unlimited jurisdiction to review the Commission's decisions concerning the gravity of fines or periodic penalty payments in Article 31 of Regulation 1/2003. In addition, Articles 261 and 263 of the TFEU can both be demonstrated to give the full jurisdiction in competition matters, in particular the cases of imposing fines. The control of legality under Article 263 of the TFEU may be viewed as a comprehensive method to review the facts and law, and the purpose of this provision is to ensure the protection of citizen's rights. Fines in competition enforcement are entitled to unlimited jurisdiction, pursuant to Article 31 of Regulation 1/2003 in a relationship to Article 261 of the TFEU. In other words, these two provisions of the TFEU and Article 31 of Regulation 1/2003 have empowered the GC and the CJEU to review the Commission's decisions in competition cases, particularly in terms of the legality of the Commission's decisions dealing with fines.

Such a legal effect has put further for the discussion concerning fair trial requirement of Article 6 of the ECHR and the Commission's role in carrying out the enforcement. This discourse between EU competition enforcement and the role of the EU Courts in terms of their judicial review as a company's fair trial protection has also been at the core of EU competition law. Given this critical issue, the subsequent content will analyse the scope and intensity of the judicial review that the EU Courts can exercise, while ruling on the antitrust cases.<sup>84</sup>

### **c. Judicial Review and the Commission's Complex Economic Assessment**

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<sup>83</sup> Otis and Others (n 79) para 59.

<sup>84</sup> José Carlos Laguna De Paz 'Judicial Review in European Competition Law' (2012) 5 <<http://intranet.law.ox.ac.uk/ckfinder/userfiles/files/JUDICIAL%20REVIEW%20IN%20EUROPEAN%20COMPETITION%20LAW.pdf>> accessed 26 September 2016.

The judicial review of the amounts of fines in antitrust cases is more in-depth, because of the relationship between Article 261 of the TFEU and Article 31 of Regulation 1/2003.<sup>85</sup> However, following the ruling of the *Otis and others*, the EU Courts cannot use the Commission's discretion power, which is usually related to a complex economic appraisal, and therefore the Courts would have a marginal review.<sup>86</sup> This lighter scope and intensity of review consequently constitutes a doctrine of judicial deference of the EU Courts.<sup>87</sup> In fact, the EU Courts have shown its utmost judicial deference to the Commission in the cases of the commitments.<sup>88</sup> The *Alrosa* case concerns the Commission's decision object to commitments pursuant to Article 9 of Regulation 1/2003. The CJEU upheld the manifest error test, and it had left the Commission a wide margin of discretion when deciding whether or not to accept commitments. However, this case of decisions concerning the imposition of fines for infringements of Articles 101 and 102 of the TFEU is fundamentally different from the commitments.<sup>89</sup>

The Commission has the decision-making power to carry out a complex economic appraisal in the infringements of Articles 101 and 102 of the TFEU. It follows that the loss of this decision-making power may be problematic as it undermines the authority's policy-making functions.<sup>90</sup> As a consequence, an introduction of a marginal review is generated, when the EU Courts examine elements and factors of the Commission's decisions that have been adopted in consideration of a margin of appreciation that the decision-maker legally holds. The EU Courts would thus restrain themselves to justifying whether the Commission's acts have been compliant with the procedural rules and whether there have been any manifest errors.<sup>91</sup> It could be argued that the marginal review of the EU Courts is focused on two main issues: reviewing

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<sup>85</sup> *Ioannis and Adriana* (n 48) 401.

<sup>86</sup> *Otis and other* (n 81) para 59.

<sup>87</sup> Marc Jaeger, 'The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of the Marginal Review?' (2011) 2(4) *Journal of European Competition Law and Practice* 300.

<sup>88</sup> *Ibid* 304.

<sup>89</sup> C 441/07 P, *Alrosa Company Ltd v Commission* paras 63 and 64. Advocate General Kokott's Opinion para 81.

<sup>90</sup> Marco Bronckers and Anne Vallery, 'Fair and Effective Competition policy in the EU: Which Role for Authorities and Which Role for the Courts after Menarini?' (2012) 8(2) *European Competition Journal* 297.

<sup>91</sup> Jaeger (n 88) 296.

the finding of infringements and reviewing the amount of fines by the Commission. This article will therefore evaluate to what extent the EU Courts are entitled to control the decisions from these two perspectives.

Firstly, regarding the marginal review of infringing Article 101(1) of the TFEU, according to *Remia*, judicial review would be restricted to justifying whether the statement of reasons for the decision is appropriate, as well as assessing whether there has been a manifest error of appraisal or a misuse of powers.<sup>92</sup> It is notable that the identical standard of judicial review has also been applied to exemption decisions under Article 101(3) of the TFEU based on *Van den Bergh*.

This marginal review was extended to Article 102 of the TFEU which assesses where there is an abuse of dominance as well. For instance, in *Microsoft*<sup>93</sup> and *AstraZeneca*<sup>94</sup>, the GC had to review the definition of the market on which the existence of a dominant position would be determined. The GC applied the marginal review in respect of the Commission's analysis relating to the abuse. The Court referred to the *Deutsche Telekom*<sup>95</sup> and the *Wanadoo*<sup>96</sup> cases and ruled that the calculations of margin squeeze and recovery of costs of predatory pricing on markets were upraised to the Commission's discretionary power to carry out complex economic assessments.<sup>97</sup>

With respect to reviewing the amount of fines, the Commission has a considerable margin of discretion according to Regulation 1/2003, the Fining Guidelines and Leniency Notice and the case law of the Commission. This broad margin of discretion may contradict with the GC's unlimited jurisdiction under Article 261 of the TFEU and Article 31 of Regulation 1/2003. This unlimited jurisdiction legalises the GC to reduce, increase or cancel the fines. Although many companies appealed to the CJEU that the GC had failed to exercise its unlimited jurisdiction in dealing with the Commission's discretion regarding the amount of fines, the CJEU ruled in both the *Chalkor* and *Schindler* cases that the GC cannot substitute the

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<sup>92</sup> C 42/84 *Remia v Commission* para 26.

<sup>93</sup> T 201/04 *Microsoft v Commission* para 30-35.

<sup>94</sup> T 321/05 *AstraZeneca v Commission* para 30-31.

<sup>95</sup> C 280/08 P *Deutsche Telekom v Commission* para 143.

<sup>96</sup> T 340/03 *France Télécom v Commission* paras 129 and 163, upheld by C 202/07 P.

<sup>97</sup> Jaeger (n 91) 298-300.

Commission, on the grounds that the application of the Fining Guidelines and the Leniency Notice both belong within the Commission's margin of discretion.<sup>98</sup>

To sum up, provided in *Menarini*, it is clear that the decisive factor for the compliance with Article 6(1) of the ECHR is whether or not the judicial body actually exercises its full jurisdiction when reviewing the administrative first-instance decision.<sup>99</sup> In view of the case law of the CJEU, it is admitted that the GC did not infringe the right to a fair trial protected by Article 6(1) of the ECHR.<sup>100</sup> In other words, this indeed complies with the principle of effective judicial protection by the GC, because the Court has in fact exercised a comprehensive review of the law and of the facts, and the complex economic assessment does not fall within the scope of the Court's judicial review. Section IV will provide a further analysis concerning the scope and intensity of the GC's judicial review.

### 3. Companies' Fundamental Rights to be Heard

There are a number of procedural rights and safeguards, which are derived from the EUCFR, restricting the Commission's powers of investigation. Good administration, or due process guarantees, is one of the procedural rights standards protected in Article 41 paragraph 2 (a) of the EUCFR. The due process guarantees support the proposition that the Commission carries a general duty to undertake a fair and impartial examination in dealing with complaints.<sup>101</sup> These procedural rights turn to be more and more essential and appear to establish a significant principle of fundamental rights protection in the EU competition enforcement.<sup>102</sup> For example, as to show the respect for the rights of defence, in *Orkem*, the CJEU ruled that the Commission cannot force undertakings to admit that they have constituted antitrust infringements of Articles 101 and 102 of the TFEU.<sup>103</sup> Moreover, the *Nexans* case affirmed

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<sup>98</sup> Chalkor (n 13) para 62 and C 501/11 P *Schindler v Commission*.

<sup>99</sup> *Menarini* (n 49) para 60-67.

<sup>100</sup> *Ibid* and Chalkor (n 13) para 51-52 and 67.

<sup>101</sup> *Tridimas* (n 10).

<sup>102</sup> Wouter Wils, 'Powers of Investigation and Procedural Rights and Guarantees in EU Antitrust Enforcement: The Interplay between European and National Legislation and Case-Law' (2006) 29(1) *World Competition* 15.

<sup>103</sup> C 374/87 *Orkem v Commission* paras 32-34.

the guarantees of companies' fundamental rights to defence in the Commission's inspection.<sup>104</sup>

In the context of EU law, it would be difficult to provide a clear account of the notion defining due process guarantees.<sup>105</sup> However, the due process rights could be established within the principle of natural justice of *audi alteram partem*.<sup>106</sup> The case law of the EU Courts consequently states that the rule of *audi alteram partem* has acquired the status of "objective or absolute standard of good administration".<sup>107</sup> It is recognised that there is no general applicable framework of fair administrative procedures stipulated either by the EU treaties or by the legislature, albeit a number of rules of procedures have been dictated by EU law in specific areas.<sup>108</sup> Nevertheless, early in *Hoffmann-La Roche* the CJEU indicated that a fundamental principle of EU law is the recognition of the due process rights in administrative proceedings that possibly result in sanctions.<sup>109</sup> The CJEU further upheld that companies' fundamental rights of defence expand to the Commission's preliminary investigation procedures.<sup>110</sup>

Among these procedural protections, the significance of the right to be heard as related to companies' fundamental rights in the EU competition enforcement system has vastly developed and therefore drawn the attention.<sup>111</sup> The Commission's practice proved that the right to be heard has become an essential component of the rights of defence of the suspected companies. Furthermore, the kind of rights of defence has led to a particular responsibility imposed on the Commission to 'observe the procedural safeguards provided for by EU law'.<sup>112</sup>

In view of the case law, the *National Panasonic* case was involved in a claim by National Panasonic for the validity of the Commission's competition

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<sup>104</sup> T-135/09 *Nexans v Commission* para 3.

<sup>105</sup> See *Lianos & Andreangeli* (n 48), 407.

<sup>106</sup> *Arianna* (n 37) 32.

<sup>107</sup> *Arianna* (n 37) 34.

<sup>108</sup> *Lianos and Andreangeli* (n105).

<sup>109</sup> Case 85/76 *Hoffmann-La Roche v Commission* p511.

<sup>110</sup> Joint Cases 97-99/87 *Dow Chemical Ibérica* para 12; Case 85/87 *Dow Benelux v Commission* para 3.

<sup>111</sup> *Tridimas* (n 10) 395.

<sup>112</sup> *Arianna* (n 37) 38.

inspections at its office and a request for the return of the documents taken from its premises. Another issue in this case concerns whether or not the Commission's action violated the companies' right to be heard within an inspection process.<sup>113</sup> In the judgment of *National Panasonic*, the CJEU held that between the Commission's decisions taken in the exercise of investigatory powers and those taken to terminate an infringement, there is a substantive difference.<sup>114</sup> The distinction stated by the CJEU is that the inspections processed by the Commission carry the intention to enable it to collect the necessary evidence so as to assess the real existence and scope of a given legal and factual situation. Hence, the Commission is not required to carry out a communication with the undertaking before reaching a decision ordering an investigation, as not to affect the lawfulness of the information collected.<sup>115</sup>

The judgment additionally stated that, with regard to the validity of the Commission's investigation and the companies' fundamental rights, provisions related to investigatory decisions under Articles 18 and 20 of Regulation 1/2003 may be carried out by the Commission without having to uphold the investigated undertakings' right to be heard. This implies that the due process rights are not affected in respect of investigated powers, since the Commission is only focused on the 'collection of the necessary information'.<sup>116</sup>

Having discussed the *National Panasonic* case, this does not necessarily illustrate that the principle of due process cannot be applied in the enforcement system of Articles 18 and 20 of Regulation 1/2003. In other words, the assessments of these provisions will concern whether or not there are procedural rights and safeguards applicable to suspected undertakings, inasmuch as administrative due process principles are enshrined in the ECHR.<sup>117</sup>

Despite the debate for an overprotected procedural rights in competition enforcement, it could be contested that there is a rather limited possibility to

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<sup>113</sup> Case 136/79 *National Panasonic v Commission* [1980].

<sup>114</sup> *Ibid.*, para 21.

<sup>115</sup> *National Panasonic* (n 113) para 17-22.

<sup>116</sup> *Ibid.*

<sup>117</sup> Sophia Kulevska, 'Corporate Human Rights Protection in Light of Effective Competition Law Enforcement' (Master Thesis, Faculty of Law Lund University 2011) 26-27.

have access to the oral hearing. Such limitation results in several concerns.<sup>118</sup> The cases in which third parties are involved in for a clarification and further examination of complaints can demonstrate the problematic issues. Accordingly, *Alrosa* is a recent case concerning the third party's right to be heard.<sup>119</sup> *Alrosa* was not a simple interested third party in the case, yet it was the party having a contractual relationship with De Beers in a long term. The CJEU analysed *Alrosa*'s rights to be heard in the administrative proceeding. Accordingly, it held that *Alrosa* should have been considered as an 'undertaking concerned'.<sup>120</sup> Having been widely recognised by EU law, the right to be heard is a general principle of the law in all kinds of proceedings, and such a right is liable to terminate a measure which may affect the person in question.<sup>121</sup> Because the Commission had altered its mind, after having published draft commitments which it had been ready to accept, the Commission carried a responsibility to hear the parties' comments on the observations of third parties. Moreover, the Commission is able to change its mind only if the facts had altered or its initial assessment was established on wrongful information. Therefore, the CJEU upheld that *Alrosa* had a right to be heard on the extra commitment offered by De Beers, and *Alrosa* had not been granted such a right completely.<sup>122</sup>

To conclude, the implication of the *National Panasonic* and *Alrosa* cases is that due process rights in competition proceedings are considered important.<sup>123</sup> The *National Panasonic* judgment indicated that companies' fundamental rights to be heard should be protected only in the circumstance to terminate an infringement. However, this does not mean that due process rights cannot be applied in Articles 18 or 20 of Regulation 1/2003. Indeed, due process guarantees play an essential role in EU competition enforcement scheme as to protect company defendants. Although the protection of the right to be heard seems sufficient, there are some issues regarding the completeness of the statement of objection and the involvement of the Hearing Officer in

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<sup>118</sup> *Arianna* (n 37) 40-41.

<sup>119</sup> *Alrosa* (n 89).

<sup>120</sup> *Ibid*, para 88.

<sup>121</sup> *Tridimas* (n 10) 371.

<sup>122</sup> See the detailed case study and comments by John Temple Lang, 'Commitments Decisions Under Regulation 1/2003' in Charles Gheur and Nicolas Petit (eds) *Alternative Enforcement Techniques in EC Competition Law* (Bruylant, 2009) 132.

<sup>123</sup> *Ibid* 131.

antitrust cases.<sup>124</sup> The matter of contentions will be evaluated in the next section.

#### **IV. Legal Analysis and an Outlook**

As discussed in Section III on the companies' fundamental rights protection within competition proceedings, it may be concluded that the Commission is permitted by the ECHR and the EU treaties to act both as an investigator and as a decision maker. However, this permission from the case law does not indicate that the Commission is able to unrestrictedly carry out its investigatory and decision-making powers. A number of internal checks and procedural guarantees have illustrated their functions in protecting fairness in the EU administrative proceedings. They can be exemplified by, firstly, Regulation 773/2004 and other procedural rights guarantees, such as the best practice guidelines on competition proceedings that have all bound the Commission's enforcement abilities. Secondly, the possibility of the GC exercising its full jurisdiction concerning fines in competition enforcement constrains the Commission's powers. In this section, the current practice and debates regarding these two main contentions will be evaluated in this article.

##### **1. Ensuring Full Respect for a Fair Hearing**

In the context of protecting the right to be heard, Article 14(1) of Regulation 773/2004 provides that hearings shall be conducted by a fully independent Hearing Officer. The role of Hearing Officer was established in 1982, and it has dramatically changed in the last decade.<sup>125</sup> The essential function of the Hearing Officer is to contribute to the impartiality, objectivity, transparency and efficiency of the competition proceedings, by giving the Hearing officer competences and responsibilities to ensure the concerned undertakings' rights

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<sup>124</sup> Arianna (n 37) p31.

<sup>125</sup> Michael Albers and Jérémie Jourdan 'The Role of Hearing Officer in EU Competition Proceedings: A Historical and Practical Perspective' 2(3) *Journal of European Competition Law and Practice* (2011) 188.

to be heard.<sup>126</sup> Therefore, he or she can not only conduct the oral hearing, but also is also empowered to exercise a full review of the Commission's investigation team's decision, and modify it if necessary.<sup>127</sup> The New Hearing Officer Mandate in 2011 has demonstrated the power of protecting companies' rights in procedural matters between the Commission's investigation team and suspected undertakings and the third parties subject to the proceedings.<sup>128</sup>

In addition to the Hearing Officer's important function in protecting the procedural rights, the creation in 2011 of the Commission's Best Practices Package on the proceedings concerning the application of antitrust and merger cases has brought about numerous benefits. The Commission has published the Best Practices in antitrust proceedings of Articles 101 and 102 of the TFEU,<sup>129</sup> Best Practices on submission of economic evidence (hereafter collectively referred to as "Best Practices Package").<sup>130</sup> The purposes of these new measures are to strengthen procedural guarantees and transparency, while respecting for the need for efficient enforcement proceedings. In line with the Best Practices Package, the Hearing Officer provided a plain classification for two dissimilar types of procedural rights protection during the competition proceedings. There are two kinds of procedural guarantees in this Best Practices Package. The first category focuses on the rights of defence, which concern the truth and relevance of the facts and the documents used by the Commission for inspection.<sup>131</sup> The second category is related to procedural rights of complainants.<sup>132</sup> The right to a fair hearing as well as the right to a fair trial derived from the protection of the EUCFR, are both within the group of rights of defence and therefore compliant with the general principle of EU law.<sup>133</sup> Although the Best Practices Packages does not change the Commission, it has led to a number

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<sup>126</sup> Ibid.

<sup>127</sup> See Albers and Jourdan (n 125) 186.

<sup>128</sup> Decision on the function and terms of reference of the hearing officer in certain competition proceedings [2011] OJ 275/29 (New Hearing Officer Mandate).

<sup>129</sup> Commission Notice on Best Practices for the conduct of Proceedings concerning Articles 101 and 102 TFEU [2011] OJ C 308/06 (Best Practice Notice).

<sup>130</sup> DG Competition, Best Practice for the Submission of Economic Evidence and Data Collection in Cases Concerning the Application of Articles 101 and 102 TFEU and in Merger Cases.

<sup>131</sup> Guidance on procedures of the Hearing Officers, para 4.

<sup>132</sup> Ibid.

<sup>133</sup> Zingales (n 73) p143.

of changes in its previous practice.<sup>134</sup> It could therefore be concluded that the Best Practices Packages provides more certainty and transparency, and it delineates clearer stages and phases to the competition proceedings.<sup>135</sup>

Despite the full independence of Hearing Officer and the advantages of the Best Practice Package, the current framework of oral hearing raises a lot of issues. Many competition law practitioners suggest for strengthening the Hearing Officer's function to ensure a full respect for a fair hearing.<sup>136</sup> Several stakeholders of companies have claimed for an earlier and wider Hearing Officer's involvement, while the others advocated for improving the transparency of the competition proceedings. In response to these requests, Albers and Jourdan provided a neutral opinion which did not take sides, yet emphasised the significance of the EUCFR.<sup>137</sup> They pointed out that due to the envisaged EU's accession to the ECHR, the competition procedure shall change to show respect for the increased fundamental rights protection.<sup>138</sup> In my opinion, this concluding remark is convincing, for the reason that the development of numerous policies in competition law is in support of fundamental rights protection in the EU. As there is few judgment questioning the competition law procedure, this argument would let the EU Courts reconsider its current case law.<sup>139</sup>

## **2. The Scope and Intensity of the GC's Judicial Review**

There is increased criticism of the EU competition enforcement and review mechanisms applicable at the level of the EU, from the perspectives of the institutional hierarchy of the Commission and the potential for judicial review of its decisions in competition cases before the EU Courts. In other words, due to the institutional design and the concurrent powers of investigation and decision-making in the Commission concerning Regulation 1/2003, it could be argued that the Commission as an institution does not uphold the standards of Article 6(1) of the ECHR for a 'fair and public hearing within a reasonable

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<sup>134</sup> Anne MacGregor & Bogdan Gecic 'Due Process in EU Competition Cases Following the Introduction of the New Best Practices Guidelines on Antitrust Proceedings' (2012) 3(5) *Journal of European Competition Law and Practices* 433.

<sup>135</sup> *Ibid.*

<sup>136</sup> Albers and Jourdan (n 125) 199.

<sup>137</sup> *Ibid.* 200.

<sup>138</sup> *Ibid.*

<sup>139</sup> *Ibid.*

time by an independent and impartial tribunal established by law'.<sup>140</sup> Commentators advised that the full jurisdictional control exercised by the EU courts over an interpretation of law derives from their function that is within the institutional framework of the EU. Review of law thus gives power to the GC to interpret the law and then assess whether the legal principles are correctly applied by the Commission to cases.<sup>141</sup>

By contrast, if the competition cases appealed by the companies challenge the Commission's complex economic assessments, the EU courts may become less forceful. In the case, *Società Italiana Vetro SpA and Others*<sup>142</sup>, the GC provided a reserved stand and ruled that if any further extensive powers of review were conferred to the court, this extension could interrupt the balance among the EU institutions and would therefore run the risk of prejudicing the companies' rights of defence.<sup>143</sup> One academic opinion claimed that although the Court must be empowered to review the legality of the Commission's decisions, it cannot displace the role of the Commission as the administrative body which is authorised with particular and specific powers and expertise.<sup>144</sup> In addition, the principle of separation of powers demonstrates that the function of the EU Courts is to review, not to substitute, administrative authorities' decisions.<sup>145</sup> The Commission is thus responsible for carrying out the complex economic assessments required by the enforcement of competition law in the EU.<sup>146</sup> The Commission's appraisal of facts will be raised into question only if there has been a manifest error of assessment, the facts in competition cases have not been precisely stated or there has been any misuse of powers.<sup>147</sup>

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<sup>140</sup> Graells (n41) p3.

<sup>141</sup> Vesterdorf 'Standard of Proof in Merger Cases: Reflections in the light of recent case law of the Community Courts' 1(1) European Competition Journal 12 cited in Arianna (n 37) 166.

<sup>142</sup> T 68, 77-78/ 89 *Società Italiana Vetro SpA and Others v Commission* [1992].

<sup>143</sup> Ibid, para 319.

<sup>144</sup> Laguna De Paz (n 84) 15.

<sup>145</sup> Heike Schweitzer 'The European Competition Law Enforcement System and the Evolution of Judicial Review' in Ehlermann, Claus-Dieter and Marquis, Mel (eds) *European Competition Law Annual 2009: Evaluation of Evidence and its Judicial Review in Competition Cases* (Hart Publishing 2011) 33-35.

<sup>146</sup> Arianna (n 37) 167.

<sup>147</sup> Cases 142/84 and 156/84 *British American Tobacco Co Ltd and RJ Reynolds Industries Inc v Commission* para 104.

With a view to the case law, it appears justifiable to argue that there is the necessity to guarantee the administrative power within the EU institutional framework and the nature of competition enforcement as requiring ‘complex economic assessments’. Consequently, the EU courts would exercise a limited review of the assessment of the evidence conducted by the Commission.<sup>148</sup> Nonetheless, this concluding approach has led to the criticism that the components of a complex economic assessment might be unclear. In particular, while the Commission did not succeed in providing an adequate statement of reasons to support its decision, this situation caused an argument that the procedural and the substantial factors may be so actively connected as to become interdependent.<sup>149</sup>

However, even if the Commission does not qualify the standards of an ‘independent and impartial tribunal’, this should not be automatically considered as an adequate justification for any major alterations in the enforcement scheme of EU competition law. Pursuant to the standard interpretation of Article 6(1) of the ECHR, the requirement for a ‘fair and public hearing within a reasonable time by an independent and impartial tribunal established by law’ does not need to be met in the first instance, when an administrative body makes the initial decision by levying fines (even if they fall within the concept of ‘criminal charge’ under the ECHR).<sup>150</sup> Article 6(1) of the ECHR stipulates that the guarantees would be supported if the initial conviction can be evaluated before an institution qualifying the standards of Article 6(1) that can be evaluated before an institution qualifying the standards of Article 6(1) that can examine it on the merits of both the law and the facts. GRAELLS argues that this is in compliance with Article 13 of the ECHR as well, on the grounds that the available access to judicial review constitutes an effective remedy confronting any possible infringements of the fundamental rights of the companies concerning the conviction in the investigation led by the Commission.<sup>151</sup>

One may consider that whether or not the current competition enforcement system shall be modified. In view of the evolving case law in the judgments

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<sup>148</sup> Ibid.

<sup>149</sup> T 68, 77-78/ 89 *Società Italiana Vetro SpA and Others v Commission* (n 143) para 95.

<sup>150</sup> Graells (n 41) 3.

<sup>151</sup> Ibid.

of *KME*<sup>152</sup> and *Chalkor*<sup>153</sup>, the answer to whether any changes to the review of EU competition enforcement scheme are required for the compliance with Article 6(1) of the ECHR has been in tentatively negative tone.<sup>154</sup> From the perspective of the CJEU, since the review before the EU Courts includes the review of law and facts, which means the Courts have the power to annul the Commission's decisions and change the amount of fines, this implies that EU competition law is in accordance with Article 47 of the EUCFR and that there is no infringement of the standard of effective judicial protection in that provision. Moreover, in the current enforcement system, there are already sufficient guarantees of undertakings' due process rights in investigations of competition matters. As a consequence, in Graells' point of view, he claims that it is unnecessary to set up a more protective enforcement scheme, and he also states that there is sufficiency in the scope or intensity of judicial review in EU competition law cases.<sup>155</sup>

Nonetheless, one discussion<sup>156</sup> stemming from the implication of the *Menarini* judgment focused on whether or not the EU Courts really obtain 'full jurisdiction' in respect of the Commission's decisions to impose fines to cancel, reduce or increase the fines. In fact, executive institutions have some policy discretion, at least within the scope that they are granted by the legislature. By contrast, if the Commission exercises its discretionary power to decide a criminal penalty, this would be unacceptable from a perspective of fundamental rights. Subsequently, as the legality of a competition law fine relies on the full review by a court, an important issue arose: whether or not an appeal to the court should have an effect to suspend the obligation to pay the fine. More specifically, if an administrative criminal sanction is enforced without reviewing by a court, there is a question regarding whether this is consistent with the standard set out in Article 6 of the ECHR.

Following the opinion above, it takes issue with Graells' argument related to the lack of necessity for changes in the current enforcement scheme.<sup>157</sup> This position implies that certain aspects of the current set-up are difficult to accord with a fair trial. Regarding the high-fine imposition cases, some

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<sup>152</sup> *KME* (n12).

<sup>153</sup> *Chalkor* (n13).

<sup>154</sup> Graells (n 41) p4.

<sup>155</sup> Graells (n 41) p5.

<sup>156</sup> Bronckers and Vallery (n90) 283.

<sup>157</sup> *Ibid.*

scholars argued that since the Commissioners are not judges and the Commission itself is not a tribunal, there seems no opportunity to carry out the right to cross-examine and other rights usually protected in criminal law proceedings.<sup>158</sup> Although Article 14(1) of the Implementing Regulation provides an oral hearing as an internal guarantee to avoid the Commission's manifest error, the issue is that this hearing is not compulsory. Moreover, the position of the Hearing Officer does not separate from the Commission. Given that the Commission actually has the competition policy to defend and to win the antitrust cases, it is thus difficult to accept that the Commission having such internal policy could set an effective brake on these inherent biases, while making decisions on fine sanction. Furthermore, suspected companies would face the fear of severe fines, and they are unable to appeal their case prior to the first-instance decision.<sup>159</sup>

As a result, should the Commission's power to issue criminal sanctions be condemned as contrary to the principles of a fair trial, and should a transfer of decision-making power to the courts be required, it would be impossible to distinguish between efficient and inefficient judiciaries in the EU. Prior to expanding this fundamental rights argument to the widest scope, it seems necessary to make sure that courts in the EU as a whole are ready to enforce competition law. In other words, an approximation of fairness for a transitional period might have to be accepted, with improvements being implemented to the administrative process, so as not to jeopardise the effectiveness of competition law.<sup>160</sup> Simultaneously, in those countries where courts operate effectively, a transfer of decision-making power from the competition authorities to the courts could have already been put in motion. Indeed, this is a change from the initial set-up of EU competition enforcement system.

It could therefore be concluded that changes in competition enforcement seem unnecessary. However, many academics have discussed the advantages of establishing a professional and independent competition law court.<sup>161</sup> The creation and development of the UK's Competition Appeal Tribunal, which is a specialised administrative body, has subsequently been evaluated. The

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<sup>158</sup> Lianos and Andreangeli (n 48) 413.

<sup>159</sup> Ibid p297.

<sup>160</sup> Ibid.

<sup>161</sup> Graells (n 39) 11.

decisions of the Competition and Markets Authority can be appealed to the Tribunal, which carries out a review on fines as well as a control of legality, of merger decisions.<sup>162</sup> Nonetheless, it may be contested that whether Article 257 of the TFEU empowers to establish an EU competition court.<sup>163</sup>

### **3. Balance between Effective Enforcement and Companies' Procedural Rights**

Having regard to the analysis above, it might be admitted that companies' rights in competition proceedings are protected and this practice has met the requirement under Article 6(1) of the ECHR. The judicial deference may benefit the Commission's enforcement, yet an issue related to the maintenance of the current judicial review occurs.<sup>164</sup> Furthermore, one may need to think of the balance between the effective enforcement and the sufficient protection of fundamental rights. This article would support a more effective enforcement, which benefits the market and consumers.

Firstly, there is an emerging debate concerning the extent and intensity to which companies' rights have not been excessively protected in competition enforcement system.<sup>165</sup> Commentators have claimed that granting a complete due process guarantee to companies is not necessary, and the recognition of all due process safeguards would impair the effectiveness of competition enforcement. Furthermore, the opinion of Graells and Marcos argued that EU competition law nevertheless plays a key role in maintaining one of the fundamental safeguards of the undistorted market economy, and thus this

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<sup>162</sup> Laguna De Paz (n 84) 8.

<sup>163</sup> Lianos and Andreangeli (n 48) 438.

<sup>164</sup> Maciej Bernatt, 'The Compatibility of Deferential Standard of Judicial Review in the EU Competition Proceedings with Article 6 of the European Convention on Human Rights' Research paper in Loyola University Chicago School of Law 2013-2014.

<sup>165</sup> Graells, A & Marcos, F "'Human Rights" Protection for Corporate Antitrust Defendants: Are We not Going Overboard?' 11 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2389715](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2389715)> accessed 26 September 2016.

excessive due process rights protections will lead to a less efficient market economy.<sup>166</sup>

With respect to the due process rights, although there are internal checks and balances, they do not constitute formal proceedings followed by stringent procedural protections. Consequently, these internal guarantees would still have to be examined by the EU competition enforcement system. It then caused a problem that the Commission's internal procedures cannot recover the inadequacies of the broader enforcement model. Accordingly, the kind of procedural rights protection would deteriorate the due process system.<sup>167</sup> Having addressed these problems, effective competition enforcement outweighs the further protection of fundamental rights.

## V. Conclusions

This article has provided a framework of how the EU established its fundamental rights legal order and, to a further extent, analysed the current protection of companies' fundamental rights. In line with the case law, the ECHR is applicable to both natural and legal persons; therefore, companies are subject to the safeguards afforded by the ECHR. Companies' fundamental rights are particularly protected in competition proceedings, which are carried out by the Commission. As the justice and fairness in administrative proceeding becomes far more important in the EU, companies, as antitrust defendants, may defend their fundamental rights according to a strong basis of law and regulation. Moreover, the EUCFR is now bound to the EU, which means that the EU should show respect for the fundamental rights order and comply with the Charter. Accordingly, the critical points of companies' fundamental rights to a fair trial and a fair hearing in competition proceeding has generated a large number of legal debates.

The issues concerning the competition enforcement and its compliance with the ECHR have been examined in this work. In accordance with the results of Section II's assessments, it is clear that the current competition enforcement is compliant with Article 6(1) of the ECHR, and it is unnecessary to amend the enforcement procedures. In addition, with the recent creation of

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<sup>166</sup> Ibid, 15-16.

<sup>167</sup> MacGregor and Gecic (n 134) 437.

the Best Practice Package concerning antitrust cases, this internal check in the Commission plays a key role in helping to maintain the fairness of competition proceedings. The Hearing Officer's new mandate as of 2011 strengthens companies' procedural rights and makes the procedures more transparent and reliable. The entire unprecedented competition policy seems to ensure the complete respect for a fair hearing, in spite of the contested independence of the Hearing Officer in the Commission.

With regard to the controversy of the judicial review involved in the matters of fines, the EU Courts are empowered by the legal basis derived from Articles 263 and 261 of the TFEU and Article 31 of Regulation 1/2003 to exercise their full jurisdiction. By contrast, while the Commission conducts an economic appraisal to investigate and judge the antitrust cases, the need for a complex economic assessment is undoubtedly part of the Commission's discretionary powers in deciding the finding of the infringements and the subsequent fines as sanctions. Accordingly, a legal question arose: whether EU courts truly have unlimited jurisdiction to review the antitrust cases. In view of the principle of separation of powers within EU law, it is argued that the EU Courts cannot substitute the Commission. Thus, the EU Courts can only exercise marginal review, and they are restricted in justifying whether the Commission's decisions are inappropriate and whether there is a manifest error of assessment or misuse of powers of the Commission.

In fact, as administrative bodies have some policy discretion in execution, they ought to comply with the framework and objectives of the policy. Regulation 1/2003 authorises investigation, prosecution and adjudicate powers to the Commission; hence, the Commission is the essential authority to deal with and penalise antitrust infringements. However, determining to what extent the Commission can exercise its discretion in the effective competition enforcement without violating the companies' fundamental rights is difficult. Usually, the solutions vary, due to the dissimilar and diverse facts of cases, and this makes the problem even more complicated. Some have discussed the advantages of a specialised and independent competition law court. The UK's Competition Appeal Tribunal would thus become a model. Nonetheless, due to the EU treaties' restriction, creating a specialised competition law court would be challenging.

In conclusion, the EU indeed has to provide sufficient respect to EU fundamental rights law, particularly due to the EUCFR's binding effects on the EU. In other words, an intensive balance between an effective EU competition enforcement and companies' fundamental rights protection is required. As the fundamental rights protection is one of the general principles of EU law, the enforcement cannot be excessive and cause a violation of companies' fundamental rights. While there is a tension between an authority's powers and defendants' fundamental rights, the author argues that a powerful and effectively implemented enforcement system should prevail over the fundamental rights protection, which currently has considerable value in the EU. One reason is that a well-functioning internal market in the EU still requires complete and sound supervision from the Commission, which has a combination of various powers in dealing with antitrust infringements. Another factor to support this claim is that the enforcement scheme is ultimately beneficial to the entire society and consumers, and this perhaps demonstrates another aspect of fundamental rights protection.