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ORIGINAL SCIENTIFIC ARTICLE

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THE EU INSTITUTIONAL MODEL OF COMPETITION LAW ENFORCEMENT REVISITED: HOW MUCH RULE OF LAW SUFFICES?

Abstract: *The EU model of competition law enforcement has been criticized by many authors ever since antitrust provisions in the EEC Treaty became effective. The fundamental contradiction between the high level of fines threatened (and often imposed) for antitrust violations and the administrative, inquisitorial procedure for investigating antitrust offences and imposing sanctions has principally inspired the critics. The compatibility of the EU model with Article 6 of the European Convention on Human Rights (the ECHR) was disputed, instigating the EU institutions to take steps to improve the institutional and procedural framework for applying competition rules. This process has not been completed yet. Directive 2019/1 raised additional controversies regarding the compliance of variegated national enforcement models with the rule of law.*

This article aims to analyze the genesis of the competition enforcement model in the EU, which materialized mainly through the EU secondary legislation and ECJ case law. We evaluate the EU model against the enforcement system imagined by the Ordoliberal school of thought and, secondly, against administrative models existing in two "old" Member States, in which the rule of law has deeply rooted – France and Germany. We conclude by identifying the most cumbersome deficiencies of the EU model and proposing possible solutions for eliminating them.

Key words: competition law, administrative enforcement, Ordoliberal school of thought, the rule of law, Article 6 of ECHR, Directive 2019/1, Menarini decision.

1. Introduction

The European Union's institutional arrangement partially reflects the structure of national governments. At the same time, there exist significant differences, which are deeply rooted in the EU's unique character.

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The EU was established through international agreements, and largely shaped by the signatory states' willingness to confer certain powers while maintaining control over EU institutions. For this reason, it is not always possible to assess EU institutions and legislation simply by applying legal principles that are appropriate in a national context.

The above is particularly noticeable in the enforcement of EU competition law. The compatibility of the EU competition enforcement model with the rule of law and, more specifically, with Article 6 of the European Convention on Human Rights (the ECHR) has raised the interest of academics and practitioners ever since the late 1960s. Concern has grown in parallel with the gradual increase in fines for competition infringements imposed by the European Commission, and with the proclamation of the EU Charter of Fundamental Rights in 2000. Even though the EU has continuously strived to improve its model and make it compatible with the rule of law, open issues still exist. The conferral of powers to apply Articles 101 and 102 of the Treaty on the Functioning of the European Union (the TFEU) by Regulation 1/2003 to national competition authorities has additionally complicated the matter.

Most Member States developed their competition enforcement models by taking the EU model as an example. The same happened in the EU accession countries. This practice is generally beneficial since it has led to harmonization in institutional design and procedures. At the same time, however, it resulted in an unconsidered transposition of the major deficiencies of the EU model to the national level. This is not the case with some "old" Member States, which built their competition authorities independently from the EU.

This article traces back the development of the EU competition enforcement model from the viewpoint of its compliance with the rule of law. It aims to identify the deficiencies in EU and national institutional frameworks. In Part 1, we analyze Ordoliberal ideas concerning the enforcement of competition rules. We are confident that these ideas strongly influenced the drafters of the Treaty of Rome and formed a basis for the EU enforcement model. In Part 2, we elaborate on the developments of the EU competition enforcement model induced by secondary legal acts of the Council and the Commission and the case law of the ECtHR and ECJ. In Part 3, we explain the competition enforcement model in two "old" Member States, Germany and France, by identifying particular features that facilitated the compliance of the administrative enforcement model with the rule of law. In Part 4, we present the requirements of the Directive 2019/1 regarding the institutional setup of national competition authorities and respect for the rule of law. In the concluding part, we give

our views concerning the deficiencies of the present EU competition enforcement model and possible ways to eliminate them.

2. Origins of the European Competition Enforcement Model

The present model of competition law enforcement in the European Union and some of its Member States is rooted in the ideas of the Ordoliberal school. The Ordoliberals considered competition law as an important part of the economic constitution. They believed that the economic constitution shaped competition law and left little discretion for the legislature. They therefore thought that there would be little incentive for private influence in formulating the law.[1] Ordo school members dealt not only with substantive aspects of competition law but also with procedural ones. It was mainly due to their distrust of the three branches of state power that they proposed the creation of an autonomous monopoly office with the exclusive competence to apply competition law. The independence of the monopoly office was important to protect it from the pressure of interested parties. Walter Eucken warned in his seminal work "The Basis of Economic Policy" that a monopoly office should be subject only to the law and that it should not be part of any ministry.[2] The creation of the office was necessary and achievable. Without it, the competitive order and, consequently, the *Rechtsstaat* would be jeopardised.[3] Eucken argued: "The monopoly office is as indispensable as the highest court."[4]

Ordoliberals did not predict that law enforcement by the monopoly office would be troublesome. They identified many symptoms of monopoly activity, such as boycotts, loyalty rebates, price discrimination, predatory pricing, etc. The monopoly office should act when these symptoms are evident. The monopoly office should ensure that monopolists behaved "as if" there existed full competition in the market. Ordoliberals conceptualized the monopoly office as a quasi-judicial institution that would use judicial methods to apply authoritative norms. It should have strong enforcement powers to demand compliance with the law effectively.

1 Gerber, D. J., 1994, Constitutionalizing the Economy: German Neoliberalism, Competition Law and the 'New' Europe, *The American Journal of Comparative Law*, 42, p. 54.

2 Eucken, W., 2004, *Grundsätze der Wirtschaftspolitik*, Mohr Siebeck, p. 294.

3 On the link between Ordoliberal's ideas and *Rechtsstaat* principle see Stones, R. R., 2018, *EU Competition Law and the Rule of Law: Justification and Realisation*, The London School of Economics and Political Science.

4 Eucken, W., 2004, p. 294.

It should have enough resources to operate efficiently and attract highly qualified personnel. It therefore needed career specialists protected from outside political or financial influence.[5]

Ordoliberals strongly opposed the conferral of discretionary powers to state administration since they feared the risk of private influence upon state decision-making. They advocated for applying generalized and equally applicable norms, leaving no room for exceptions, as necessary to protect the competitive order.[6] The monopoly office would apply legal principles according to objective standards. Hence, administrative courts designed to control the misuse of discretionary powers by administrative authorities should not review the monopoly office's decisions. According to Ordoliberals, the role of courts in reviewing decisions of the monopoly office should have been limited to assessing whether the competition law was correctly interpreted and conformed with the economic constitution.[7]

As we will show in the following sections, Ordoliberal ideas largely shaped the German model of competition law enforcement, and partly the EU model.

3. Development of the EU Enforcement Model

3.1. FOUNDATIONS OF THE MODEL

At the time when the fathers of European integration were formulating the EEC Treaty, Germany was the most experienced European country in the enforcement of competition law. The original version of the Law against Restraints of Competition entered into force in 1957 – the same year the EEC Treaty was concluded. However, the Federal Cartel Office operated even before 1957, applying the Allied decartelization laws.[8] The leading members of the German delegation who participated in drafting the EEC Treaty were Ordoliberal adherents. Their ideas strongly influenced the formulation of rules on competition in the Treaty of Rome and the creation of the European institutions.[9]

5 Gerber, D., 1994, p. 55.

6 Stones, R. R., 2018, pp. 98–99.

7 Gerber, D., 1994, p. 55.

8 Buxbaum, H., 2005, German Legal Culture and the Globalization of Competition Law: A Historical Perspective on the Expansion of Private Antitrust Enforcement, *Berkeley Journal of International Law*, 23, p. 482.

9 Gerber, D., 1994, p. 71; McLachlan, D. L., Swan, D., 1967, *Competition Policy in the European Community*, Oxford University Press, pp. 79–80. Law professor Hallstein

The EEC Treaty gave the Commission unprecedented power to shape substantive and procedural competition rules. Based on Article 87(1) of the EEC Treaty (now TFEU Art. 107), the Commission was entrusted with the task of formulating appropriate regulations or directives to give effect to the principles set out in Articles 85 and 86 (now TFEU Art. 101 and 102). Although the Commission did not have the final word in creating detailed substantive and procedural rules, its overwhelming influence on the content of these rules was inevitable. Regulation 17/62 entrusted the Commission with strong enforcement authority.[10] The Commission became an investigator and a decision-maker in cases of alleged violations of competition rules. The Commission acquired similar powers to those in criminal proceedings in its investigatory role. Commission officials were conferred with authorities to make unannounced inspections of undertakings' premises, land, and means of transport, examine books and business records, make copies or take extracts of these books and records, and ask for oral explanations from employees.[11] Authorities of the Member States and undertakings were obliged to provide information to the Commission upon its request.[12] In its role as a decision-maker, the Commission obtained the power to enforce EEC Treaty Articles 85 and 86 and to impose fines and periodic penalty payments.[13] By Regulation No. 19/65, the Council delegated the Commission power to issue regulations specifying rules on the exemption of categories of agreements under EEC Treaty Article 85(3) (now TFEU Art. 101(3)) – Block Exemption Regulations. EEC Treaty Article 87(1) (now TFEU Art. 103(1)) and Regulations 17/62 and 19/65 effectively constituted the Commission as a body unifying legislative, executive, and judicial functions under the same roof.

The enforcement model of competition law founded in the 1960s has survived subsequent changes in the European integration treaties and EU institutions. Moreover, the Commission's powers to enforce competition law have gradually strengthened, either under Council regulations or due to the Commission's vivacity in producing pieces of soft legislation.

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was one of the founders of the EEC and the first president of the European Commission. Müller-Armack, the German minister for European affairs, led the German delegation during negotiations on the EEC Treaty, while Von der Gröben was the head of the working group in charge of drafting Treaty rules on the internal market. Von der Gröben later became the first Competition Commissioner (1958–1970), with Pieter Verloren van Themaat as the first Director General of the EEC Directorate for Competition, then the so-called DG IV (1958–1967).

10 EEC Council, Regulation No. 17: First Regulation implementing Arts. 85 and 86 of the Treaty, *OJ* 13, 21.2.1962. (Further in the text: Regulation 17/62)

11 Art. 14 of the Regulation 17/62.

12 *Ibid.*, Art. 11.

13 Arts. 9, 15 and 16 of the Regulation 17/62.

3.2. REGULATION 1/2003

Regulation 1/2003[14] widened the investigative powers of the Commission by conferring it prerogatives to inspect private premises, including the homes of directors, managers, and members of staff of undertakings and associations of undertakings, without the prior authorization of national courts.[15] Other provisions guaranteed the parties in proceedings before the Commission the right to be heard, the right to defence, and professional secrecy.[16] The Commission's authority was extended also regarding its decision-making powers. The Commission obtained the authority to impose interim measures[17] and make settlements with undertakings violating competition rules (commitments).[18] The Commission attained comparable competencies in the field of control of concentrations by Regulation 139/2004.[19]

Over the years, the Commission has issued many soft law acts – notices, guidance, and best practices to make the EU rules on competition and its enforcement policy more transparent. In pursuing this progressive goal, the Commission has captured the role of the sole interpreter or even creator of EU competition rules. EU courts have stated that the Commission's soft law instruments produce legal effects, *i.e.*, represent a source of EU law.[20]

The Commission has taken important steps to improve the model within the existing legal framework. Rulings of the Court of First Instance in 2002 that reversed several Commission decisions prompted the Commission to implement these steps.[21]

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14 Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, *OJ* L 1, 4.1.2003. (Further in the text: Regulation 1/2003)

15 Art. 21 of the Regulation 1/2003.

16 Arts. 27 and 28 of the Regulation 1/2003.

17 Art. 8 of the Regulation 1/2003. Such power has not been much applied so far, although it has been more used by some National Competition Authorities.

18 Art. 9 of the Regulation 1/2003.

19 Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings, *OJ* L 24, 29.1.2004.

20 "Guidelines are capable of producing legal effects. Those effects stem not from an attribute of the Guidelines as rules of law in themselves, but from their adoption and publication by the Commission. By adopting and publishing the Guidelines, [...] the Commission imposes a limit on its own discretion; it cannot depart from its own rules under pain from being found, where appropriate, to be in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations and legal certainty", EU Court of First Instance, Case T-59/02, *Archer Daniels Midland*, 2006, para. 43.

21 OECD Country Studies, 2005, *European Commission – Peer Review of Competition Law and Policy*, p. 62.

Under Regulation 1/2003, investigative and decision-making powers are nominally separated. The Directorate-General for Competition (the DG COMP) and the college of commissioners share investigative and decision-making powers. DG COMP officials headed by the Director-General conduct investigations. However, the DG COMP works under the patronage of the Competition Commissioner (the commissioner in charge of competition matters), meaning that the separation of powers is not functional. The Competition Commissioner decides about issuing an act informing parties about the DG Competition findings in particular cases: "The sending of a statement of objections is normally decided by the Competition Commissioner, after consultation of the Commission's Legal Service, which operates under the authority of the President of the Commission, and, where appropriate, also after consultation of other Commission services." Apart from its role in the investigation phase, there is *opinio communis* that the Competition Commissioner dominates EU competition policy.[22]

Regulation 1/2003 made the oral hearing binding in all antitrust cases. The Hearing Officer, an official not belonging to DG Competition but reporting to the Competition Commissioner, presides over oral hearings. DG Competition staff, usually the same officials as those conducting an investigation, draft a final decision. The Commission introduced new internal checks of draft decisions after 2003 to improve the impartiality of the investigation process. The Peer Review Panel, consisting of experienced officials, looks at the case. The Panel reports to the Director-General and informs the Competition Commissioner of its views. Secondly, the Chief Competition Economist, together with his specialist staff, provides economic advice throughout the investigation process.[23] Thirdly, the Advisory Committee on Restrictive Practices and Dominant Position, consisting of representatives of national competition authorities of the EU member states, is regularly consulted before the Commission decides on antitrust cases.[24]

3.3. CRITICS OF THE MODEL

Legal writers and practitioners have regularly criticized the EU model of enforcement of competition rules, even from the early days of EU integration.[25] Their criticism was founded mainly upon the following argument: the combination of investigative, prosecutorial, and adjudicative

22 Wise, M., 2007, Competition Law and Policy in the European Union, *OECD Journal of Competition Law and Policy*, Vol. 9, No. 1, p. 38.

23 *Ibid.*

24 Art. 14 of the Regulation 1/2003.

25 See, for example, Graupner, F., 1973, Commission Decision-Making on Competition Questions, *Common Market Law Review*, 10, pp. 291–305.

functions prevented the Commission from dealing with competition cases impartially. The cumulation of these functions in the Commission has been considered contrary to Article 6(1) of the European Convention on Human Rights (the ECHR) and Article 47 of the Charter of Fundamental Rights of the EU (the CFREU). During the 1990s there appeared proposals to create an autonomous agency at the EU level to deal with competition cases, comparable to the German Federal Cartel Office.[26] They did not gain sympathy on the side of EU decision-makers, both for political and legal reasons. On the political level, competition rules constitute a part of the internal market mechanism for which the Commission is responsible.[27] On the legal side, the ECJ stated it was impossible to delegate discretionary powers to bodies other than those established by EU Treaties.[28]

The debate over the compatibility of the EU competition enforcement model with the rule of law has not ended with the improvements introduced alongside Regulation 1/2003. Over the last two decades an increasing number of voices have been raised to draw public attention to the incompatibility of the EU competition enforcement model with the rule of law.[29] The debate concentrated on two main arguments. The first one concerned the (in)adequacy of administrative procedure conducted by the Commission in competition cases. The administrative procedure in European continental legal systems is inquisitorial,[30] while competition cases are mainly controversial.[31] In every antitrust case a dispute arises as to whether competition rules have been violated (decided under the TFEU Art. 101 and 102). A dispute also emerges in concentration cases in which the Commission raises objections to implementing a concentration. The Commission plays the role of prosecutor and judge in the same case.[32]

26 Wilks, S., McGowan, L., 1995, Disarming the Commission: The Debate over a European Cartel Office, *Journal of Common Market Studies*, 33, pp. 259–273.

27 Gronden, J. W. van de, Vries, S. A. de, 2006, Independent Competition Authorities in the EU, *Utrecht Law Review*, Vol. 2, Issue 1, p. 66.

28 *Meroni v. ECSC High Authority*, C-9/56, 1958, ECR 133, p. 152; *Alliance for Natural Health*, Joined Cases C-154/04 and 155/04, 12. July 2005, para. 90.

29 See, for example, Forrester, I., 2009, Due Process in EU Competition Cases: A Distinguished Institution with Flawed Procedures, *European Law Review*, 34, pp. 817–843.

30 On the difference of the administrative procedure in European continental law and Anglo-Saxon law see Forrester, I., Komninos, A., 2006, EU Administrative Law Competition Law Adjudication, Sector Report on Adjudication in the Competition Field, American Bar Association, *European Union Administrative Law Project*, pp. 6–7.

31 See on this point Hauger, N., Palzer, C., 2013, Investigator, Prosecutor, Judge...and now Plaintiff? The Leviathanian Role of the European Commission in the Light of Fundamental Rights, *World Competition*, 35, pp. 565–584.

32 Teleki, C., 2021, Due Process and Fair Trial in EU Competition Law: The Impact of Article 6 of the European Convention on Human Rights, *Nijhoff Studies in European Union Law*, 18, pp. 30–31.

The combination of prosecutorial and judicial powers essentially violates the right to a fair trial guaranteed by ECHR Article 6(1) and the long-established principle: *Nemo iudex in causa sua*. Wils pointed out three sources of prosecutorial bias conceivable in the EU competition enforcement model: confirmation bias, hindsight bias, and the desire to show a high level of enforcement activity.[33] The first bias is related to a psychological predisposition of every human to search for evidence that confirms his/her beliefs rather than those that challenge them. Hindsight bias refers to the inclination of investigators to justify their past efforts invested in the investigation of a particular case. Admittance at the end of the inquiry that there was no violation of competition rules would cause disappointment among officials involved and, most probably, a need to justify budgetary expenses to monitoring bodies. The second bias also relates to the third – an aspiration to show success in the work done to the monitoring authorities, colleagues and the rest of the world. Even internal checks and balances introduced after 2003 could not eliminate these biases.[34]

The second argument concerned the limited jurisdiction of EU courts in competition matters. As we indicated before, both Regulation 17/62 and 1/2003 on antitrust issues and Regulation 139/2004 regarding the control of concentrations conferred the European Court of Justice (the ECJ) unlimited jurisdiction in cases where the Commission imposed fines or periodic penalty payments. At first glance, the EU model satisfies requirements imposed by the ECHR in criminal matters. The fundamental rights of defendant companies in competition cases are at the highest stake in cases where the Commission has imposed fines. However, fundamental rights can be violated even if no fine is imposed. For example, if the Commission prohibits a concentration without imposing a fine, the companies' right to property is at stake. It is dubious whether participants in a concentration have an effective remedy within the meaning of ECHR Article 13, if the ECJ has the power to review the Commission's decision only from the aspect of its legality? Secondly, if the Commission imposes a fine by its decision, the concept of full jurisdiction is related only to the part of the decision concerning the fine: "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

33 Wils, W., 2005, *Principles of European Antitrust Enforcement*, Oxford, Hart Publishing, pp. 164–168; see also on this point Slater, D., Thomas, S., Waelbroeck, D., 2008, Competition Law Proceedings before the EU Commission and the Right to a Fair Trial: No Need for Reform?, *Research Papers in Law*, 5, p. 28; Jenny, F., 2016, The Institutional Design of Competition Authorities: Debates and Trends, pp. 23–24, (http://dx.doi.org/10.2139/ssrn.2894893).

34 Wils, W., 2005, p. 169.

the fine or periodic penalty payment."[35] The ECJ may fully review the entire decision, but it cannot replace it with its own decision, except for the part of the decision concerning fines or periodic penalty payments.

The EU model of judicial review of the Commission's decisions is not a full jurisdiction model. TFEU Article 263(1) empowers the ECJ to review the legality of the Commission's acts. It may review Commission's decisions on the grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or any rule of law relating to their application or misuse of powers.[36] Regulations adopted by the European Parliament and the Council may give the ECJ unlimited jurisdiction concerning the penalties provided for in such regulations.[37] In practice, a legality review is impossible without questioning whether the case facts were properly established. In that respect, the ECJ had traditionally confined itself to examining whether the Commission's findings contained a manifest error of appraisal or constituted a misuse of powers.[38] Fortunately, in the last two decades, the ECJ has extended its jurisdiction to assess more complex economic findings upon which the Commission's decisions inevitably rely. In *Tetra Laval*, the ECJ declared:

> *"Whilst the Court recognises that the Commission has a margin of discretion with regard to economic matters, that does not mean that the Community Courts must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must the Community Courts, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent 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."*[39]

Recent ECJ case law shed new light on the role of courts in reviewing Commission decisions in competition cases. After the ECJ ruling in *Infineon Technologies AG v. EC*,[40] the distinction between the unlimited jurisdiction regarding the fine imposed and the legality review of the remaining parts of the Commission's decision became blurred. In the

35 Art. 31 of the Regulation 1/2003. Art. 16 of the Regulation 139/2004 contains a similar provision.

36 Asimow considers the EU model as a model with limited judicial review. Asimow, M., 2015, Five Models of Administrative Adjudication, *American Journal of Comparative Law*, 63, pp. 3–31. See also Forrester, I., 2009, p. 821.

37 Art. 261 of the TFEU.

38 *Remia BV and others v. Commission*, C 42/84, ECR 1985, p. 2545, para. 34.

39 *Commission of the European Communities v. Tetra Laval BV*, C-12/03 P, ECR 2005 I-00987, para. 39.

40 Case C-99/17 P, 26.09.2018, ECLI:EU:C:2018:773.

case concerning a cartel in the smart card chip sector, the Commission found a single continuous infringement of TFEU Article 101(1) and imposed fines on cartel members. Infineon Technologies appealed to the General Court, which rejected its appeal.[41] The appellant then complained to the EU Court of Justice (the CJEU), pushing, among others, the argument that the first-instance court examined only five out of eleven allegedly unlawful contacts which took place between him and two other cartel members, whereas the appellant had disputed all those contacts. The appellant considered the incomplete and selective judicial review of the decision contrary to TFEU Article 263, which resulted in an insufficient review of the fine. The CJEU stated that it suffices for the General Court to examine only five out of eleven contacts to confirm the Commission's legal qualification of a single continuous infringement. However, when assessing the lower court's findings regarding the fine imposed, CJEU admitted a more thorough review of the Commission's decision was necessary:

> *"[...] In order to satisfy the requirements of Article 47 of the Charter of Fundamental Rights of the European Union when conducting a review in the exercise of its unlimited jurisdiction with regard to the fine, the EU judicature is bound, in the exercise of the powers conferred by Articles 261 and 263 TFEU, to examine all complaints based on issues of fact and law which seek to show that the amount of the fine is not commensurate with the gravity or the duration of the infringement."*[42]

> *"[...] By its pleas raised before the General Court, the appellant disputed inter alia the Commission's assessments on each of the 11 bilateral contacts found against it and criticized the calculation of the amount of the fine that was imposed on it as regards both the gravity multiplier of 16% and the rate of reduction of 20% which was granted on account of mitigating circumstances. It follows that, by its line of argument put forward in its application at first instance, the appellant requested the General Court to examine whether it actually participated in the infringement at issue and, if so, the precise extent of that participation. That line of argument could be relevant in order to assess, in accordance with the case-law cited in paragraph 195 of this judgment, in the light of the appellant's conduct, whether the amount of the fine that was imposed on it is commensurate with the infringement that it committed. Although, for the purpose of assessing the gravity of the infringement committed by the applicant and setting the amount of the fine, the General Court is not required to rely on the exact number of bilateral contacts found in regard to the applicant, that factor may nevertheless constitute a relevant factor among others [...] In those circumstances, the General Court was not entitled, without misconstruing the extent of its unlimited jurisdiction, to*

41 *Infineon Technologies v. Commission*, T-758/14, EU:T:2016:737.

42 Para. 195.

> *refrain from responding to the argument raised by the appellant according to which the Commission had infringed the principle of proportionality by setting the amount of the fine imposed without taking into account the small number of contacts in which the appellant participated. That conclusion is all the more compelling given that, in the present case, the General Court confined itself to confirming 5 of the 11 contacts found in the decision at issue, whilst not responding to the question of whether the Commission had established the existence of the 6 other contacts found in that decision."*[43]

The fine imposed by the Commission must be proportionate to the infringement committed. The part of the Commission's decision determining a fine emanates logically from the other parts ascertaining relevant facts and qualifying them as an infringement of TFEU competition rules. The lower court might have dispensed itself from inspecting some of the case facts to assess the legality of the Commission's decision. However, the proper execution of full jurisdiction concerning the fine level necessitated the lower court's comprehensive and thorough analysis ascertaining all relevant facts.

While the new approach of the ECJ undoubtedly improves the EU competition enforcement model regarding its compatibility with fundamental rights protected by the ECHR and CFREU, shortcomings in the judicial review of the Commission's decisions remained. The ECJ rarely allows companies challenging a Commission's decision to introduce new evidence to support their claim. The right of parties to present new evidence in the court's proceeding is one of the characteristics of full jurisdiction.[44] Thus, for example, the ECJ has only in rare cases relied on the opinions of external experts.[45] Secondly, the General Court may not undertake a new and comprehensive investigation of the file on its motion.[46] Rather, it will respond to pleas in law submitted by parties and review both the law and the facts. Thirdly, the General Court cannot issue a new decision to replace a Commission's decision. It can either confirm a Commission's decision or annul it.[47] The consequence of the present model is that the Commission solely decides the merits of a case. The Commission still enjoys a substantial margin of discretion concerning initiating an investigation, interpreting TFEU rules and secondary legislation, making

43 Paras. 195 and 204–206.

44 Asimow, M., 2015, p. 9.

45 *Dyestuffs*, C-48/69, ECR 1972, para. 619; *Wood Pulp*, Joined cases C-89, 104, 114, 116, 117 and 125 to 129/85, ECR 1988, para. 5193.

46 *Chalcor AE Epexergasias Metallon v. European Commission*, C-386/10 P, ECR 2011-0000, paras. 66–67.

47 Hauger, N., Palzer, C., 2013, pp. 578–579.

settlements with defendant undertakings and setting fines.[48] When it decides upon the merits of a case, the Commission is free to choose between different economic methods and establish a basic approach when assessing a complex economic matter.[49] These powers are clearly in confrontation with the Ordoliberal model, in which the monopoly office would not possess discretionary powers.

3.4. MENARINI

The European Court of Human Rights (the ECtHR) largely confirmed the compatibility of the existing EU model of competition enforcement with the ECHR in *Menarini*,[50] where it analyzed the Italian model of judicial review in competition cases.[51] In *Menarini* the ECtHR classified competition law cases as criminal cases based upon criteria defined in *Engel*.[52] However, relying upon its judgment in *Jusilla*,[53] the ECtHR considered competition cases as different from hardcore criminal cases. Therefore, the criminal-limb ECHR guarantees did not necessarily apply with full stringency.[54] The ECtHR found that appellate courts, deciding upon

48 Wils, W., 2011, Discretion and Prioritisation in Public Antitrust Enforcement, in Particular EU Antitrust Enforcement, *World Competition*, Vol. 34, No. 3, pp. 353–382.

49 Hauger, N., Palzer, C., 2013, p. 578; Cengiz, F., 2011, Judicial Review and the Rule of Law in the EU Competition Law Regime after Alrosa, *European Competition Journal*, p. 128, (https://doi.org/10.5235/174410511795887615).

50 *A. Menarini Diagnostics S.r.L. v. Italy*, no. 43509/08, 27. September 2011. (Further in the text: *Menarini*)

51 The features of the Italian model of competition law enforcement are very similar to the EU model. Competition cases are investigated and decided by the *Authorità garante della concorrenza e del mercato*, an independent administrative authority. In the second instance cases are decided by the Lazio Administrative Court, whose competence is limited to reviewing the legality of the Authority's decision, although it is free to cancel or amend a fine imposed on a defendant. A decision of the Administrative Court can be appealed to the State Council (*Consiglio di Stato*), which reviews it on the points on law. On the compatibility of the Italian model with Art. 6(1) ECHR see Giovagnoli, R., Tavassi, M., Police, A., Libertini, M., Siragusa, M., Chieppa, R., 2015, *Judicial Review of Antitrust Decisions:* Q&A, *Rivista Italiana di Antitrust*, 1, pp. 144–163.

52 These criteria are: defining the offence as a criminal one in the national legal system, the nature of the offence and the severity of penalty. *Engel and others v. The Netherlands*, 5100/71, 8. July 1976.

53 A criminal case must be decided by an independent and impartial tribunal in the first instance and a defendant must be given an opportunity, *inter alia*, to give evidence in his own defence, hear the evidence against him and cross examine the witnesses. *Jusilla v. Finland*, no. 73053/01, 23. November 2006, (Further in the text: *Jusilla*).

54 However, in *Jusilla* several judges dissented, stating that ECtHR Art. 6 does not provide a basis to make a distinction between hard-core and beyond hard-core cases. See

the legality of the decision of the Italian Competition Authority (the ICA), had met standards of independence and impartiality required by ECHR Article 6 and examined various defendant's allegations, both in facts and law. The administrative court did not have the power to substitute itself for an independent administrative authority. However, it was able to verify that the ICA had made proper use of its discretionary powers. Appellate courts were able to examine whether the ICA's decision was substantiated and proportionate and even check its technical findings.[55]

Moreover, the courts executed full jurisdiction regarding the fine imposed. They could verify if the fine fitted the offence, and they could have changed it if necessary. The ECtHR found that Italian courts in the particular case had gone beyond the formal review of the logical coherency of the ICA's decision concerning the penalty imposed. They made a detailed analysis of the appropriateness of the penalty regarding relevant parameters, including proportionality.[56] The ECtHR decided by majority that the Italian judicial bodies had exercised full jurisdiction and that there was no violation of ECHR Article 6.[57]

In his dissenting opinion, Judge Pinto de Albuquerque accentuated that the Italian administrative courts could not substitute their case evaluations for that of the ICA. In his view, a court's review of an administrative decision imposing penal sanctions needs to be exhaustive, covering all factual and legal aspects of the case. This approach rests upon the doctrine of the separation of powers, under which, traditionally, the power to impose penalties has been reserved for the judiciary. Even the Italian courts themselves admitted in the course of proceedings before the ECtHR that the ICA's legal characterization of the facts was subject to limited review. Judge Pinto pointed out that appellate courts merely repeated arguments already presented in the administrative decisions. A full review of an administrative court is not a mere *reformatio* (reform) of the administrative decision, but its *revisio* (re-examination). Judge Sajo made a concurring opinion, agreeing with Judge Pinto that the Italian law (which existed when the ICA imposed the fine) required courts to make only a formal or "weak" review of decisions of independent administrative bodies. However, he decided to join the majority in the same case since the Italian Council of State, in the role of the second instance court, had conducted a thorough analysis of the ICA's decision.

Medzmariashvili, M., 2012, Case Note: Jusilla v. Finland, *Fundamental Rights and EU Competition*, *Special Edition*, LSEU/CP, pp. 82–86.

55 *Menarini*, para. 64.

56 *Menarini*, paras. 65–66.

57 *Menarini*, para. 67.

The significance of *Menarini* is not only related to the explicit classification of competition cases as criminal cases. More importantly, it required an appellate court to analyze each case in depth. The ECtHR was less concerned with the issue of whether an applicable national law allows for full jurisdiction of appellate courts. To satisfy ECHR requirements, courts must show that they examined the case thoroughly, both from the aspects of facts and law. The ECJ interpreted *Menarini* so that full jurisdiction existed if an appellate court can quash, in all respects, on questions of facts or law, a decision of the body below.[58] The wording of the ECtHR decision does not support this understanding. ECtHR judges assessed the intensity of the appellate courts' review. In *Menarini*, they were satisfied with the extent of the appellate court's scrutiny and for this reason they considered the court's limited jurisdiction irrelevant.

The ECtHR failed to qualify competition cases as either hardcore or "light" criminal cases. Secondly, it avoided assessing the relevance of the fines for antitrust violations and associated stigma on defendant companies when characterizing antitrust cases as criminal.[59] Commenting on *Menarini*, Forrester underlined the severity of fines imposed by the Commission when arguing that EU competition cases cannot be equated with "light" criminal cases in the sense of *Jusilla*. He drew attention to the inconsistency of the ECtHR regarding the qualification of hardcore and other criminal cases and consequent ECHR requirements.[60] Bronckers and Vallery reminded us that competition authorities spoke openly about the stigma affecting companies sanctioned for breaches of EU competition law.[61] These arguments undermine the qualification of antitrust cases as "light" criminal cases. However, in a few instances, the ECtHR found that administrative authorities could decide even hardcore criminal cases.[62] On this point, Teleki concluded that the ECtHR, when applying ECHR Article 6 to administrative cases, links the intensity of judicial review with other safeguards of the right to a fair trial, such as the independence of a tribunal and the right to be heard.[63] The requirement of the separation of judicial and executive powers has become less strict, at least in the minds of ECtHR

58 *Schindler Holding Ltd and Others v. European Commission*, C-501/11 P, ECLI:EU:C:2013:522, para. 35.

59 Bronckers, M., Valery, A., 2012, Fair and Effective Competition Policy in the EU: Which Role for Authorities and Which Role for the Courts after Menarini?, *European Competition Journal*, 8, pp. 283–299, DOI: 10.5235/ECJ.8.2.283.

60 Forrester, I., 2011, A Challenge for Europe's Judges: The Review of Fines in Competition Cases, *European Law Review*, 2, pp. 203–205.

61 Bronckers, M., Valery, A., 2012.

62 *Ibid*.

63 Teleki, C., 2021, p. 293.

judges. However, the persistence of this conclusion becomes problematic, knowing that *Menarini* is not a decision of the ECtHR Grand Chamber.[64]

3.5. HEARINGS BEFORE THE COMMISSION AND THE GENERAL COURT

Alongside critiques related to the inadequacy of the administrative enforcement of competition law and the limited jurisdiction of the ECJ, commentators put forward other remarks on the EU model, such as shortcomings regarding hearings taking place before the Commission and GC and the Commission's increasing reliance on the commitment and settlement procedure.

In the EU competition cases, the Hearing Officer conducts a hearing, not a body that takes a decision. That solution contradicts the adversarial model. The Hearing Officer has limited functions. His principal role is to take care of procedural issues,[65] although his report may include some reflections on evidence and substantive issues.[66] Commissioners do not even participate in the hearing. One of the functions of the oral hearing is allowing parties to express and confront views regarding the facts and the law in the presence of a decision-making body. To achieve fairness and impartiality in the process, members of a decision-making body must get an opportunity to conclude upon relevant issues of the case. In the EU model, that is not happening. Besides, parties cannot cross-examine witnesses and test their testimonies in the hearing before the Hearing Officer.[67]

64 Bellamy, C., 2012, ECHR and Competition Law post Menarini: An Overview of EU and National Case Law, *e-Competitions*, No. 47946.

65 Functions of the Hearing Officer essentially relate to the physical conduct of the hearing, execution of the right to access to file and maintaining the confidentiality of proceedings. Forrester, I., 2009, p. 824.

He also has powers to make observations on substance to the Competitition Commissioner and suggest further investigative measures in antitrust proceedings. This latter function was reinforced by the 2011 Terms of Reference. See Italianer, A., 2012, The European Commission's New Procedural Package: Increasing Interaction with Parties and Enhancing the Role of the Hearing Officer, *Revista de Concorrência e Regulação*, 7–8, p. 33. There have recently been proposals to provide the Hearing Officer with a more important role. See González-Diaz, F. E., Rivero, Á. F., 2017, European Competition Law Procedural Reform – An Introduction, *Competition Law & Policy Debate*, September 1, p. 31.

66 OECD, 2005, p. 40; Temple Lang, J., 2011, Three Possibilities for Reform of the Procedure of the European Commission in Competition Cases under Regulation 1/2003, *CEPS Special Report*, p. 197.

67 Dempsey, J. J., 2010, A Right to Confrontation for Competition Hearings before the European Commission, *Brooklyn Law Review*, 4, pp. 1489–1534.

We have already indicated that the oral hearing before the General Court is limited in scope and duration. Neither the first instance administrative body nor the second instance independent tribunal can hear all aspects of the case and conclude on its own. ECHR Article 6(1) requirements are not fully satisfied in the EU model, especially recalling the ECtHR statement that "the requirements of a fair hearing are the most strict in criminal law".[68] In *Menarini*, the ECtHR was satisfied by the second instance tribunal's exhaustive examination of the facts and the law. It did not make any remark concerning the necessity of holding an oral hearing before the first-instance administrative body or the second-instance independent tribunal. However, this does not mean that the ECtHR excluded the Article 6 requirement for a public hearing. The wording of Article 6, first sentence, is very clear on this point: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time before an independent and impartial tribunal established by law."

In addition, some authors remarked on the composition of the Commission, considering it incapable of dealing with competition cases. The OECD peer review stated that the Commission is too large to deliberate and decide fact-intensive matters.[69] Temple Lang noted: "The decision is taken by the Commissioners, none of whom may have any specialized knowledge or experience of competition law or competition economics, none of whom may have any training or experience as a judge, and none of whom is likely to have read all the evidence and arguments or attended the hearing."[70]

Others probated the Commission's independence. Even though the Commission is nominally independent in decision-making from the Member States, indirect links exist, for example, through the procedure for the appointment of the Commissioners.[71] Political considerations within the Commission influence the content of the final decision, as well as lobbying by companies involved in a case and their lawyers with Commissioners and national competition authorities whose representatives sit on the Advisory Committee.

3.6. COMMITMENTS AND SETTLEMENTS

Even if one agrees with the ECtHR's finding that justice is served if an independent tribunal reviews a case exhaustively in the second instance, let us not forget that Regulation 1/2003 and Implementing Regulation

68 *Jusilla*, para. 42.

69 OECD, 2005, p. 63.

70 Forrester, I., 2011, pp. 822, 831–832; Temple Lang, J., 2011, p. 204.

71 Gronden, J. W. van de, Vries, S. A. de, 2006, p. 65.

773/2004[72] have caused the ECJ not to hear many competition cases at all. The decrease in competition cases deliberated before the ECJ resulted from the Commission's power to end cases through commitment and settlement procedures.

As we have already mentioned, Article 9 of Regulation 1/2003 introduced commitment decisions. Defendant undertakings in antitrust cases may offer commitments to the Commission to meet its concerns expressed in a preliminary assessment. The commitment decision leaves open whether an infringement of EU antitrust law has occurred in a specific case. The Commission may reopen the case at a later stage. The Commission has used the commitment procedure to discharge itself from the burden of long investigations and further disputes at the ECJ. In several cases in the energy and transport sector, defendant undertakings have even offered structural remedies to meet the Commission's concerns.[73] The Commission has rarely imposed this remedy under an Article 7 procedure. The General Court ruled in *Alrosa* that the Commission cannot take a decision under Article 9(1) that it could not take as a final decision under Article 7(1), thus limiting the Commission's discretion in accepting commitments.[74] The CJEU relaxed the limitation by confirming the Commission's discretion to secure any outcome through Article 9, so long as it accepted the least onerous of the proposed remedial packages it considered satisfactory.[75] From 2004 to 2015, the Commission approved commitments in 34 cases.[76] The rise in commitment decisions has prompted some commentators to warn of the systematic degradation of the rule of law in EU competition enforcement.[77]

Commitment decisions are not appropriate in cases where the Commission intends to impose a fine.[78] Nevertheless, in cartel cases, the settlement procedure is possible. The Commission altered Regulation 773/2004 in 2008 to provide a legal basis for settlements, making the investigation and decision-making process more efficient.[79] The Commission reserved

72 Commission Regulation No. 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, *OJ* L 123, 27.4.2004. (Further in the text: Regulation 773/2004).

73 Wish, R., Bailey, D., 2015, *Competition Law*, Oxford Univeristy Press, p. 269.

74 *Alrosa v. Commission*, T-170/06, ECR 2007 II-2601. In this case, the Commission accepted an offer from the De Beer company to cease completely all direct and indirect purchases of rough diamonds from Alrosa.

75 C-441/07 P, EU:C:2010:377.

76 Wish, R., Bailey, D., 2015, p. 269.

77 Stones, R., 2019, Commitment Decisions in EU Competition Enforcement: Policy Effectiveness v. The Formal Rule of Law, *Yearbook of European Law*, Vol. 38, pp. 361–399.

78 Recital 13 of the Regulation 1/2003.

79 Commission Regulation (EC) No. 622/2008 of 30 June 2008 amending Regulation (EC) No. 773/2004, as regards the conduct of settlement procedures in cartel cases, *OJ* L 171, 1.7.2008, recital 4.

a wide margin of discretion when selecting cases appropriate for a settlement and the power to abandon settlement negotiations at any time. The settlement procedure became a big success, at least from the aspect of the Commission and the companies involved. The settlement procedure contributed to shortening the average investigation duration.[80] As Maillo calculated, from 2010 to 2017, out of 48 Commission decisions condemning cartels, 24 decisions were based upon settlements, meaning that the Commission settled 50% of cartel cases during that period.[81] Statistics for the period before 2010 show similar results.[82] However, unlike in the commitment procedure, safeguards protecting the public interest do not exist in the settlement procedure.[83] Negotiations during the settlement procedure take part between the Commission and defendant companies willing to settle. Before the settlement is reached, third persons remain uninformed of the negotiations' content and case particularities. The Commission reserves the right to provide complainants only with a non-confidential version of the statement of objections. Besides, defendants must waive their right to request an oral hearing and access the file. They can do so only if the statement of objections does not reflect the content of their settlement submission.[84] Unlike the US counterpart procedure for reaching plea bargaining, EU law does not require the court's consent to a settlement.[85] In line with Article 31 of Regulation 1/2003, defendant companies can appeal a Commission decision that it adopted following the settlement procedure. However, in practice, they are not motivated to do so. Victims of a cartel who might wish to sue cartel members in national courts for damages would have little if any use of evidence collected during the investigation procedure. The Commission will normally escape a thorough investigation if a settlement peeps out over the horizon.[86]

The most important concern caused by the decreasing number of antitrust cases challenged at the ECJ is the diminishing level of legal certainty.

80 See Hellwig, M., Hüschelrath, K., 2016, Cartel Cases and the Cartel Enforcement Process in the European Union 2001–2015, Centre for European Economic Research (ZEW), *Discussion Paper No. 16-063*, pp. 35–36.

81 Maillo, J., 2017, *EU Cartel Settlement Procedure: An Assessment of Its Results 10 Years Later*, Instituto Universarię de Estudios Europeos, Universida San Pablo, Working Paper.

82 Georgiev, G. S., 2007, Contagious Efficiency: The Growing Reliance on U.S.-Style Antitrust Settlements in EU Law, *Utah Law Review*, 4, p. 999.

83 The commitment procedure also raises questions regarding the protection of third person interests. See on this point Emmerich, V., 2012, *Kartellrecht*, C.H. Beck, p. 215.

84 Arts. 12 and 15(1a) of the Regulation 773/2004.

85 This is different from the US settlement procedure. See on this point Georgiev, G. S., 2007, p. 999.

86 Wish, R., Bailey, D., 2015, p. 299.

The ECJ does not have the opportunity to say a final word regarding issues of the application of EU antitrust rules in cases decided under the commitments or the settlement procedure. When the Commission comes out with an accusation that a company infringed competition rules, defendants make calculations about the pros and cons if, on one side, they offer commitments or try to settle or if, on another side, the Commission continues the investigation. In most cases the defendant will opt for the best alternative to reduce costs and avoid public defamation. The second option might end with the Commission imposing very high fines.

In commitment decisions, the Commission is not even required to assert whether there was an infringement. Consequently, there is a great probability that cases in which the violation of competition rules is not so clear-cut will end with a commitment decision or a settlement.[87] For this reason, several commentators accused the Commission of using the commitment procedure to conduct its liberalization policy in the energy and transport sector.[88] Commissioner Vestager admitted this indirectly by remarking it was "very important not to make a habit out of settlements" and highlighting a need "to develop a case law by way of precedents".[89]

The Commission's increasing reliance on the commitment and settlement procedure made it more problematic for companies to comply with competition rules. The Commission has extended its power to exclusively interpret TFEU Articles 101 and 102 to the ultimate limit since, under the commitment procedure, it can effectively sanction behaviour without satisfying the standard of proof required by EU courts. And thus has the rule of law become the (un)intended victim of the desire to increase the efficiency of competition law enforcement.

Besides, the possibility of settling a case with the Commission diminishes the deterrent effect of EU competition rules, one of the goals pursued by the TFEU.[90]

4. Competition Law Enforcement in EU Member States

Regulation 1/2003 empowered national competition authorities (NCA) and courts to enforce TFEU Articles 101 and 102. Several reasons prompted the EU legislator to make this move: increasing resources needed for the detection and punishment of competition infringements, releasing

87 Recital 13 of the Regulation 1/2003.

88 Emmerich, V., 2012, p. 215.

89 Commissioner Vestager in the interview to *Financial Times* on March 8, 2015.

90 *Ibid.*

the Commission of the burden of cases impacting narrower relevant markets and boosting innovation in the interpretation and application of the law.[91] NCA received the power to take decisions requiring that an infringement be brought to an end, order interim measures, accept commitments, impose fines, periodic penalty payments, or any other penalty provided for in their national law.[92] Exceptionally, the CJEU in the *Tele2Polska* interpreted that Article 5 did not empower NCAs to adopt decisions finding that TFEU Article 102 was not infringed.[93] Regulation 1/2003 does not require any particular arrangement for NCAs. It suffices that a Member State designates a national competition authority and provides it with the necessary powers in line with Article 5.[94] Regulation 1/2003 reflected the variegated situation in the Member States regarding models of enforcement of national competition laws. It allowed Member States to designate administrative authorities or courts as NCA and allocate different enforcement functions between administrative and judicial bodies.[95] Regulation 1/2003 did not prevent Member States from stipulating a criminal liability for individuals breaching competition rules.

The abundant diversity of national models of competition law enforcement in the EU Member States has prevented their harmonization so far. We do not have room here to analyze in detail these models. Instead, we merely note that the administrative enforcement model prevails compared to the judicial model. In the remaining part of this article, we will analyze the enforcement models existing in two "old" Member States. In our view, they represent the most advanced competition enforcement regimes in terms of their compatibility with ECHR requirements. They can serve as a model for identifying deficiencies in the EU enforcement model.

4.1. GERMANY

It is an evident fact that Ordoliberal thoughts highly influenced German competition law.[96] The influence is evident also when looking at the German model of competition law enforcement. It is an administrative model but with strong powers of appellate courts in controlling the decisions of a competition authority. On the federal level, the Federal Cartel

91 Wils, W., 2005, pp. 16–17.

92 Art. 5 of the Regulation 1/2003.

93 *Prezes Urzędu Ochrony Konkurencji i Konsumentów v. Tele2Polska*, C-375/09, ECR 2011 I-3055.

94 Art. 35(1) of the Regulation 1/2003.

95 *Ibid.*, art. 35(2).

96 Gerber, D. J., 1994, p. 67; Buxbaum, H., 2005, p. 479.

Office (the FCO) is solely responsible for enforcing the EU and national competition law as the first-instance body. Article 51 of the Act against Restraints of Competition (the ARC) determines the status of the FCO and requirements for officials engaged in decision-making. The FCO is defined as "an independent higher administrative authority" within the Federal Ministry of Economic Affairs and Energy (the FMEAE). The FCO is headed by a President appointed by the FMEAE.

Within the FCO, there exist divisions responsible for the different economic sectors. Although nominally subordinated to the FMEAE, FCO has over the years secured a status highly independent of the German Government. In line with Ordoliberal visions, the FCO is bound only by instructions of law and not by economic policy considerations of the executive branch.[97] The FCO's independence is secured in many ways, even geographically: the FCO seat is located in Bonn, while the Government sits in Berlin.[98] The FCO President and division heads do not change with changes of Government. Rather, they are appointed for a life term. The permanence of their office shields them from political influence. The President himself is not involved in the decision-making in individual cases. However, he is in charge of distributing competencies between divisions, determining the composition of divisions and defining internal rules of procedure, subject to the approval of the FMEAE. The President discusses FCO operations in regular meetings with division heads. These powers make him able to steer the investigation and decision-making process indirectly. Senates, composed of a division head and two associate members, decide in individual cases. Members of the senates must have qualifications to serve as judges or senior civil servants.[99] The ARC laid down safeguards to prevent conflicts of interest of FCO officials.[100]

The Higher Regional Court of Cologne decides upon appeals to FCO decisions. There exists a Cartel Panel in this court that solves cases brought under the ARC.[101] The same is valid for the Federal Supreme Court, which decides upon appeals to the points of law in the third

97 Fiebig, A. R., 1993, The German Federal Cartel Office and the Application of Competition Law in Reunified Germany, *University of Pennsylvania Journal of International Business Law*, Vol. 14, No. 3, p. 392.

98 Until the unification of Germany, it used to be the other way around – the Government seat was in Bonn, while the FCO seat was in West Berlin.

99 Para. 51(4) of ARC.

100 The FCO officials may not own or manage any undertakings, nor may they be members of the management or supervisory board of and undertaking, a cartel, or a business and trade association or professional organisation. ARC, para. 51(5).

101 Para. 91 of ARC.

instance.[102] In this way, a specialization of judges in competition law has been safeguarded.

In the court, parties can present new facts and evidence in appeals against FCO decisions.[103] Besides an appellant and the FCO, persons and associations of persons whose interests are substantially affected by a decision admitted to the first instance proceedings by the FCO may also participate in the appellate proceedings.[104] The appellate court must hold a hearing, except in cases where the parties agree for it to take a decision without a hearing.[105] The appellate court investigates facts *ex officio*. The presiding judge shall endeavour to have formal defects eliminated, unclear motions explained, relevant motions made, insufficient factual information completed, and all declarations essential for ascertaining and assessing the facts made.[106] The appellate court decides on the basis of its conclusions, which are freely reached from the overall results of the proceedings. The court is also entitled to ascertain whether the FCO has used its discretionary powers improperly and, in particular, whether it has exceeded the statutory limits of its discretionary power or if it has exercised its discretion in a manner violating the purpose and intention of the ARC. If it holds the FCO decision inadmissible or unfounded, it shall reverse it.[107] Evidently, the appellate court cannot adopt a decision to substitute a FCO decision. In all other aspects, the ARC lays down prerequisites for the full judicial review of FCO decisions.

Since the ARC has defined competition violations as regulatory offences (*Ordnungswidrigkeiten*),[108] FCO decisions imposing fines on undertakings are appealed under separate proceedings laid down in the Act on Regulatory Offences. A regulatory offence is an unlawful and reprehensible act constituting the factual elements outlined in a statute that enables the act to be sanctioned by imposing a regulatory fine.[109] The issue of the distinction between criminal and regulatory offences has occupied German legal thought since the 19th century. The Federal Constitutional Court has acknowledged the right of the legislator to distinguish between criminal acts and regulatory offences. In the view of the FCC, the characterization of an act as criminal represents a socio-ethical value judgment. Regulatory offences constitute a plain misperformance of a legal obligation.

102 *Ibid.*, para. 94.
103 *Ibid.*, para. 63(1).
104 *Ibid.*, para. 67(1).
105 *Ibid.*, para. 69(1).
106 *Ibid.*, para. 70(1)(2).
107 *Ibid.*, para. 71.
108 *Ibid.*, para. 81.
109 Para. 1 of the Regulatory Offences Act.

A regulatory offence does not cause the defamation of an offender as criminal offences do. Therefore, criminal acts are sanctioned by punishment, while regulatory offences are subject to a regulatory fine. Only courts are entitled to punish a person, while administrative authorities can decide upon regulatory offences and impose a fine.[110] The same opinion prevails in German legal theory.[111]

In proceedings for prosecuting regulatory offences, provisions of the Act on Regulatory Offences and, subordinately, norms of the Code of Criminal Procedure are applied, thus securing the fundamental rights guaranteed by the German Constitution.[112] The proceedings feature principles of oral hearing, immediacy, and publicity. A fined person may object to a regulatory fining notice to a court (in the case of competition cases, the Higher Regional Court).[113] The court decides a case *de novo*. The Public Prosecutor and not the FCO represents the state in these cases.[114] The court enjoys the freedom to determine which proposed evidence it will take. It can also choose *ex officio* to take specific evidence to establish the truth by considering the importance of the matter. However, the proceedings can be simplified. The court may decide to read aloud records taken during the administrative proceedings instead of an examination of witnesses, experts, and other persons, and read out written statements given by state authorities and other agencies.[115] Instead of reading out the document, the court may state its substantial content or include the statement in the record under the condition that the parties are allowed to cognize the document's wording.[116]

4.2. FRANCE

The Constitutional Council of France dealt with the issue of the constitutionality of the sanctioning power of French independent administrative authorities over 30 years ago. It found this power to be in line with the

110 Senge, L., 2006, *Karlsruher Kommentar zum Gesetz über Ordnungswidrigkeiten*, C.H. Beck, pp. 21–22.

111 See, for example, Brodowski, D., 2016, Die Verwaltung darf nicht strafen – warum eigentlich nicht? Zugleich eine Vorstudie zu einer rechts-evolutionären, weichen Konstitutionalisierung strafrechtsdogmatisher Grundannahmen, *Zeitschrift für gesamte Strafrechtswissenschaft*, 2, pp. 370–393.

112 Bundeskartellamts, 2015, *Zwischenbericht des Bundeskartellamts zum Expertenkreis Kartellsanktionenrecht*, *Reformimpulse für das Kartellbussgeldverfahren*.

113 Para. 67 of the Regulatory Offences Act.

114 This is considered as a deficiency by FCO. See page 9 of the FCO document provided in public consultations on the subject of empowering NCAs to be more effective enforcers, (http://ec.europa.eu/competition/consultations/2015_effective_enforcers/bundeskartellamt_en.pdf).

115 Para. 77a(1)(2) of the Regulatory Offences Act.

116 *Ibid.*, para. 78.

French Constitution, under the condition that substantive requirements pertaining to the criminal trial were fulfilled.[117] Namely, the Constitutional Council found no infringement of the principle of separation of powers as long as principles of the legality of crimes, the necessity of punishments, and the non-retroactivity of laws providing for more severe penalties limited the exercise of quasi-judicial power. In the next decade, the French Court of Cassation and the Administrative Council came out with decisions admitting the applicability of ECHR Article 6(1) in cases dealing with the imposition of sanctions by administrative authorities.[118] Consequently, the principle of separation of investigatory, prosecutorial, and adjudicatory functions was introduced into French administrative law. The former *Conseil da la Concurrence* was found breaching ECHR Article 6(1) by its practice of an investigating officer (*rapporteur*) being present during the deliberation of the adjudicatory panel deciding the sanction, even if he did not participate in voting.[119] The court's decision, among other reasons, caused the reform of French competition law in 2008,[120] establishing the new Competition Authority (*Autorité de la Concurrence*, the AdlC).

The new French enforcement model has been based on the clear separation of investigative and decision-making powers. Case investigations are carried out by case handlers appointed and supervised by the General Rapporteur. The General Rapporteur is appointed by a ruling of the Minister of Economy, following an opinion of the Board of the AdlC. The AdlC Board is a decision-making body. It consists of a President, four Vice-Presidents, and 12 members from different milieus – judges, experts in economic affairs, competition and consumer protection, and business people. Members of the AdlC Board are appointed for a five-year term by the President of the Republic after obtaining an opinion of the Parliamentary Committee in charge of competition affairs.[121] Rules of appointment of the General Rapporteur and the AdlC President and Board Members ensure the independence of the General Rapporteur from the AdlC Board. The Board meets in a Plenary Session, in a Section, in a Permanent Commission or as a single judge. The Board usually sits in Sections, which are general and not organized by any economic sector. The Permanent Commission is composed of the President and Vice-Presidents. The Board is assisted in matters of proce-

117 Conseil Constitutionnel, DC, 17.1.1989.

118 Custos, D., Independent Administrative Authorities in France: Structural and Procedural Change at the Intersection of Americanization, Europeanization and Galicization, in: Rose-Ackerman, S. and Lindseth, O. L. (eds.), 2010, *Comparative Administrative Law*, Edward Elgar Publishing, pp. 286–287.

119 Custos, D. in: Rose-Ackerman, S. and Lindseth, O. L. (eds.), 2010, p. 287.

120 Law No. 2008-776, 4.8.2008.

121 Art. 95 of the Law 2008-776.

dure by the Hearing Adviser, appointed by the Minister of Economics upon obtaining the Board's opinion. He must have the capacity of a magistrate or offer the same guarantees of independence and expertise.[122] Former AdlC President Lassere confirmed that he and other members of the Board were in no way involved in the investigation process: "For instance, I don't give any directive to case handlers, nor take any part in the way investigations are led. Moreover, neither the members of the Board nor myself have access to the file before the companies have responded to the final phase of the investigation in order to guarantee that we have an impartial view of the case. Conversely, our case handlers don't take part in the decision, which is taken by a Board whose members act in full independence."[123]

French courts went further on the issue of the separation of investigation, prosecution, and adjudication. The Court of Appeal confirmed that a *Rapporteur* might decide on starting investigations *ex officio*.[124] The Court of Cassation (the French Civil Supreme Court) found an infringement of the impartiality principle if the same persons were sitting in a Section adjudicating interim measures and a Section deciding the merits of a case.[125] The Court of Appeals held that the same principle need not apply in the commitment procedure since it does not involve the determination of a criminal charge.[126]

Parties can appeal against the AdlC's decision before the Paris Court of Appeals. This solution is a significant departure from the traditional French system of adjudication, where administrative courts decide upon administrative cases while civil courts decide upon civil law cases. Although decisions of the AdlC are essentially administrative acts, the French legislator thought that civil law judges would be more apt to deal with complex competition cases. The Paris Court of Appeals was selected because it had the largest number of judges specializing in competition law and economic regulation.[127]

The transfer of competition cases to the civil law court brought consequences regarding the powers of the appellate court. French adminis-

122 The Hearing Officer collects remarks from the Parties relating to handling of procedures. He/she then passes on a report to the President proposing solutions that might be necessary to enhance the exercise of the Parties' rights.

123 An Interview with Bruno Lassere, *Global Competition Review*, August/September 2008.

124 *SA Caisse nationale du credit Agricole et a.*, Paris Court of Appeals, 27 November 2001.

125 *Sté Béton travaux et a.*, Court of Cassation, 9 October 2001.

126 *Societè Canal 9 SAS*, Paris Court of Appeals, 6 November 2007.

127 Petit, N., Raboux, L., Judicial Review in French Competition Law and Economic Regulation – A Post-Commission v. Tetra Laval Assesment, in: Essen, O., Gerbrandy, A., Lavrijsen, S. (eds.), 2009, *National Courts and the Standard of Review in Competition Law and Economic Regulation*, Europa Law Publishing, p. 106.

trative courts have powers to decide upon actions for damages and actions seeking annulment of administrative acts as *ultra vires*.[128] In contrast to that, the Paris Court of Appeals has much wider authorities (and duties) in competition law disputes: 1) the obligation to examine the grounds of the AdlC decision in fact and law, and 2) the duty to replace it (or reshape it) with its own decision to resolve the dispute.[129] A decision of the Court of Appeals may be subject to a further appeal to the Court of Cassation on questions of law. Decisions of the Paris Court of Appeals have been praised for sustaining a stronger standard in competition cases and a meticulous examination of the AdlC's decisions.[130]

5. EU Directive to Empower National Competition Authorities

The EU took steps to strengthen the status of national competition authorities (NCAs) by adopting Directive 2019/1. The principal aim of this Directive is to empower NCAs to enforce EU competition law effectively. The Preamble to the Directive states that many NCAs lack the necessary guarantees of independence, resources, and enforcement and fining powers.[131] Directive 2019/1 does not interfere with Member States' rights to select a model of competition law enforcement which they consider the most appropriate. Member States can entrust the enforcement of TFEU Articles 101 and 102 exclusively to an administrative authority, as in most jurisdictions, or authorize both judicial and administrative authorities.[132] However, the exercise of powers conferred by the Directive to NCAs "should be subject to appropriate safeguards which at least comply with general principles of Union law and the Charter of Fundamental Rights of the European Union, in particular in the context of proceedings which could give rise to the imposition of penalties. These safeguards include the right to good administration and the respect of undertakings' right of defence, an essential component of which is the right to be heard."[133] When formulating the Member States' obligation to comply with general principles of Union law and the CFREU, the Directive explicitly refers to

128 Massot, J., The Powers and Duties of the French Administrative Judge, in: Rose-Ackerman, S., Lindseth, P. (eds.), 2010, *Comparative Administrative Law*, Edward Elgar Publishing, p. 417.

129 Petit, N., Raboux, L. in: Essen, O., Gerbrandy, A., Lavrijsen, S. (eds.), 2009, p. 109.

130 *Ibid.*, p. 118.

131 Para. 5 of the Directive 2019/1.

132 *Ibid.*, para. 13.

133 *Ibid.*, para. 14.

safeguards in respect of undertakings' right of defence, including the right to be heard and the right to an effective remedy before a tribunal.[134]

The Directive does not elaborate in detail on these obligations. Member States need to interpret Article 3 and figure out what they should do to comply with the obligations.[135] The diversity of competition enforcement models in the EU prevented drafters of the Directive from specifying which guarantees of fundamental rights the Member States should provide in the first and the second instance proceedings. In most Member States, administrative authorities enforce competition law in the first instance. These Member States need to assess the compatibility of the enforcement procedure with fundamental rights by analyzing the quality of the first instance administrative proceedings and the second instance judicial review, taken in combination. Regarding the conditions of judicial review, the Directive merely asks for "an effective remedy before a tribunal", avoiding even laying down a requirement for "an independent and impartial tribunal established by law", existing in ECHR Article 6(1) and CFREU Article 47(2). One could argue that these notions have already been thoroughly explained in the practice of the ECtHR and ECJ and that there existed no need to specify detailed rules in the Directive 2019/1. We deem it a deficiency which could provide a ground for some countries to avoid compliance with the ECHR and CFREU. This deficiency is particularly problematic in the case of EU candidate countries. During the accession process, pieces of national legislation of a candidate country are, as a rule, checked mechanically against provisions of EU regulations and directives. If the EU legal act does not list specific obligations, there is a greater risk that the issue of compliance with fundamental rights requirements will be neglected.[136] Temple Lang raised a similar problem regarding EEA-EFTA countries that are not signatories of the CFREU.[137]

Furthermore, the Directive made an imbalance between a detailed regulation of NCA powers and a general outlining of the companies' right to defence. The imbalance could lead to the different status of defendant companies in proceedings conducted before an NCA,[138] particularly

134 Art. 3 of the Directive 2019/1.

135 Temple Lang, J., 2017, Fundamental Rights and the Proposed Directive, *Competition Law & Policy Debate*, September issue, p. 48.

136 See on this point Markovic-Bajalovic, D., 2020, Competition Enforcement Models in the Western Balkan Countries: The Rule of Law Still Terra Incognita?, *Yearbook of Antitrust and Regulatory Studies*, Vol. 13. No. 22, pp. 27–66.

137 Temple Lang, J., 2017, p. 49.

138 Rea, M., 2019, New Scenarios of the Right to Defence following Directive 1/2019, *Yearbook of Antitrust and Regulatory Studies*, Vol. 12, No. 20, DOI: 10.7172/1689-9024.YARS.2019.12.20.4, pp. 111–126.

considering the existing difference in levels of procedural rights guaranteed in Member States.[139]

6. Conslusion

Even though significant improvements to the EU competition enforcement model have been made since the early days of European integration to make the model compliant with the rule of law, full conformity has yet to be achieved. This is mainly due to the intrinsic shortcomings of the model, which cannot be eliminated by purely cosmetic face-lifting.

The EU administrative enforcement model was originally highly influenced by Ordoliberal ideas. However, it is wrong to assign the very idea of entrusting an administrative authority with powers to enforce competition law to Ordoliberals. They merely insisted on the independence of the imaginary Antimonopoly Office from the three branches of the government and the elimination of any discretion in enforcing competition law. Historical developments turned the genuine Ordoliberal ideas into the present administrative model. Moreover, when looking through Ordoliberal lenses, we can only conclude that the European Commission is neither an independent enforcer – since it epitomizes the executive power at the EU level – nor is fully bound by EU legislative acts when enforcing competition law.

In the present EU model, we identify several critical deviations from requirements of the rule of law, which we enumerate below.

The European Commission merges investigative and decision-making roles under the same roof. Even though efforts have been made to divide investigative and decision-making roles, the investigative authority, DG Competition, remained subordinate to the Commission. Besides, the collegium of commissioners also relies heavily on DG Competition in the decision-making phase, when DG Competition officials draft decisions in competition cases.

At the same time, the European Commission merges legislative and law enforcement functions under the same roof. It exclusively proposes legislative acts adopted by the Council and the European Parliament and therefore influences their content significantly. Besides, it has maintained considerable discretion when creating and applying competition rules. It formulates soft law instruments representing an important source of EU

139 Bernatt M., Botta M., Svetlicinii A., 2018, The Right of Defence in the Decentralized System of EU Competition Law Enforcement: A Call for Harmonization from Central and Eastern Europe, *World Competition*, Vol. 41, No. 3, pp. 339–334.

competition law. Finally, the ECJ acknowledged the Commission's right to choose the economic methods applied in investigating cases. By executing this right, the Commission essentially supplements legislative acts.

Serious defects in applying the adversarial principle exist in the EU model. As the first-instance decision-making body, the collegium of commissioners does not hear the parties directly. Even though the Hearing Officer is subordinated to the Competition Commissioner, commissioners themselves are not present at the hearing and cannot derive their conclusions regarding the case. Secondly, the Hearing Officer has very limited powers concerning the determination of facts and legal issues to be solved. The end result is that DG Competition *de facto* steers the case from the initiation of an investigation until drafting a decision, which means that it has an overwhelming influence over the final product – the Commission's decision. In addition, defendant companies do not have an opportunity to cross-examine the witnesses during the hearing. This shortcoming further compromises the adversarial principle in proceedings before the Commission.

Shortcomings in the first-level procedure cannot be cured in the second-instance court proceedings. The ECJ has progressed significantly in deepening its review of Commission decisions in competition cases over the last two decades. The ECJ's hands are tied, however, by TFEU provisions defining its mandate. Based on TFEU Articles 261 and 263, the ECJ performs a legality review of the Commission's decisions, while unlimited jurisdiction is possible only with regard to the penalties provided for in regulations. The existing EU judicial system is controversial since, in many cases, it is not possible to make the full review of fines imposed without at the same time fully reviewing the factual and legal issues upon which the fines are based. In recent years, the ECJ has gradually intensified the review of the Commission's decisions. One can argue that the legality review also includes the review of facts. However, the ECJ is missing a fundamental power that would compensate for the defects of the first instance procedures – the power to substitute the Commission decision with its own.

By contrast, existing competition enforcement models in Germany and France have succeeded in embedding ECHR Article 6 principles into the administrative system. The German model has allowed the inquisitorial first-instance proceedings to be strengthened by high institutional autonomy. In the second instance proceedings, the appellate court hears the case *de novo*, thus remedying the negative consequences of the inquisitorial character of the first instance proceedings. The French model has gone even further by introducing adversarial elements into proceedings

before the first-level competition authority. The French competition authority represents a genuine quasi-judicial institution with clearly separated investigative and decision-making functions. The appellate court's proceedings allow for a full judicial review and to replace a decision of the first instance body with its own decision.

More radical cuts in the EU institutional setup are necessary to fully comply with the rule of law. Even though establishing an independent EU competition authority has not shown itself to be feasible so far, it would be a mistake to fully abandon the idea. We see no reason why creating an EU competition authority would be impossible, even though it requires amending the Treaties. The new authority should have fully separated investigative and decision-making functions. In the first instance proceedings, fully-fledged adversarial elements must be incorporated. Besides, amendments to TFEU provisions related to the ECJ are necessary regarding judicial proceedings. The ECJ needs to have full jurisdiction when reviewing decisions in competition cases. Commitment and settlement procedures also need remodelling to narrow down the Commission's wide discretion in reaching agreements with defendant companies and allow for judicial control over elements of the deal and the possible misuse of discretionary powers.

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PREISPITIVANJE INSTITUCIONALNOG MODELA EU ZA PRIMENU PRAVA KONKURENCIJE: KOLIKO VLADAVINE PRAVA JE DOVOLJNO?

Dijana Marković-Bajalović

APSTRAKT

EU institucionalni i proceduralni model za primenu prava konkurencije bio je podvrgnut kritikama još od vremena ranih šezdesetih godina XX veka, kada se započelo sa primenom pravila konkurencije iz Ugovora o osnivanju EEZ. Kritike su bili pretežno inspirisane uočenom fundamen-

talnom suprotnošću između, s jedne strane, zaprećenih (i sve češće izricanih) visokih novčanih kazni za počinioce povreda konkurencije i, s druge strane, inkvizitornog upravnog postupka u kome se povrede konkurencije ispituju i kazne izriču. EU modelu osporena je kompatibilnost sa članom 6 Evropske konvencije o zaštiti ljudskih prava i osnovnih sloboda. Ove kritike podstakle su institucije EU da početkom dvehiljaditih godina preduzmu korake u cilju unapređenja institucionalnog i proceduralnog okvira za primenu prava konkurencije. Taj proces još uvek nije okončan. Naprotiv, čini se da je Direktiva 2019/1 o ovlašćenjima tela nadležnih za konkurenciju podstakla dodatne kontroverze koje se tiču usklađenosti postojećih institucionalnih modela država članica EU sa načelom vladavine prava.

U ovom članku autorka analizira razvoj EU institucionalnog i proceduralnog modela za primenu prava konkurencije, zasnovanog pretežno na sekundarnim izvorima prava EU i odlukama Suda pravde. Autorka preispituje EU model, najpre u svetlu misli Škole ordoliberala, kao začetnika ideje o nezavisnom antimonopolskom organu, a zatim u svetlu presuda Evropskog suda za ljudska prava i upravnopravnih modela za primenu prava konkurencije u dvema „starim" državama članicama EU – Nemačkoj i Francuskoj. U zaključku autorka identifikuje najkrupnije nedostatke EU modela sa aspekta načela vladavine prava i predlaže moguća rešenja za njihovo eliminisanje.

Ključne reči: pravo konkurencije, upravni postupak, Škola ordoliberala, vladavina prava, član 6 Evropske konvencije za zaštitu ljudskih prava, Direktiva EU 2019/1, slučaj Menarini.

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