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IBL Special Report

The Sphynx and the Chimera

Antitrust proceedings in the European Union

Serena Sileoni

Executive Summary

Serena Sileoni is Vice-Director General of Istituto Bruno Leoni

1. The principle of due process as a matter of rule of law

The chapter will explain, from an historical and legal point of view, the recognition of formal and substantive guarantees for defendants in administrative and legal proceedings.

Starting from the classical theory of the constitutionalism, the separation of powers is the starting point for the guarantee of fundamental rights, among which it appears the right to a fair process and the right of defence.

This brief explanation of the rule of law applied to legal proceedings is preliminary to the analysis and evaluation of due process in EU competition cases, bearing in mind that Europe was the cradle of such a principle and an infringement of it should be ironic at least.

2. EU competition proceedings: actors, rules and practices

2.1 Institutions involved

In the first part, the paragraph will analyze the role of the European institutions involved in the enforcement of the EU competition law. A large section will focused on the Commission, that is the main actor in such an issue, but we will examine also the role of the General Court and the Court of Justice, and of the other European institutions. The second part will be dedicated to the Competition Authorities of the Member States, which act as "federal agencies" of the European Commission, from one hand, and as administrative independent authorities, from the other one.

2.2 Rules defining the EU competition proceedings

The paragraph focuses on the rules of procedure, also from a diachronic point of view, that regulate the EU competition proceedings. From the former treaties to the Lisbon one, and passing from legislation and principles deriving from jurisprudence, we will describe the functioning of the EU competition procedures, the organization of the actors involved and the margin of defense of parties.

3. EU competition proceedings and the rule of law: critical aspects and grey areas

Recalling what we have argued in chapter one and after having enumerated the norms regulating of the EU competition proceedings, this paragraph will compare the archetypal of due process with the EU competition system.

At a deeper remark, there are several points that infringe some basic principles concerning the right to a fair proceedings.

Firstly, the DG-Competition has a multiple role that raises serious doubts about the absence of checks and balances: it acts as prosecutor, judge, jury and executioner, breaking with the legal tradition and common sense. As the OECD stated, the combination of investigative, prosecutorial and adjudicative function is not at all coherent with the separation of powers, that is one of main consequence of the principle of rule of law.

Secondly, there are no sufficient guarantees of a full protection of the right to defense: there is no right of undertakings to cross-examine witnesses or leniency applicants; the College of Commissioner – i.e. the authority of the Commission charged with the final decision – is not required to attend the oral hearings, that usually are collected by Commission officials, such as members of the Legal Service or of other Directorates, which mediate among the undertakings and the College; the practice of inspections and requests for information can shift in abuse of coercive powers and can be extremely intrusive.

Thirdly, the Commission's decisions can be appealed only on the ground of legality. This implies a limited standard of review that contrasts with the basic principle of sentence to be reviewed by an higher courts. While undertakings subject to a Commission investigation could reasonably expect to challenge the decisions before a judicial body that has full jurisdiction, the General Court and the ECJ only can conduct a mere control of legality, with the power to strike down the Commission's decision (in full or in part) but not to substitute it with a new one. Moreover, the ECJ recognizes a margin of discretion to the Commission when reviewing "complex economic matters."

If it is true that EU competition cases "are 20 percent fact, 20 percent law and 60 percent policy," as the Judge rapporteur in the Microsoft case said, the 80 percent of the Commission decisions are outside the judicial review, with a clear sacrifice of the right to a fair trial.

5. Conclusion

In conclusion, we will be able to answer to the question if the EU competition proceedings seriously interfere with fundamental rights enshrined in the rule of law and separation of powers principles; and, subsequently, we may stress the paradox of an unfair enforcement of competition law acted by institutions bound to a liberal and democratic tradition.

Le Sphinx
(est immobile et regarde la chimère)
- Ici, Chimère! Arrête-toi!
La Chimère
- Non, jamais!
Le Sphinx
- Ne cours pas si vite, ne vole pas si haut, n'aboie pas si fort.
La Chimère
- Ne m'appelle plus ! Ne m'appelle plus !
Puisque tu restes toujours muet et que jamais tu ne te déranges de ta posture.
(G. Flaubert, *La tentation de Saint Antoine*, 1849)

1. The principle of separation between jurisdiction and regulatory power as the core of rule of law

Like Ionesco in the theatre, Picasso in painting or Wagner in musical drama, the European Union has torn up many of the classical concepts of modern political law, starting from the separation of powers into judicial, executive and legislative.

After a long path on which an attempt was made to recover a more incisive role for the so-called European citizen's representative assembly, the legislative function has been attributed to a complex joint decisional procedure involving the Parliament and the Council. There is no real judge as such but a body—the Court of Justice—that brings together the typical functions of international arbitration and of judicial review. Then, for its part, the executive power is distributed between the Commission, Council of Europe and ad hoc agencies that act without any real administrative rules as such.

The splitting up of the classic institutions of government is neither unusual nor alarming: the States, emblems and synthesis of the modern legal system, were themselves a sign of rupture with the previous—medieval—one.

Nevertheless, as Picasso used the rules of portraiture for disassembling and reassembling reality and, more in general, all the artistic avant-gardes challenged tradition by basing their new writings on old expressive grammars, the deconstruction of contemporary institutions inevitably must take account of traditional juridical thought and reconstruct a regulatory model on the basis of an inheritance whose "presumed unity, if it exists, cannot but consist of the injunction to reaffirm by choosing".[1]

The perspectives with which contemporary institutions can be redesigned cannot ignore the classical geometrical rules if the validity of those rules continues to be recognized. In general terms, nothing prevents us from leaving behind the specific phenomenology of traditional institutions and inventing something that places itself outside the plane of the institutional design; but, if the foundation of the legal systems continues to draw upon the principles that support those institutions—which is effectively what happens at European level—it is necessary to continue to use the same rules for recomposing the image of the institutions into something else, though still based on those geometrical rules that are now being revisited.

Leaving aside the metaphor, the legal thinking from which our institutions have been formed are based on a few fundamental principles, codified today by the 19th-century constitutionalism, the gist of which is the idea that as the institutions are intended to be

1 J. Derrida, *Spectres de Marx*, trad. it. *Spettri di Marx*, by G. Chiurazzi, Milan, Cortina, 1994, pp. 25-26.

at the service of the citizens, they must be limited in accordance with the techniques for separating and balancing powers specifically in order to safeguard the fundamental human rights which they are intended to serve. If we are still concerned about liberty, we cannot eliminate the theories of constitutionalism, as the "legal technique of liberty"[2], not even in the construction of the new European order which, on the other hand, continues to deem them to be at the basis of it, to the point that the preamble of the Treaty on European Union confirms the "attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law."

The separation of powers is the oldest principles of constitutionalism behind the rule of law and we are still indebted to it. When the legal system still did not employ the concept of constitution, the distinction was theorized between *gubernaculum* and *iurisdictio*[3] as respectively the totality of the king's powers divided into two distinct groups: the privileged discretional one and that of *ius-dicere*, namely justice between his subjects in accordance with the dictates of the law. It was specifically this distinction from the sphere of royal power that, centuries later, the concept of the autonomy of the magistrature, subject only to the law, would be developed.

It is worth noting that the former—perhaps insufficiently conscious—theorization of the separation regarded the distinction between making the law and stating the right, between the general moment of construction of the legal rules and the individual one of implementing them coercively, between regulatory power and judicial power, and between "representing," "deciding" and "guaranteeing"[4].

The whole of contemporary constitutionalism is indebted to this principle and, where legislative and executive powers are increasingly difficult to tell apart, the autonomy and the separation of the power to judge still remain in order to oversee the right to a defence and the right to a free and impartial trial.

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2 N. Matteucci, "Costituzionalismo" (entry), in Enciclopedia delle scienze sociali, Rome, Treccani, 1992.

3 H. de Bracton, *De legibus et consuetudinibus Angliae*, 1235 c., vol. II, cit. in C.H. McIlwain, Constitutionalism: Ancient and Modern, Indianapolis, Liberty Fund, 2008: "in the matter of liberties, we must consider who is able to grant them, to whom and in what manner they are transferred, in what way they are in possession or quasi possession, and how they are retained by user. Who, then? And you must know that it is the lord king himself, who has the ordinary jurisdiction and dignity and power over all who are in his realm. For he has in his hand all rights touching the crown, and the secular power, and the material sword which pertains to the governance of the realm (qui pertinet ad regni gubernaculum). Moreover he has the justice and the judgment belonging to his jurisdiction, so that by virtue of his jurisdiction as minister and vicar of God he attributes (tribuat) to each one what is his own."

4 S. Sicardi, Politica e giurisdizione nello Stato costituzionale: modelli "buoni" e modelli "degenerati," in www.forumcostituzionale.it. As is known, this distinction was to be fully defined theoretically with Montesquieu's L'esprit des Lois, where he insists on the need to distinguish between "la puissance législative, la puissance exécutrice des choses qui dépendent du droit des gens, et la puissance exécutrice de celles qui dépendent du droit civil." Referring to the fears expressed by John Locke in the Two Treaties on Government, Montesquieu, faithful to the ancient iurisdictio, underlined that "Il n'y a point encore de liberté si la puissance de juger n'est pas séparée de la puissance législative et de l'exécutrice. Si elle était jointe à la puissance législative, le pouvoir sur la vie et la liberté des citoyens serait arbitraire; car le juge serait législateur. Si elle était jointe à la puissance exécutrice, le juge pourrait avoir la force d'un oppresseur."(Book XI, chap. VI).

There is however a growing element of invalidation of the power of "*ius-dicere*" as traditionally understood, triggered largely by the European legal system. It can be summarised in that "judicial technocracy" which, for sectors, renders it possible for the law, including the enforcement part, to be "made" and to be "applied" by bodies that are not jurisdictional but which exercise those so-called para-judicial functions just because, as they belong to the administrative power and being the only judicial one, as Montesquieu teaches us, they cannot properly be described as jurisdictional.

In fact, if the jurisdiction consists of settling disputes[5], applying sanctions[6] and affirming the concrete legal system[7], there are "islands of *ius-dicere*," such as the independent Authorities whose power to "lay down the law is diluted by the fact, by no means insignificant, that their decisions can be appealed in the courts of First Instance. This does take anything away from the fact that their decrees in concrete cases, though reviewable by the courts, are capable of autonomously affecting subjective legal positions in a coercive manner. If, in fact, "the jurisdictional function, in compliance with specific procedures and guarantees (pre-established), consists: a) of knowledge of the rules, namely in the identification and interpretation of normative statements b) of the application of the rules obtained in this way (and therefore pre-existing) to the concrete cases submitted for adjudication"[8], we cannot avoid asking the question—which has been seeking answers in the doctrine of public law for some time—of the extent to which this category of so-called para-jurisdictional decisions constitutes a challenge to the separation between administration and jurisdiction. Among these "islands of *ius-dicere*," as regards the application of competition rules, is the European Commission, with regard to which, indeed, the national antitrust authorities are deemed to be considered to be operating arms.[9]

We will seek in this paper to analyze the rules behind the competition law infringement procedure before the European Commission, and highlight the murky areas, compared with the rule of law, of the separation of powers and, as a consequence, of the right of defence, and we will attempt to bring out the gaps in the procedure which, if filled, would compensate partially for the anomalies in proceedings without a judge.

After briefly describing the role of the European institutions and bodies in the antitrust field, we will carry out a deeper analysis of the central one, that of the Commission, and dwell in particular on the procedural rules that make the Commission's decisions the jurisdictional product of an administrative procedure, with serious doubts about its appropriateness, if not of legitimacy from the point of view of the right to a fair procedure.

5 F. Carnelutti, *Sistema del diritto processuale civile*, I, Padua 1936, p. 44.

6 E. Redenti, "Intorno al concetto di giurisdizione," in Scritti e discorsi giuridici di mezzo secolo, I, Milan 1962, p. 227.

7 S. Satta, "Giurisdizione (nozioni generali)," in *Enciclopedia del diritto*, XIX, Milan 1970, p. 224. V. and also G. Chiovenda, *Principii di diritto processuale civile*, Naples 1928, p. 301; R. Guastini, *Il giudice e la legge. Lezioni di diritto costituzionale*, Turin 1995, p. 12.

8 P. Alvazzi del Frate, *Appunti di storia degli ordinamenti giudiziari,* Aracne, Rome, 2009, p. 12.

9 This expression is indebted to M. Clarich, G. Corso, and V. Zeno-Zencovich, p. 8 of their paper at the Convention on *The system of independent authorities. Problems and perspectives,* Rome, 27 February 2006. Also see among others, M. Cuniberti, Autorità indipendenti e libertà costituzionali, Giuffrè, Milan 2007, p. 146, n. 2, with regard to the similarity between the decisions of the Commission and the national antitrust authorities.

2. EU COMPETITION PROCEEDINGS: ACTORS, RULES AND PRACTICES

2.1 Institutions involved

2.1.1 The European level

The regulation of competition constitutes one of the main sectors of European Union law. Right from its conception, in fact, the four fundamental liberties and the establishment of a single, open and competitive market have been tempered by the task of the Community institutions to oversee those market events that are rightly or wrongly be considered to distort the same.

In this work, we will omit a substantive investigation of competition law as this has been examined and continues to be examined by many scholars in an extremely vast literature.

We will dwell instead on the competences of the European institutions as regards competition law and on the procedures for controlling and repressing the cases of what Community law deems to constitute unfair competition. As we have said, the aim of this work is to assess the degree of compatibility of these procedures with the principle of separation of powers and with the rules of due process governing the rule of law, the latter being a formula that cannot be separated from the genesis and development of European legal systems.

Article 101 (formerly art. 81 TCE) of the Treaty on the Functioning of the European Union (hereinafter the TFEU) declares the incompatibility with the common market of, and therefore prohibits agreements between undertakings, the decisions of associations of undertakings and the practices agreed that can be detrimental to trade between the Member States and the goal and effect of which are to impede, restrict or distort the interplay of competition inside the common market and, in particular, those consisting of a) directly or indirectly fixing the prices of purchase or sale or other transaction conditions; b) limiting or controlling production, outlets, technical development or investments; c) sharing out the markets or sources of procurement; d) applying, in commercial relations with the other contracting parties, dissimilar conditions for equivalent services in such a way as to determine a competitive disadvantage for the latter; e) subordinating the conclusion of contracts to the acceptance by the other contracting parties of additional services which, because of their nature or according to commercial practice, have no connection with the subject of the contracts themselves.

A waiver vis-à-vis the nullity of these agreements can be granted to those agreements between undertakings or decisions of associations of undertakings or any agreed practice that contribute to improving production or the distribution of products or the promotion of technical or economic progress, while reserving a congruous part of the profits that derive from them for the users, and avoiding the imposition on the undertakings involved of restrictions which are not indispensable for achieving competition for a substantial part of the products in question.

The next article of the Treaty prohibits the abusive exploitation by one or more undertakings of a dominant position in the common market or in a substantial part of it as being incompatible with the common market, to the extent to which it could be detrimental for trade between the Member States. The abuse of a dominant position, the article explains, is intended as the direct or indirect imposition of the prices of purchase or sale or of other unfair transaction conditions, the limitation of the production, of the outlets or of technical

development, to the detriment of consumers, the application in commercial relations with the other contracting parties of dissimilar conditions for equivalent services that gives rise to a competitive disadvantage for the latter, and the subordination of the conclusion of contracts to the acceptance by other contracting parties of supplementary services which, because of their nature or according to commercial usage, have no connection with the subject of the contracts themselves.

The interpretation of these rules is still the laborious and bitter fruit of constant exegetic work both regarding the institutions involved, which we will examine shortly, and the doctrine. In fact, competition law is one of the most investigated and most studied sectors and one of the commonest subjects of the activities of the European institutions.

It is sufficient for our purposes, however, to understand who the actors are in this sector and what level of guarantee is offered by the distribution of the competences and by the procedural discipline to the parties involved in the procedures for assessing and controlling compliance with competition law.

Once again it is primary law that fixes the competences where, in art. 103 TFEU (formerly art. 83 TCE) it provides that the regulations and the directives for the purposes of applying the principles mentioned above be established by the Council, with a qualified majority, on the proposal of the Commission and after consulting the Parliament.

A crucial role is played however by the European Commission which, pursuant to art. 105 TFEU (formerly art. 85 TCE) "the Commission shall ensure the application of the principles laid down in Articles 101 and 102." Therefore, as an express provision of the Treaty, it prepares the cases of presumed infringement of the aforesaid principles on the request of a Member State or even ex officio and in liaison with the competent national authorities. Whenever it ascertains the existence of an infringement, it proposes the means for tackling it and, if an end is not put to it, it sets it out in a justified decision and fixes conditions and procedures for remedying it.

The centrality of the Commission in the definition and implementation of competition law already emerges from this provision. As we will see, not only it is the institution with the greatest jurisdiction, from both the regulatory and the applicative standpoints, for competition law, but it is also at the top of the European network of competition guarantor authorities, consisting of independent national authorities that carry out, in their own territories, the same supervisory functions as those of the Commission.

More specifically, the Directorate-General for Competition (hereinafter the DG), the office with the main responsibility for supervising compliance with the rules laid down in the Treaty, is inside the Commission. This is this body that prepares and conducts the infringement procedures which the entire Commission then decides on.

With a staff of about 900 and an annual cost of about €100 million[10], the DG initiates the cases of concentration and state aid with deeds of notification, while in the cases of agreements and abuses of a dominant position it can open the infraction procedure on its own initiative or following third-party reports. If it concludes that an undertaking or a State have violated the antitrust rules it has the power to propose to the Commission that a formal decision be taken, prohibiting the conduct and ordering remedies to be taken, also in reparation by imposing a fine. In addition to the strictly supervisory powers, the DG oversees compliance with the rules of the common market, also by means of investigations

10 http://ec.europa.eu/dgs/competition/factsheet_general_en.pdf.

of the various sectors and, furthermore, carries out informative activities for the correct application and interpretation of the rules governing competition on the framework of which it can not only produce guidelines but also general deeds of exemption from, and implementation of, the regulations. Finally it is consulted whenever the legislation in force is amended.[11]

Procedurally, the functionaries of the DG prepare the preliminary procedures, possibly with the aid of a "peer revision" of their conclusions, as we shall see shortly. After hearing the Commission's Legal Service, the Commissioner for Competition can then decide whether or not to send a statement of objections to the company or companies that are the subject of the investigation. This statement, that has to be exercised in agreement with the President of the Commission and which sets out the evidence and the possible remedy, constitutes the fundamental document for the parties in order to allow them to prepare their defensive strategy and respond, both in writing and verbally. The Commission is in fact obliged to comply with the statement as regards the type and gravity of the alleged breach, the evidence on which it is based and the size of the sanction.

The infraction proceedings are then conducted by the DG, both during the investigative and preliminary stage and in drafting the decision. Even though it is not the DG that takes the final decision, the fact that the latter is taken by a body—the Commission—which has never had any relationship with the parties involved and which only decides on the basis of the results produced by the DG, leads to the conclusion that there is a concentration of investigative and decision-making functions within the DG with respect to which, as we will see, the internal checks and balances are not sufficient for guaranteeing the impartiality and fairness of the procedure.

Compared with the Commission's centralism—which, on the one hand, is one of the maker of the development of antitrust legislation due to legislative power initiative and, on the other hand, is its first guardian—the powers of the Parliament are quite exiguous, especially in comparison with its role as co-legislator. As regards competition, indeed, the joint decision-making procedure is not followed because—as we have already seen, art. 103 TFEU envisages that the legislation governing competition be established by the Council on the proposal of the Commission and following consultation with the European Parliament. While, as provided by the Treaty of Lisbon, many of the Union's other legislative competences are passed to the joint decision-making procedure, the competition area has remained the prerogative of the Council and of the Commission.

There are two parliamentary commissions with competence for competition and for the protection of consumers. The European Parliament ECON committee (economic and monetary affairs), to which the European Competition Commission periodically reports, is responsible for the Union's monetary and economic policies, the functioning of the economic and monetary Union and Europe financial and monetary system, the free circulation of capital and payments, the international monetary and financial system, the rules governing public and State aid, the tax regulations, and the regulation and control of the financial markets. The European Parliament IMCO committee (internal market and consumer protection), on the other hand, is competent for identifying and removing potential obstacles to the common market and for promoting and protecting the interests of consumers. For this purpose, it is responsible for the coordination at European level of the national legislations governing the common market. The Parliament receives a report from the DG

11 See Rules of procedure of the Commission, 24.2.2010 (C(2010)1200 final)

annually.

As we have said above, it is the Council, on the other hand, that is competent for approving the regulations and directives of use for applying the principles laid down by the Treaty on competition and it makes its decisions on the basis of proposals from the Commission. In June 2002, the composition of the Council for Competition was institutionalized by uniting three offices that were previously separate (common market, industry and research), as a response to the increasingly evident need for greater coordination of the Council's decisions on the matter.

The European Council, in agreement with the Parliament, plays an important role in the appointment of the Commissioner for Competition who is selected by the national governments and by the President of the Commission.

The Court of Justice plays a crucial role in reviewing the Commission's decisions. The Court of First Instance is the place into which the appeals against the Commission's decisions flow, except that they can then be examined again by the Court of Justice for reasons of law. If referred preliminarily by the national courts, it contributes to the clarification of the rules governing competition.

Finally, the Central Bank and the Court of Auditors also participate in the regulatory system governing competition. The former is consulted in the cases in which the questions regarding competition are linked to financial matters; the latter has the task of imposing sanctions on undertakings responsible for anti-competitive behaviour following a decision from the Commission.

2.1.2 The national levels

Initially, compared with the competences of the Member States of the European Community, the control of compliance with antitrust regulations was essentially in the hands of the Commission. The first regulation implementing the provisions of the 1962 Treaty[12] recognized a marginal role for the national authorities envisaging only that the Commission was required to send them a copy of the most important applications, notifications and documents lodged with it for the purposes of ascertaining the breaches referred to in arts. 85 and 96 TCE, or of the issue of a negative ruling or of a declaration pursuant to art. 85.3. They limited themselves to formulating observations on the procedures the Commission is responsible for and to getting involved in the assessments on the Commission's request.

Forty years later, having observed that the centralised system envisaged by the 1962 regulation was no longer effective for guaranteeing control of anticompetitive practices in an efficient manner, a new regulation[13] was approved and, while envisaging a parallel system of competences between the national authorities and the Commission, places the former alongside the latter in the application of the articles of the Treaty regarding breaches of competition rules.

The Commission, therefore, is no longer the sole supervisory authority but is part of a "network of public authorities which apply the Community competition rules in close

12 Regulation (EEC) no. 17/1962 of the Council of 06 February 1962, the first regulation applying articles 85 and 86 of the Treaty.

13 Regulation (EC) no. 1/2003 of the Commission of 16 December 2002 concerning the application of the competition rules referred to in arts. 81 and 82 of the Treaty.

cooperation."[14] This regulation, known as the "modernization regulation," marked a decisive change from the past and indicated the passage from a national control system based on the principle of the exception to a system in which, on the contrary, the national authorities are the first guardians of the infringement of the competition rules in their own territory, even if the Commission still retains the power to take over the cases initiated by the national authorities. In fact, the national supervisory authorities, where they exist, and the national jurisdictional authorities are directly competent for the application of articles 101 and 102 of the Treaty in individual cases, also acting *ex officio*, and can impose the fines and sanctions envisaged by national law.

In conclusion, Regulation (EC) 1/2003 inverted the control mechanism on the basis of which agreements that are detrimental for internal trade had to be notified to the Commission so that it could grant an exemption. Today, instead, there is an automatic legal exception in force which, basing itself on the decentralized application of the competition rules and the reinforcement of the subsequent control, made it possible to lighten the Commission's work both for the inversion of the control mechanism and for the decentralisation of the control functions.

This change of perspective was already suggested by the Commission itself which, overwhelmed by the copious number of notifications of restrictive practices sent by undertakings—whether to obtain reassurance regarding their conduct or to avoid legal action before the national authorities—asked at the end of the last century, in the White Paper on modernisation of the rules implementing Articles 81 and 82 of the EC Treaty (formerly Articles 85 and 86)[15], for the system of prior notification and centralized authorization to be substituted with one based on the mechanism of derogation and subsequent control.

Furthermore, the regulation envisages mechanisms for cooperation between the national guarantor authorities and the Commission that require the former to inform the latter of the launch of an investigation as well as the decision that they wish to take, if this tends to order the cessation of a breach, the acceptance of commitments or the revocation of the application of an exemption rule for a category. On the other hand, the initiation of proceedings by the Commission bars the national authorities from undertaking an identical procedure at domestic level or, if one has already been initiated, it imposes deferment to the Commission after hearing the national authority involved.

Even though, in theory, all the national authorities are competent in parallel to hear cases of infractions and the undertakings involved have no right for the procedure to be followed by a particular authority in the network of competition authorities, as clarified by the Commission notice on cooperation within the Network of Competition Authorities[16], the general practice is that the authority that receives an appeal or starts an investigation ex officio remains charged with hearing the case, as it is normally the authority that is competent in the territory in which the abusive agreement or practice originated.

14 Considering no. 15.

15 COM (1999) 101 final.

16 2004/C 101/03.

2.2 Rules defining the EU competition proceedings

2.2.1 The internal organization of the Commission in antitrust proceedings

As we have already seen, the rules governing the antitrust law control and supervisory procedures were mainly envisaged by two Europeans regulations. The provisions of the Treaty had, in fact, left substantial leeway in identifying the forms of control in the antitrust area. The 1962 regulation was critical for initially shaping those principles of the Treaty that some even believed not to be directly applicable, but valid as general principles that would guide the conduct of the Member States. Ever since, controlling the antitrust area was conceived less as a political-legislative activity, than as a function articulated by typically jurisdictional powers, thanks to which the Commission had the investigative and enforcement powers typical of a jurisdictional body, even when formally adopted following the outcome of a procedure that was not fully such.

The first regulation therefore made the Commission, in the function examined here, a real independent authority of the European Community as regards competition law, characterized like the independent national authorities by a series of hybrid powers of the administrative and jurisdictional type. Afterwards, the 2003 regulation, while repealing the assessment mechanism and strengthening the role of the national authorities, confirmed the Commission's centrality in the application of competition law, while increasing the investigative powers, moreover, and reconfirming the combination of investigative and judging functions.

The 2003 regulation entailed quite a significant change in the means of application of the controls over abusive practices not only in the perspective of the Commission's role and the burden of proof, but also in strengthening the powers thereof when undertaking an infraction procedure, *ex officio* or following a report.

In the first place, the regulation broadens the investigative powers of the Commission which can now receive spontaneous declarations from anyone who is aware of the facts and can contribute to the conduct of the investigations; ask any representative or member of the personnel of the undertaking or association of undertakings for explanations of facts or documents relating to the subject and scope of the investigations and consequently put them on the record them while, when the previous regulations were in force, it could request verbal explanations in loco; seize goods for the duration of the investigations—a power that enables it to affix seals on company premises, books, documentation and instruments, all by using the law enforcement forces if necessary; and proceed with inquiries in premises other than the offices of the undertaking being investigated, including the domiciles and means of transport of administrators, directors and other staff members of the undertakings involved. In the case of these investigations of a coercive type, the national judicial authorities retain the power to control their proportionality.

If, following the preliminary investigation carried out, the Commission believes that there are grounds for proceeding, it notifies its observations to the parties involved by means of the 'statement of objections' and opens the stage which, as we will see more clearly in the next paragraph, being characterized by a substantially litigious nature, makes it into a court with a judging function after it, itself, acted at an investigating magistrate.

If the infringement is confirmed at the end of the proceedings, which has no peremptory limits, the Commission has the power to propose various types of sanctions.

First of all, there is a remedy, we might say, of the transaction type, consisting of the as-

sumption by the undertaking involved of commitments which, if respected, will then lead to the closure of the case. Otherwise, the Commission can put an end to the infraction by imposing behavioural or structural remedies, proportioned to the infraction committed and necessary for putting an effective end to the infraction. The most significant sanction is nevertheless the imposition of fines that can amount to 10% of the total turnover reached in the previous financial year.

The accumulation of investigative and judging roles, present since the 1962 regulations, has never been considered to constitute grounds for concern from the point of view of the right to a defence by the European institutions, deeming that the procedural guarantees and the possibilities for appeal to the Court of First Instance are sufficient for protecting the undertakings involved. However, it should also be remembered that competition law in 1962 was something quite different and much less consistent than it is today. It is no coincidence, as we have seen, that starting from 2000 and being unable to keep abreast with the mountain of procedures initiated, the Commission asked the Council to modify and overturn the investigation and enforcement mechanisms, in accordance with what is envisaged today by the 2003 regulation. The combined effect of the expansion of competition law and the reinforcement of the Commission's investigative power has been to make the Commission's role increasingly critical for the conclusions. Compared to the early years when "the Commission was a young institution whose powers, rather like the medieval papacy, were far reaching in theory but in practice uncertain, and whose decisions and concerns by no means matched the priorities of National courts or agencies or governments. [...] an apparatus of fact-gathering apt to quasi-criminal investigation exists and is regularly used."[17]

Internal and external checks and balances have been implemented over time in order to counter the criticism and the risk of "persecutory prejudice" from the Commission, specifically because of the mixing of investigative and judging powers. In this way, in 1982, the Commission established within itself the figure of the 'hearing officer' who, extraneous to the fact-finding activities in the case, conducts the hearings and ensures that they are carried out in an impartial and fair manner, and fully respect the rights of the parties to be heard. For this purpose, before the final decision is taken, the hearing officer draws up a final report to the Commission on respect for the procedural guarantees. While in principle the hearing officer was a functionary of the DG, today he is a direct collaborator of the Commissioner for Competition. Even if this has made him more independent from the Directorate General, his role, though important, is not decisive as the Commission is not bound in any way to accepting his arguments. His job, furthermore, is fundamentally limited to checking the completeness of the statement of objection and the formal regularity of the hearing and to deciding on access to documents, except that he cannot take positions that are binding on the Commission:

> it should be noted at the outset that the hearing officer's report constitutes a purely internal Commission document, which is not intended to supplement or correct the undertakings' arguments and which therefore does not constitute a decisive factor which the Community judicature

17 I.S. Forrester, A Bush in Need of Pruning: The Luxuriant Growth of Light Judicial Review, in C-D. Ehlermann, M. Marquis (edited by), European Competition Law Annual 2009: evaluation of Evidence and its Judicial Review in Competition Cases, Hart Publishing, Oxford, 2011.

> must take into account when exercising its power of review.[18]
>
> Therefore a real opportunity for an accused undertaking to clarify, elaborate and emphasize its arguments before a neutral party who then decides as to guilt or innocence on the basis of the facts and evidence before it, would go a long way towards realizing effective justice in competition law.[19]

A further internal check is provided by the peer review panels which can be established by the Director General for Competition in liaison with the Commission for Competition in order to verify some or all the results of the investigative part of the case. The composition of the panels and their recommendations are not made public or communicated to the parties.

Finally, in order to ensure greater reflection in deciding individual cases, the Commission can draw on an Advisory Commission, a committee of experts who represent the national antitrust authorities with merely consultative functions and whose approach

> is naturally deferential to the authority who has been working for a considerable amount of time on the case and has seen the whole body of evidence. As a matter of fact the Advisory Committee has never voted against the adoption of a Commission Decision.[20]

In reality, not only the Advisory Committee, but none of these bodies which have no limiting powers as regards the Commission's decisions and whose documents are sometimes even ignored by the parties, have been able to contain the expansion of the Commission's role. This role was initially permitted by the succinct character of the text of the Treaties and later broadened by the conferment by the Council of the set of investigative powers envisaged right from the 1962 regulation and by the support of the Court of Justice for a broad interpretation and application of the provisions of the Treaty with regard to competition. And so, the Commission

> did not face the narrow, technical limitations on jurisdiction or power that some national courts have imposed on new competition agencies. Instead, the ECJ supported expansive claims of competition policy jurisdiction, because they implemented the Court's goals of promoting market integration and strengthening the institutions of the common market.[21]

2.2.2 Procedural guarantees for a fair proceedings

The fact that the Commission has powers that are administrative and, *de facto*, jurisdictional, at least in the competition sector, is not surprising news per se. We have already said that the model of independent administrative authorities, for example, is specifically

18 Case T-161/05, Hoechst GmbH v Commission of the European Communities, 2009, ECR 3555. par. 176. For a more detailed examination of the powers and functions of the Hearing Officer v. N. Zingales, *The Hearing Officer in EU Competition Law Proceedings: Ensuring Full Respect for the Right to Be Heard?*, in "The Competition Law Review," Vol. 7, 1, p. 134.

19 J. Flattery, *Balancing Efficiency and Justice in EU Competition Law: Elements of Procedural Fairness and their Impact on the Right to a Fair Hearing*, in "The Competition Law Review," Vol. 7, 1, 2010, p. 56. p. 68.

20 N. Zingales, *The Hearing Officer in EU Competition Law Proceedings*, cit., p. 134.

21 OECD, *European Commission - Peer Review of Competition Law and Policy*, 2005, p.11.

based on a mixture of Montesquieu's classical powers and is deemed to be a source of greater efficiency and competence for governing and controlling specific sectors of the administration. On the other hand, if it is true that the separation of powers as traditionally understood was severely tried in today's legal systems to the point of being replaced by the idea of a functional specialization[22] and, therefore, that the separation of powers no longer necessarily presupposes the separation of the bodies, it is also true that the separation deficit is deemed admissible only on condition that it be compensated by a sort of principle of formal legality that, by becoming concretely expressed in very strict procedural constraints, guarantees respect for the rule of law.[23]

With reference to those administrative procedures capable of generating decisions of a quasi-jurisdictional type, as in the case of the procedures for infringements of arts. 101 and 102 TFEU, what cannot be sacrificed on the altar of administrative efficiency is the parties' right to a defence or, in Anglo-Saxon terms, the right to a fair trial.

This right is indisputably recognized formally by the sources implementing arts. 101 and 102 TFEU and by the jurisprudence of the Court of Justice.

The procedural guarantees initially envisaged by the 1962 regulation were truly meagre and effectively consisted merely of the right of undertakings to be heard. These were limited to the right of the undertakings involved to express their point of view with regard to the charges on which the Commission would be basing itself (art. 19). Thanks also to the warning of the Court of Justice that a system of guarantees that directly descend from the general principles of European law and from the common traditions of the Member States must be applied, today the parties' right to defend themselves has been codified by the 2003 Regulation which makes explicit reference to the fundamental rights and to the written principles in the Charter of Fundamental Rights of the European Union (considering no. 37 and art. 27.1).

In addition to the 2003 Regulation a further regulation was added the following year and regards the procedures carried out by the Commission in accordance with articles 81 and 82 if the EC Treaty (arts. 101 and 102 TFEU today)[24]. This reiterates the right of legal and natural persons to be informed and to be heard before the Commission takes a decision (arts. 10-12), while it remains understood that no member of the Commission, not even the Commissioner for Competition, may participate at such hearings and that they are not public.

For its part, right from the seventies, the Court of Justice has emphasized that inherent in the right to be heard is the right to be promptly informed and that

> it is clear [...] both from the nature and objective of the procedure for hearings [...] a person whose interests are perceptibly affected by a decision taken by a public authority must be given the opportunity to

22 B. Ackerman, *The New Separation of Powers*, It. by A. Ferrara, *La nuova separazione dei poteri. Presidenzialismo e sistemi democratici*, Rome, Carocci, 2003.

23 L. Cuocolo, "Il potere sanzionatorio delle autorità indipendenti: spunti per una comparazione," *Quaderni regionali*, 2007, pp. 601-628. Reference should also be made to S. Sileoni, "Tecniche di regolazione delle autorità amministrative indipendenti: esperienze applicative," in P. Caretti (edited by), *Osservatorio sulle fonti*, Turin, Giappichelli, 2009, pp. 140-170.

24 Regulation (EC) no. 773/2004 of the Commission of 7 April 2004 regarding procedures carried out by the Commission pursuant to articles 81 and 82 of the EC Treaty.

> make his point of view known. This rule requires that an undertaking be clearly informed, in good time, of the essence of conditions to which the Commission intends to subject an exemption and it must have the opportunity to submit its observations to the Commission.[25]

The right to be heard, according to the Court of Justice, must not be guaranteed only in jurisdictional proceedings as understood in the narrow sense but—consistently with the jurisprudence of the European Court of Human Rights—also in administrative procedures where these may conclude with the adoption of a provision that could affect the interests of the parties:

> In this regard it should be recalled that the necessity to have regard to the rights of the defence is a fundamental principle of Community law which the Commission must observe in administrative procedures which may lead to the imposition of penalties under the rules of competition laid down in the treaty. Its observance requires inter alia that the undertaking concerned must have been enabled to express its views effectively on the documents used by the Commission to support its allegation of an infringement.[26]

The right to be heard therefore remains central and, at the same time, open and dynamic to the point that it is considered to be an equivalent to the concept of due process[27].

This right, as expressly envisaged by art. 27 of Regulation no. 1/2003, comprises the right to obtain a detailed and complete enough *statement of objections* for preparing a defence, the possibility for making observations on the documents and the information behind the Commission's assumptions and the right of access to the Commission's documents.[28]

In this regard, the jurisprudence of the Court of Justice has always recognized that, even though this right cannot be recognized in full as regards the period before notification of the charges—because, were it to be extended to this stage, the effectiveness of the investigation could be compromised—the investigative measures adopted by the Commission during the preliminary investigations imply, by their very nature, the charge of an infringement and are capable or giving rise to importance consequences for the situation of the suspected undertakings. Therefore it is necessary to make it impossible for the rights to a defence to be irremediably compromised during this stage of the administrative procedure, as the investigative measures can be critical for constituting sufficient evidence proving the unlawfulness of the undertakings' behaviour and their responsibility.

> It follows that, when the first measure is taken in respect of an undertaking,

25 Case C-17-74, Transocean Marine Paint Association v Commission of the European Communities, 1974, ECR 2063.

26 Case C-322/81, NV Nederlandsche Banden-Industrie Michelin v Commission of the European Communities 1983 ECR 3461, par. 7. V. also C-121/76, Alessandro Moli v Commission of the European Communities, 1977, ECR 1971, par. 20.

27 J. Flattery, Balancing Efficiency and Justice in EU Competition Law, cit., p. 56.

28 Case T-57/01, Solvay SA v Commission of the European Communities, 2009, ECR 4621, pars. 404-405. Other important procedural guarantees include the right not to incriminate oneself, the right to be supported by legal counsel, legal professional privilege, and the principle of good administration that binds the Commission to reaching a rules in a reasonable time and exercise its powers with diligence and impartiality.

> including in requests for information under Article 11 of Regulation No 17, the Commission is required to inform the undertaking concerned, inter alia, of the subject-matter and purpose of the investigation underway. In that regard, the reasoning does not need to be so extensive as that required for decisions ordering investigation, owing to the more restrictive nature of the latter and the particular intensity of their impact on the legal situation of the undertaking concerned (see, in relation to the Commission's powers of investigation, CB v Commission, cited in paragraph 54 above, paragraph 71). That reasoning must, however, enable the undertaking to understand the purpose and the subject-matter of that investigation, which means that the putative infringements must be specified and, in that context, the fact that the undertaking may be faced with allegations related to that possible infringement, so that it can take the measures which it deems useful for its exoneration and, thus, prepare its defence at the *inter partes* stage of the administrative procedure.[29]

Nevertheless, there is a central element which we will look at in the next paragraph, which makes the interpretation of the right to a defence in procedures regarding infringements of competition law jar with the interpretation classically given in the framework of the rule or law, and this is the fact that undertakings do not have the right, not indeed do they even have the occasion, to make their defence before an impartial third-party which would then make the final ruling as must be the case in fact in proper legal proceedings and as effectively happens in all the European Union Member States and in the main common law systems.

The European Parliament itself has admitted that

> the Commission is the only competition authority in Europe in which the only independent and objective assessment of the authority's final decision is not disclosed to the parties. If this defect were corrected, this would go a long way to persuade the companies which appear before the Commission that their arguments are objectively listened to and considered fully and fairly. This will be necessary if the Commission's decisions are to inspire the confidence which they should inspire.[30]

29 Case T-99/04, AC-Treuhand AG v Commission of the European Communities, 2008, ECR 1501, par. 56.

30 European Parliament, Committe on Economic and Monetary Affairs, Report on the proposal for a Council regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty amending Regulations (EEC) No 1017/68, (ECC) No 2988/74, (ECC) No 4056/86 and (EEC) No 3975/87, (COM(2000)582 - C50527/2000 - 2000/0243(CNS)„ p. 59.

Member State of the EU	Body responsible for taking a decision imposing sanctions for competition law infringements	Right to an oral hearing before the members of this body who are ultimately taking the decision
Austria	Cartel Court	Yes
Belgium	Competition Council	Yes
Bulgaria	Commission for the Protection of Competition	Yes
Cyprus	Commission for the Protection of Competition	Yes
Czech Republic	Office for the Protection of Competition	Yes (if necessary)
Denmark	Criminal Court	Yes
Estonia	Criminal Court	Yes
Finland	Market Court	Yes
France	Competition Council	Yes
Germany	Competition Authority	Yes
Greece	Competition Commission	Yes (but not always before all of them)
Hungary	Competition Council	Yes (but only in important cases)
Ireland	Court	Yes
Italy	Competition Authority	Yes
Latvia	Competition Council	Yes
Lithuania	Competition Council	Yes
Luxembourg	Competition Council	Yes
Malta	Court	Yes
Netherlands	Director General of the Competition Authority	Yes
Poland	President of the Competition Office	No
Portugal	Competition Council	No
Romania	President of the Competition Council	Yes
Slovakia	Antimonopoly Office	Yes
Slovenia	Competition Authority	Yes (but not always)
Spain	Competition Court	Yes (upon request)
Sweden	Court of First Instance	Yes (upon request)
United Kingdom	Office for Fair Trading	No

State outside the EU	Body responsible for taking a decision imposing sanctions for competition law infringements	Right to an oral hearing before the members of this body who are ultimately taking the decision
Australia	Court	Yes
Canada	Court	Yes
Japan	Court	Yes
United States	Federal District Court	Yes
Source: Global Competition Law Centre, Enforcement by the Commission: The Decisional and Enforcement Structure in Antitrust Cases and the Commission's Fining System, report presented at the Fifth Annual Conference of the, 11-12 June 2009		

2.2.3 Judicial review of the Commission's decisions

The Commission's decisions are of course binding for the parties: they can only be appealed in the court of First Instance and, for reasons of law, in the Court of Justice, and they are immediately executive however, unless they are suspended during the review stage, something that normally occurs in the case of a fine.

The review of the decisions, which lasts about 2-3 years, should render the enforcement system consistent and compatible with the right to a fair trial established by the European Convention on Human Rights because, as the Commission is not an independent and impartial court, when all is said and done it is the power to appeal its decisions to the Court of First Instance that renders the system not incompatible, on paper, with the right to a defence as interpreted both by the Court of Justice and the European Court of Human Rights. Nevertheless,

> their review is, in relation to the substantial findings contained in them, limited to the existence of any manifest errors of law or of fact, of error in the interpretation of EU competition law and of misuse of power.[31]

This is because art. 263 TFEU attributes a control of the legitimacy of the binding deeds of the European institutions to the Court of Justice and declares that the latter is competent to rule on appeals for incompetence, infringement of the substantial forms, infringement of the treaties or of any rule of law relating to their application, or for misuse of powers, proposed by a Member State, by the European Parliament, by the Council or by the Commission.

This means that the Court does not have full competence, even as regards their merits, for checking such deeds, but on the contrary, its jurisdiction is limited to questions of law and therefore, if it deems a deed to be unlawful, it can only cancel it or refer it back to the body that adopted it. Full control and the possibility of replacing the Commission's decision with its own are limited only to the proposed sanctions.[32] In short, the Court at best can quash the Commission's decision but cannot take its place in assessing the merits of the case.

Apart from the case of the referral of the decision back to the Commission, an element that excludes the idea that the decisions of the latter can in some way be subject to a form of appeal, it is also necessary to ask ourselves what type of assessment the Court can conduct from the point of view of legitimacy.

It can be seen from the drift of art. 263 that the Court has full jurisdiction for judging respect for European rules and procedural correctness. As regards the latter aspect, the Court has sought to offer an extensive interpretation of the provisions relating to procedural guarantees, tracing them back to the right to a defence[33], while, as regards correctness in the interpretation of the substantive rules, the Court developed a series of tests

31 I. Lianos, A. Andreangeli, Institutional design and decision-Making processes in European competition Laws and Policy, Law and Governance in Europe Working Paper Series, 15/2011.

32 In this regard, the ex-president of the Court of First Instance, Bo Vesterdorf, calculated that, as at 2009, the Court made use of the power granted to it by art. 262 of the TFEU only on three occasions and that it is limited in general to checking that the Commission has correctly applied its guidelines: The Court of Justice and Unlimited Jurisdiction: What does it mean in practice?, in "Antitrust Chronicle," vol. 6, 2009, p. 2.

33 Case C374/87, Orkem v Commission of the European Communities, 1989, ECR 3283, par. 33.

and standards for determining the compatibility of a series of commercial practices with competition law.[34]

The control of the Court of First Instance goes as far as to "check meticulously the nature and import of the evidence taken into consideration by the Commission."[35]

There remains, however, the recognition of a margin of discretion as regards the more complex economic questions that limits the Court's control

> to checking whether the relevant rules on procedure and on stating reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers.[36]

34 V. E. Elhauge, D. Geradin, Global Antitrust Law & Economics, Foundation Press, 2007, cit. in D. Geradin, N. Petit, Judicial Review in European Union Competition Law: A Quantitative and Qualitative Assessment, in TILEC discussion Paper No. 2011-008.

35 Joined cases T-68/69, T-77/89 and T-78/89, Società Italiana Vetro Spa, Fabbrica Pisana Spa and PPG Vernante pennitalia Spa v Commission of the European Communities, 1992, ECR 1403, par. 95.

36 See case T-201/04, Microsoft Corp. v Commission of the European Communities, 2007, ERC 3601, pars. 85-88: "The Commission claims that the contested decision rests on a number of considerations involving complex technical and economic assessments. It submits that, according to the case-law, the Community Courts can carry out only a limited review of such assessments (Case C-269/90 Technische Universität München [1991] ECR I-5469, paragraph 13; Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P Aalborg Portland and Others v Commission [2004] ECR I-123, paragraph 279; and Case T-28/03 Holcim (Deutschland) v Commission [2005] ECR II-1357, paragraphs 95, 97 and 98). Microsoft, citing by way of example Case T-62/98 Volkswagen v Commission [2000] ECR II-2707, paragraph 43, responds that the Community Courts do not refrain from 'conducting searching inquiries into the soundness of the Commission's decisions, even in complex cases.' The Court observes that it follows from consistent case-law that, although as a general rule the Community Courts undertake a comprehensive review of the question as to whether or not the conditions for the application of the competition rules are met, their review of complex economic appraisals made by the Commission is necessarily limited to checking whether the relevant rules on procedure and on stating reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers (Case T-65/96 Kish Glass v Commission [2000] ECR II-1885, paragraph 64, upheld on appeal by order of the Court of Justice in Case C-241/00 P Kish Glass v Commission [2001] ECR I-7759; see also, to that effect, with respect to Article 81 EC, Case 42/84 Remia and Others v Commission [1985] ECR 2545, paragraph 34, and Joined Cases 142/84 and 156/84 BAT and Reynolds v Commission [1987] ECR 4487, paragraph 62. Likewise, in so far as the Commission's decision is the result of complex technical appraisals, those appraisals are in principle subject to only limited review by the Court, which means that the Community Courts cannot substitute their own assessment of matters of fact for the Commission's (see, as regards a decision adopted following complex appraisals in the medico-pharmacological sphere, order of the President of the Court of Justice in Case C-459/00 P(R) Commission v Trenker [2001] ECR I-2823, paragraphs 82 and 83; see also, to that effect, Case C-120/97 Upjohn [1999] ECR I-223, paragraph 34 and the case-law cited; Case T-179/00 A. Menarini v Commission [2002] ECR II-2879, paragraphs 44 and 45; and Case T-13/99 Pfizer Animal Health v Council [2002] ECR II-3305, paragraph 323). However, while the Community Courts recognise that the Commission has a margin of appreciation in economic or technical matters, that does not mean that they must decline to review the Commission's interpretation of economic or technical data.

In short,

> the review carried out by the Court of the complex economic assessments undertaken by the Commission [...] must be limited to ascertaining whether the procedural rules have been complied with, whether proper reasons have been provided, whether the facts have been accurately stated and whether there has been any manifest error of appraisals or misuse of powers.[37]

Therefore,

> It is not for the Court of First Instance to substitute its own assessment for that of the Commission.[38]

Therefore, while the Court of First Instance has clarified that, in the cases of infringement of articles 101 and 102 of the TFEU, the appellants have the right to "an exhaustive review of both the Commission's substantive findings of facts and its legal appraisal of these facts," the spirit of art. 263, which seems to limit the Court's control to questions of legitimacy, and the recognition of a margin of appreciation in the assessment of economic and technical questions—which provide the justifying grounds for the Commission's antitrust decisions—might well hinder the appraisal of the merit. While the Court warns that the margin of appreciation in economic and technical questions "does not mean that they must decline to review the Commission's interpretation of economic or technical data," committing itself as a consequence not only to establishing "whether the evidence put forward it factually accurate, reliable and consistent" but also to determining "whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it,"[39] the boundary between appreciation and assessment of legitimacy is not so clear, especially in the more complex questions. As a consequence,

> legally, the EGC is empowered to engage in fact-finding of its own in the course of its review. However, in most cases the EGC does not make use of these powers. Instead, it will carefully review the information in the files, inquiring whether the facts adduced by the Commission are reliable, consistent and sufficiently meaningful in the light of the substantiated challenge by the applicant.[40]

As "the Commission moves toward a more explicitly economic point of view," as the

See, in relation to merger operations, Case T-210/01, General Electric Company v Commission of the European Communities, 14 dicembre 2005, par. 60: "It must be observed first that the Commission has a margin of assessment with regard to economic matters for the purpose of applying the basic provisions of Regulation No 4064/89, in particular Article 2 thereof. It follows that the Community judicature's power of review is restricted to verifying that the facts relied on are accurate and that there has been no manifest error of assessment (Joined Cases C-68/94 and C-30/95 France and Others v Commission (Kali & Salz) [1998] ECR I-1375, paragraphs 223 and 224, and Case C-12/03 P Commission v TetraLaval [2005] ECR I-987, paragraph 38)."

37 Case T-29/92, Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid et al. v Commission of the European Communities, 1995, ECR 0289, par. 288.

38 Case T-354/05, Télévision Française 1 SA (TF1) v Commission of the European Communities, 2009, ERC 0471, par. 8.

39 Case T-201/04 Microsoft v Commission, cit. par. 89.

40 H. Schweitzer, The European Competition Law Enforcement System and the Evolution of Judicial Review, 2009 EUI Competition Law and Policy Workshop/Proceedings, p. 12.

OECD has already warned,

> a new understanding with the courts will have to be worked out, about how the courts will deal with economics and the Commission's claim to economic expertise. Convincingly and consistently presented, economic analysis could substitute for legal soundness as an anchor against politically-driven manipulation of policy outcomes.[41]

41 OECD, 2005, cit., p. 59.

3. EU COMPETITION PROCEEDINGS AND THE RULE OF LAW: CRITICAL ASPECTS AND GREY AREAS

3.1 The overlap of investigative, prosecutorial and adjudicative functions

Notwithstanding the provision of internal control systems for balancing the powers of the DG and notwithstanding the extension jurisprudentially of the procedural guarantees, when a deeper analysis is carried out serious critical points emerge in the procedure for breaches of the competition rules vis-à-vis the right to a fair trial for the party that is presumed to have infringed the rules, a right which is one of the foundations of constitutionalism.

In the first place, the Commission is the body that represents the European Union and, even if with functions that are different from those of the Parliament and of the Council, and tough in abstract terms, it is fully independent from the member States, it is nevertheless a political and not a jurisprudential institution which, ruling "in a particular case, will no doubt be affected by its overall policy objectives in competition matters."[42]

Even should we wish to ignore what has been maintained by a part of the doctrine regarding the tendency for Commissioners to favour, de facto, the policies and the interests of the countries from which they come[43], the only attribution of functions resembling jurisdictional ones to one of the political institutions of the Union is difficult to reconcile the separation of powers, especially of the political and judicial ones, with classical teaching, recalled in the first paragraph.

As the OECD has pointed out, "no other jurisdiction in the OECD assigns decision-making responsibility in competition enforcement to a body like the Commission," which, moreover, being composed of 27 members, "is too large to effectively deliberate and decide fact-intensive matters."

This consideration leads easily to the second critical point because, if on paper it is the Commission that takes the final decision,

> realistically, the Commission defers increasingly to the Competition Commissioner, providing some high-level policy control over the Competition Commissioner's initiatives.[44]

Even if the procedural guarantees have improved over the years, also thanks to the guidelines of the Court of Justice, the essential fact remains that the fact-finding and the adjudicating functions are both held by a single European body has not been assigned jurisdictional functions and this is difficult to reconcile with the typical jurisdictional model of the rule of law.

Notwithstanding the fact that the DG "limits" itself to preparing the dossiers on which the *plenum* of the Commission decides, the fact that the latter does not have any contact

42 J. Joshua, The right to be heard in EEC Competition Procedures, in "Fordham International Law Journal, vol. 15, 1, 1991, p. 71.

43 S. Wilks, L. McGowan, "Competition Policy in the European Union: Creating a Federal Agency?," in G. Bruce Doern, S. Wilks, Comparative Competition Policy: National Institutions in a Global Market, Clarendon Press, Oxford, 1996.

44 OECD, 2005, p. 63.

with the parties, but decides exclusively on the basis of papers prepared by the DG, and the fact—by no means minor—that the Commissioners are each responsible for a sector of European policy and that, therefore, the concrete possibility of investigating the case belongs effectively to the Commission for Competition alone, mean that in reality the DG finds itself playing the multiple role of prosecutor, judge, jury and executioner, in contempt for the juridical tradition that separates the roles of those who investigate from those who judge.

As once again underlined by the OECD,

> The Competition Commissioner may have consulted with the Legal Service, Hearing Officer, peer review panel and Chief Economist, and the Commission may have before it opinions from the Advisory Committee or other Commission services. But when the Commission decides a matter, it has typically not heard directly the case against the proposed decision. No Commissioner, including even the Competition Commissioner, will have attended the hearing. All depend on briefings from staff, and there is no *ex parte* rule or other control on contacts between investigating staff and the Commissioners who decide the matter. There is no initial adjudicator that is fully independent of the investigative function.

The consequence is that effectively the

> same individuals in the Commission are responsible both for drafting and approving the case against a company - the statement of objections - and for drafting and approving the decision in which the Commission determines whether the criticisms made have been sufficiently proved.[45]

The essentiality of the separation between the investigative function and the adjudicating one derives from considerations of an extra-judicial nature but clearly of common sense, which is worth recalling.

As admitted by the Hearing Officer, Wouter Wils,

> officials in charge of competition enforcement may - as other officials - be subject to a variety of biases,

and this

> creates the risk that evidence that does not neatly fit with the theory of harm a case team seeks to prove will be consciously or, more likely, unconsciously ignored or given less importance

while these biases also derive from a natural

> structure of incentives [that] will often be such that they derive greater 'value' from the adoption on an infringement decision than, for instance, a decision to discontinue an investigation. [...] After a long and painful investigation, it may be understandably hard for an official to terminate an investigation even if the case for intervention is considerably weaker than initially envisaged.[46]

More authoritatively, the United States Supreme Court has observed that "The conten-

45 European Parliament, cit., p. 61.

46 D. Gerardin, N. Petit, *Judicial Review in European Union Competition Law: A Quantitative and Qualitative Assessment*, cit., p. 13.

tion that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented."[47]

Once again, the OECD has warned that "the Commission's integrated enforcement process, though efficient, has inherent weaknesses. Combining the functions of investigation and decision in a single institution can save costs but can also dampen internal critique. Risk of unchecked discretion may make courts sceptical of the Commission's decisions."[48]

From this perspective, there is little use in the internal checks and balances which, starting from the beginning of the millennium, have been introduced as tools of greater reflection. Given their non-binding nature and, occasionally, the fact that they are anchored inside the DG itself, they cannot be compared in terms of their effects with a sufficient real separation between the fact-finding and adjudicating functions for the purpose of guaranteeing the impartiality of the ruling also as regards the prejudices that can emerge during the investigative stage.

3.2 The weakness of the right of defence in antitrust proceedings

The overlapping of investigative and decisional functions is noticeable not only from the standpoint of the quality of the decisions but—even more fundamentally—from the point of view of the consistency of the procedures for enforcing competition law with the right to be judged by an independent and impartial judge before whom the parties have been able to set out their case.

The fact that the Commission, charged with making the decision, is aware of the case only through the dossiers of the DG and has no contact with the parties is contrary to the *audi alteram partem* principle that

> is said to be 'certainly the oldest established principle in Anglo-American administrative law' [...] It is also an integral part of the 'general principles of law' which the European Court of Justice will enforce.[49]

On the other hand,

> even in countries where there is no strict separation between investigatory, prosecutorial and adjudicative powers at the administrative stage (as it is the case in the EU), parties are generally given the opportunity to present their views to those members of the administrative body who will ultimately be taking the decision imposing sanctions. The fact that no such guarantee exists under the Community system constitutes further evidence of the fact, not only that Article 6 ECHR is not complied with, but also that the general requirements of fairness embodied in that provision are not being given enough

47 U.S. Supreme Court, Withrow v. Larkin, 421 U.S. 35 (1975), p. 421 U.S. 47.

48 OECD, 2005, p. 63.

49 J.M. Joshua, The right to be heard in EEC Competition Procedures, cit., p. 16. The internal quotation is from B. Schwartz.

attention.[50]

From a positivist point of view, the right in European law to an effective appeal and to an impartial judge is in fact guaranteed not only in the Charter of Fundamental Rights of the European Union but also in the European Convention on Human Rights, art. 6, which, among other things, lays down that every person has the right for their case to be examined fairly and publicly by an independent and impartial court within a reasonable time. It should be recalled that, following the coming into force of the treaty of Lisbon, European law has integrated the Convention into its legal system and has recognized the binding value of the Union's Charter of Fundamental Rights.

The Court of First Instance has already had an opportunity to declare the compatibility of the enforcement procedure as regards competition law with the provisions of the Convention, because,

> provided that the right to an impartial tribunal is guaranteed, Article 6(1) of the Convention does not prohibit the prior intervention of administrative bodies that do not satisfy all the requirements that apply to procedure before the courts.

And because, the Court maintains, as

> the action for annulment available under Article 230 EC against Commission decisions adopted under Article 8(3) and (4) of the regulation is a remedy incorporating the safeguards required by Article 6(1) of the Convention," the review of the decision of the Court of Justice is sufficient for guaranteeing the fairness and impartiality of the procedure for the parties.[51]

Nevertheless, as noted above, the review by the jurisdictional authority is not a real appeal—that allows the possibility of making an assessment on the merits and of making a second instance ruling—but is more like an appeal to a court of cassation that only deals with issues of legitimacy, such as the correct application of the law and the correct interpretation of the facts, and leaves the Commission a margin of discretion in any case in the appreciation of complex economic questions.

In Anglo-Saxon doctrine, moreover, there are those who, using assessment parameters that are more substantive than procedural, on the basis of a specific view of the European Court of Human Rights, have deemed the competition law infringement procedure really to be a trial of a criminal type because of the sanctions that the Commission can impose[52].

For some time the Court of Strasbourg has availed itself of a substantive rather than formal or nominal criterion for distinguishing between criminal charges and those of another kind, in order to force the Convention member states to comply with the most stringent requirements of compatibility with art. 6 of the Human Right Conventions, pars. 2 and 3 of which envisage more specific rights in the case of charges of a criminal nature (the right to

50 D. Slater, S. Thomas, S. Waelbroeck, Competition law proceedings befor the European Commission and the right to a fair trial: no need for reform?, GCLC Working Paper 04/08, p. 40.

51 Case T-351/03, Schneider Electric SA v Commission of the European Communities, 2007, ECR 2237, pars. 183-184.

52 D. Slater, S. Thomas, S. Waelbroeck, Competition law proceedings before the European Commission and the right to a fair trial, cit. One of the supporters of the criminal nature interpretation is Wouter Wils, the Commission Hearing Officer.

be informed promptly, the right to the presumption of innocence, etc.). As early as 1980, the Court laid down that given "the prominent place held in a democratic society by the right to a fair trial," it was necessary "to look behind the appearances and investigate the realities of the procedure in question" and "to prefer a 'substantive' rather than a 'formal' conception of the 'charge' contemplated by Article 6 par. 1."[53] As a result, while the States are

> free to designate as a criminal offence an act or omission not constituting the normal exercise of one of the rights that it protects [...] the converse choice, for its part, is subject to stricter rules. If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a 'mixed' offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Articles 6 and 7 [...] would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the purpose and object of the Convention. The Court therefore has jurisdiction, under Article 6 [...] to satisfy itself that the disciplinary does not improperly encroach upon the criminal.[54]

The Court of Strasbourg, therefore, deems that—for the purposes of ascertaining an infringement of art. 6 of the ECHU—the "criminal" qualification be attributed on the basis of an autonomous ruling based on three alternative criteria drawn up in sentence mentioned above (known as the "Engel test"): first of all, the Court must see how the offence is considered in national law, but this only constitutes an initial, marginal aspect as, in second place, it must establish the nature of the offence and the severity and punitive ends of the penalty handed imposed.[55]

It is then necessary to ensure that the infringement proceedings before the Commission

53 ECHR, Deweer v. Belgium, No. 6903/75, 27 February 1980.

54 ECHR, Engel and others v. the Netherlands, No. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, 8 June 1976.

55 These are the criteria down up in the Engel ruling and taken into consideration since then. The sentence expressly envisages the following: "it is first necessary to know whether the provision(s) defining the offence charged belong, according to the legal system of the respondent State, to criminal law, disciplinary law or both concurrently. This however provides no more than a starting point. The indications so afforded have only a formal and relative value and must be examined in the light of the common denominator of the respective legislation of the various Contracting States. The very nature of the offence is a factor of greater import. When a serviceman finds himself accused of an act or omission allegedly contravening a legal rule governing the operation of the armed forces, the State may in principle employ against him disciplinary law rather than criminal law. In this respect, the Court expresses its agreement with the Government. However, supervision by the Court does not stop there. Such supervision would generally prove to be illusory if it did not also take into consideration the degree of severity of the penalty that the person concerned risks incurring. In a society subscribing to the rule of law, there belong to the "criminal" sphere deprivations of liberty liable to be imposed as a punishment, except those which by their nature, duration or manner of execution cannot be appreciably detrimental. The seriousness of what is at stake, the traditions of the Contracting States and the importance attached by the Convention to respect for the physical liberty of the person all require that this should be so (see, *mutatis mutandis*, the De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, p. 36, last sub-paragraph, and p. 42 in fine)."

pursuant to arts. 101 and 102 TEU pass the Engel test.

By restating what had already been clarified in the 1962 regulation, Art. 23.5 of regulation no. 1/2003 expressly clarifies that fines for infringements of arts. 101 and 102 are not of a criminal nature. This clarification derives from the desire of the Member States—when adopting the regulations –not to grant the Community all competence in criminal matters. It therefore has a specific raison d'être in the limitation of the Community's competences and, in any case, the criminal connotation must be determined in an independent manner vis-à-vis the national one, as has already been said, for the purposes of compliance with art. 6 ECHR . In fact,

> if the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a 'mixed' offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Article 6 and 7 [...] would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the purpose and object of the Convention.[56]

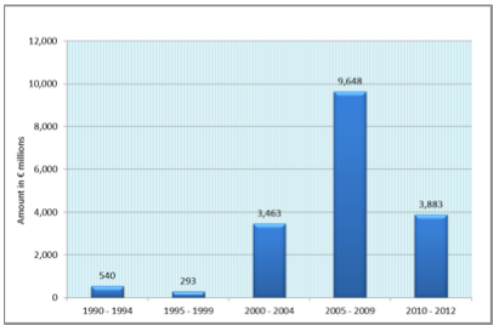
Coming, then, to the criterion of the nature and purpose of the penalty, the question concerns whether the sanction is an administrative or a criminal one.

The emergence of impositional powers for the public administration first of all, and then the jurisdictional powers for the independent administrative authorities, have made it difficult to make out the borderline between administrative and criminal sanctions, to the point that for some time French doctrine has coined the term "pseudo-droit pénal" with reference to the sanctioning powers of the independent authorities[57]. It goes without saying that administrative sanctions cannot consist of or be converted into penalties that deprive personal freedom but, when the investigated party is a legal person—as in the case of antitrust procedures before the Commission—this distinction is of little, or indeed, no importance. What counts, therefore, is the size of the penalty, also in proportion to the offence committed, in order as a consequence to check if its aim is simply to reinstate the infringed order or if it also has deterrent aims.

FIGURE 1

Fines imposed (not adjusted for Court Judgements) - Period 1990-2012

Year	Amount in €*)
1990 - 1994	539 691 550
1995 - 1999	292 838 000
2000 - 2004	3 462 664 100
++2005 – 2009++	9 647 837 500
++2010 - 2012++	3 883 258 432
total	**17 826 289 582**



Last change: 27 June 2012

Source: European Commission, statistics of the enforcement of competition law, 2012, in http://ec.europa.eu/competition/cartels/statistics/statistics.pdf

56 Ibidem.

57 M. Waline, Droit administratif, 1963, cit. in L. Cuocolo, cit., p. 608.

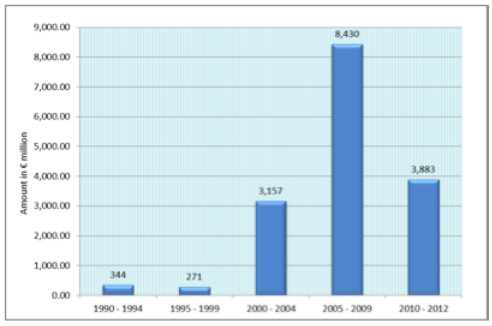
The amount of the fines, which has risen exponentially in recent years, confirms that the aim of the penalty is not simply to restore the order infringed by the punished undertaking or undertakings, but is also to discourage other undertakings from conduct that could be liable to similar fines. In reality, this is confirmed by the Court of Justice itself where is recognizes that the

> fine imposed on an undertaking may be calculated by including a deterrence factor and that factor is assessed by taking into account a large number of factors and not merely the particular situation of the undertaking concerned.[58]

Figure 2

Fines imposed (adjusted for Court Judgements) - Period 1990-2012

Period	Amount in €*
1990 - 1994	344 282 550,00
1995 - 1999	270 963 500,00
2000 - 2004	3 157 348 710,00
++2005 – 2009++	8 429 838 162,50
2010 – 2012	3 883 258 432,00
total	**16 085 691 354.50**



Last change: 29 September 2012

Source: European Commission, statistics of the enforcement of competition law, 2012, in http://ec.europa.eu/competition/cartels/statistics/statistics.pdf

The guidelines drawn up by the Commission for calculating fines recognize that

> fines should have sufficiently deterrent effect, not only in order to sanction the undertakings concerned (specific deterrence) but also in order to deter other undertakings from engaging in, or continuing, behaviour that is contrary to Articles 81 and 82 of the EC Treaty (general deterrence).

As a result,

> the autonomous interpretation adopted by the Convention institutions 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 [...] competition law.[59]

The aim and the deterrent gravity of the inflicted penalty would, according to the Engel test, be sufficient for classifying as criminal the competition law infringement procedure before the Commission, with the consequence that failure to comply with the provisions set out in pars. 2 and 3 of art. 6 of the ECHR determine the infringement of the right to a fair trial enjoyed by European citizens. In fact, as also maintained by one of the Hearing Officers,

58 Case C-289/04, Showa Denko KK v. Commission of the European Communities, 2006, ECR 5859, par. 23. V. including joined cases 100 to 103/80, SA Musique diffusion française et al. v Commission of the European Communities, 1983, ECR 1825, pars. 104-109.

59 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation n. 1/2003, del September 2006.

> it appears difficult to deny that the application of the criteria set out in the case law of the European Court of Human Rights leads to the conclusion that proceedings based on Regulation No. 1/2003, leading to decisions in which the Commission finds violations of Articles 81 or 82 EC, orders their termination and imposes fines relate to "the determination of a criminal charge" within the meaning of Article 6 ECHR.[60]

The Court of Strasbourg itself clarified that

> it suffices that the offence in question should by its nature be 'criminal' from the point of view of the Convention, because it relates to 'a general rule, whose purpose is both deterrent and punitive,' 'or should have made the person concerned liable to a sanction which, in its nature and degree of severity, belongs in general to the 'criminal' sphere.'[61]

However, the European legal system has still not clarified whether or not the sanctions imposable for breaches of competition law are criminal and indeed it is deemed that the criminal categorization of sanctions in the antitrust area "would impinge seriously on the effectiveness of Community competition law."[62]

Between the extremes of the criminal and administrative categorization of European competition law there is no harm in noting, in a median position, that there are sufficient elements of a criminal type, such as the aim and the gravity of the penalty, that would impose greater respect for the entire art. 6 of the ECHU.[63]

In any case, even if we were to consider competition law to be outside the criminal framework, this would not mean that the parties do have the right, in accordance with the terms of the ECHR, to "a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." Art. 6.1 of the Convention, which so states, applies to all the procedures regarding "civil rights and obligations or of any criminal charge," and not exclusively, therefore, to those of a criminal nature for which the subsequent paragraphs require stricter procedural guarantees.

Therefore, in the case in which it is not desired to take the case before the Commission in the criminal framework, it is still necessary to check if the right envisaged by the first paragraph is respected. The Court of Justice itself has recognized that the enforcement procedure before the Commission can be brought within the provisions of art. 6.1 ECHR, when it laid down that

> the general principle of Community law that everyone is entitled to fair legal

60 W.P.J. Wils, The combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis, in "World Competition," vol. 2, 27, 2004, p. 209. For a deeper examination of the classification of the infringement proceedings as criminal, v. D. Slater, S. Thomas, D. Waelbroeck, Competition Law Proceedings before the European Commission and the Right to a Fair Trial: No Need for Reform?, cit.

61 ECtHR, Lutz v Germany, No. 9912/82, 25 August 1987, par. 55; Bendenoun v France, No. 12547/86, 24 February 1994, par. 47; Jussila v Finland, No. 73053/01, 23 November 2006, pars. 30-31.

62 Case C-338/00 P, Volkswagen v Commission of the European Communities, 2003, 9189, par. 97.

63 M. Kròl-Bogomilska, Standard of Entrepreneur Rights in Competition Proceedings - a Matter of Administrative or Criminal Law?, in "Yearbook of Antitrust and Regulatory Studies," vol. 5, 6, 2012, pp. 10-32.

> process, which is inspired by those fundamental rights [...] and in particular the right to legal process within a reasonable period, is applicable in the context of proceedings brought against a Commission decision imposing fines on an undertaking for infringement of competition law.[64]

In this regard, the European Parliament has officially questioned the compatibility of the competition law infringement ascertainment proceedings, and advanced the following reasons:

> the European Commission could not be regarded as a 'tribunal,' and its procedures are not in public. In addition, it is open to question whether it could be considered 'independent' for this purpose, because essentially the same individuals are responsible both for making the case against a company and later for deciding whether that case has been sufficiently proved.[65]

In fact, when examined carefully, the procedural guarantees briefly examined above are not sufficient for guaranteeing full compliance with the right to a defence if the proceeding were before a third-party and impartial judge. The hearings are only conducted before the DG, and not before the Commission Members, which in the last instance takes the decisions, with the consequence that the conviction of the latter will be formed easily in a unanimous manner vis-à-vis the final report of the DG and will be filtered by what has been reported by the DG itself, also as regards the assessment of the verbal defence elements. As regards the hearings, these may be conducted in full compliance with the rules, overseen by the Hearing Officer, and will in any case be known indirectly by the institutional entity charged with taking the final decision. It therefore seems reasonable to doubt the correctness of the formulation of the Court of Justice, according to which, as

> there is nothing to prevent the Members of the Commission who are responsible for taking a decision imposing fines from being informed of the outcome of the hearing by such persons as the Commission has appointed to conduct it [...] the fact that the applicant was not heard personally by the members of the Commission at its hearing cannot amount to a defect in the contested decision.[66]

As the Commission's decision depends on the DG's reports, it is not possible to have the opportunities for exchange and cross-examination between prosecution and defence before the judging body that constitute the lynchpin of the right to be heard, which

> in all proceedings in which sanctions, in particular fines or penalty payments, may be imposed a fundamental principle of Community law which must be respected even if the proceedings are administrative proceedings.[67]

Contrary to the opinion of the Court and of the Commission,

> the fact that no such guarantee exists under the Community system constitutes

64 Case C-185-95 P, Baustahlgewebe GmbH v Commission of the European Communities, 1998 ECR 8417, par. 21.

65 European Parliament, Committee on Economic and Monetary Affairs, cit., pp. 65-66.

66 Case C-45/69, Boheringer Mannheim GmbH v Commission of the European Communities, 1970, ERC 0153, par. 23.

67 Case C-85/76, Hoffmann-La Roche & Co. AG v Commission of the European Communities, 1979, ERC 0461.

> further evidence of the fact, not only that Article 6 ECHR is not complied with, but also that the general requirements of fairness embodied in that provision are not being given enough attention.[68]

3.3 A partial right of appeal

Such a nature of the proceedings, as well as the nature of the non-jurisdictional entity of the Commission, could be deemed to be compatible with art. 6 ECHR on the sole condition that the decisions would have to be appealable before a judicial entity with full jurisdiction. The Court of Strasbourg itself has in fact admitted that, for reasons of efficiency, the determination of the civil rights and of the obligations or the "minor" criminal proceedings can be assigned to the administrative authorities, provided that the parties can then appeal against the decision of such authorities before a judicial body that has full jurisdiction and which respects the guarantees envisaged by art. 6.1. In short, the European Court maintains that compliance with art. 6.1 can also be delayed, for reasons of efficiency, with a second adjudication stage, provided that every aspect of this is in compliance with what is established in art. 6.1.[69] At the second instance level, therefore, the judge must be able to substitute the assessments of the administrative authority with his own as otherwise there would be the risk "that there was never the possibility that the central issue would be determined by a tribunal that was independent of one of the parties to the dispute."[70]

However, in the previous paragraph, we discussed the non-equivalence of the recourse to the Court of Justice with an appeal sentence, capable of replacing the Commission's decision in the merit. Besides,

> in the existence of administrative discretion judicial review not only becomes essential, but it also becomes very complex, since the judicature needs to follow fine-tuned judicial review standards that protect the rule of law while respecting the discretion of the authority in question. When it comes to competition law, the matter becomes even more complicated due to the intricate relationship between application of the law, which falls in the mandate of judicial review, and the underlying economic analysis, which falls in the Commission's discretionary mandate.[71]

As summed up by the European Parliament,

> insofar as Community fines are concerned, the Court has 'full jurisdiction' and this is certainly all that Article 6 requires. However, all the other findings and orders made by the Commission in its competition decisions are subject only to the considerable but nonetheless limited degree of judicial review on the four grounds set out in Article 230 of the EC Treaty. The Court of First instance

68 Slater, Thomas, Walebroeck, Competition law proceedings, p. 40.

69 This has been the view of the ECHR since the seventies: "Demands of flexibility and efficiency, which are fully compatible with the protection of human rights, may justify the prior intervention of administrative or professional bodies and, a fortiori, of judicial bodies which do not satisfy the said requirements in every respect" (Le Compte, Van Leuven and De Meyere v Belgium, Nos. 6878/7523 e 7238/75, 23 June 1981).

70 ECHR, Tsfayo v. Uk, No. 60860/00, 14 November 2006, par. 48.

71 F. Cengiz, "Judicial Review and the Rule of Law in the EU Competition Law Regime after Alrosa," in *European Competition Journal*, April 2011, p. 128.

> undoubtedly goes a long way to inquire into and reconsider the Commission's findings of fact and economic assessments when it thinks it appropriate to do so. The Court does, however, recall that it defers to the Commission's economic assessment unless they are clearly incorrect or have been reached after procedural errors.[72]

Even if the Court's oversight has been gradually expanding, specifically in order to compensate for the

> deficiencies of the Commission decision process under principles of European human rights law about impartiality and independence [...] the current court system would be taxed to the limit by a true first-instance decision responsibility [...] Recurring issues in competition cases, such as market definition and assessing net effects of agreements and transactions, show that it is not always clear where to draw the line between matters of fact and evidence that are subject to judicial review and matters of complex economic analysis that in principle should be entrusted to the Commission's expertise.[73]

72 European Parliament, cit. p. 66.

73 OECD, 2005. On the use of motives of appeal v. F. Cengiz, Judicial Review and the Rule of Law, cit., spec. pp. 139-145. On the possibility, not yet exploited, to use the proportionality criterion for controlling the Commission's decision, v., the same author, Alrosa v. Commission and Commission v. Alrosa: Rule of Law in Post-Modernization EU Competition Law Regime, Tilec Discussion Paper 2010-033, September 2010.

4. The Sphinx and the Chimera

The Commission's decisions on competition have a profound affect not only on events in the market but also on the specific freedoms of undertakings, such as the freedom of association, the economic initiative right and the data protection right. These not only bear on an undertaking's balance sheet but more essentially affect the very life of an undertaking, if it is true that "the possibility of preventing an undertaking from carrying out an activity corresponds to a death penalty for the legal person."[74] That is why commercial concerns, through the International Chamber of Commerce, are demanding "competition rules which are strong, but which are also fair"[75].

Furthermore, through the functions for controlling and punishing breaches of competition law, the Commission influences and guides the activities of the national guarantor authorities:

> Whether the Commission gets the facts right or gets them wrong, its findings of facts are likely to bind or at least be deferred to by national courts in private damages claims and otherwise. So the implications of Commission decisions go beyond the fine or remedy imposed.[76]

Despite the reforms that led to diluting the centrality of the DG for competition, in particular the establishment of the Hearing Officer, and despite the reinforcement of the right to a defence laid down in the 2003 regulations and the good practices adopted by the Commission, an enforcement system remains that is inadequate for guaranteeing the transparency and equity of the procedure and which, paradoxically, is defended by those institutions that wish to constitute the cutting edge of the rule of law in Europe today.

The hearings of the parties are not public and, above all, are not conducted before the officials charged with taking the final decision and do not envisage the possibility of cross-examination of the witnesses and of the parties[77]; the case is not decided by impartial and third-party judges but by an institutional body of a political kind which makes its ruling exclusively on the basis of dossiers prepared by the DG. Finally, the Commission's decisions cannot be substituted by those of the Court of Justice which can, at most, quash the decision and send it back to the Commission and which, furthermore, adopts an attitude of self-restraint as regards the assessment of complex economic and technical questions. Even if the recognition of a margin of discretion when assessing these questions "does not mean that the Community Courts must refrain from reviewing the Commission's interpretation of information of an economic nature,"[78] there are also those who have observed

74 L. Cuocolo, Il potere sanzionatorio, cit., p. 610.

75 ICC Commission on Competition, Due Process in EU antitrust proceedings, Comments on the European Commission's draft Best Practices in Antitrust Proceedings and the Hearing Officers' Guidance Paper, Document No. 225/667, 8 March 2010, p. 1.

76 I.S. Forrester, A Bush in Need of Pruning: The Luxuriant Growth of Light Judicial Review, cit.

77 On this point, the Court of Strasbourg is very clear: "Where a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6." (Luca v Italy, No. 33354/96, 27 February 2001, par. 40.

78 Case C-12/03 P, Commission of the European Communities v Tetra Laval, 2005, ECR 0987, par. 39. The Court continues by explaining that "Not only must the Community Courts, inter alia, establish

that, especially in cases of abuse of a dominant position, the Court of Justice has used an approach which is more legal than economic and,

> in so doing, the GC arguably maintains a misplaced approach of abuse of dominance law, which insulates Commission decisions from judicial scrutiny.[79]

Even where the Court decides to review the Commission's decision in detail, it is up to the losing party to prove that the Commission has committed a manifest error, contrary to the principle of criminal proceedings in which it is the accusing party that must produced arguments on the basis of which the evidence can be deemed to be exhaustive.

The imposition of fines is subject only to the limit of the percentage of the turnover (art. 23.2, Reg. 1/2003) and to the criterion of the gravity and duration of the infringement (art. 23.3. Reg. 1/2003)[80], with the consequence that the Commission has a broad margin of discretion when fixing the *quantum*. Proof of this comes from the fact that, since 2000 and without any changes to the rules, the fines mushroomed over the years, passing from €3 million in 1996 to €479.9 million in 2007. Strictly speaking, not even the guidelines for calculating the fines adopted in 1998 and in 2006 are sufficient for guaranteeing the transparency of the calculation, both because they allow the Commission first of all to determine a basic sum in a virtually unconditioned manner, and because, from the standpoint of the sources system, they are deeds of self-constraint by the Commission without any binding nature[81].

What therefore clearly emerges from this brief survey is the paradox that in a crucial sector such as competition law, the European Union does not guarantee full observance of those rights as pertain to the procedural sphere. It is case of remarking that such sphere constitutes one of the linchpins of the rule of law, that the European Union purports to be

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 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."

79 D. Geradin, N. Petit, Judicial Review in European Union Competition Law, cit., p. 34. The two authors conclude that: "[…] while our empirical data shows that the GC struck down an important number of Article 101 and merger control decisions, it indicates that the GC has shown deference to the Commission in Article 102 cases. Second, our qualitative analysis of the GC case-law suggests that while with respect to Article 101 and merger decisions the GC has been keen to define, and refine, normative legal standards in light of modern economic theory (and in particular, the so-called "effects-based approach"), including when this entailed reversing decades of earlier case-law, it has adopted a conservative attitude in Article 102 decisions essentially relying on the formalistic—and poorly in line with economics—legal standards adopted by the ECJ. That approach is likely to have a negative impact on welfare by increasing the risk of prohibition of benign dominant firm conduct for the sole reason that such conduct falls under the formalistic standards developed by in the case-law of the ECJ" (p. 39).

80 There are even those who have maintained that the lack of definition for fixing the fine violates the *nulla poena sine lege certa* principle: J. Schwarze, R. Bechtold, W. Bosh, Deficiencies in European Community Competition Law, 2008.Gleiss Lutz Rechtsanwalte, September 2008.

81 It should be said in passing that "fines have become an important resource for the Community (with a total budget of 126.5 billion Euro in 2007, fines totalling more than 2 billion euro constitute between 1% and 2% of this total budget)": Slater, Thomas, Waelbroeck, cit., p. 25, n. 123.

a champion and defender.

We started this work by recalling how the institutional makeup of the European Union constitutes a challenge to classical constitutionalism and, in the first place, to the division of powers into three parts. We know that the Parliament, the Council, the Commission and the Court of Justice are holders of a hybrid set of powers which has no equals in the world and are not faithful to the usual model of division between a legislative power representing the people, a judicial one to which everyone can have recourse and an executive one which drives political policy in compliance with the law.

As we have seen, as regards the regulation and implementation of competition law too, European rules have not paid attention to separating the powers nor fully respecting the minimum requirements for a fair and impartial trial.

It thus follows that the Commission, as the authority charged with overseeing European competition law, almost resembles the chimera that, with a lion's head (the investigative power), goat's body (the power to prosecute) and the snake-headed tail (decisional power), sowed panic in Homeric mythology.

In the work quoted at the beginning of this paper, Gustave Flaubert recounts a dramatic meeting between the Sphinx who, motionless and mute, tries to stop the Chimera while the latter, winged and fast, speeds away from those who remain silent and stationary.

In recent years, the Commission too, in its supervisory capacity over competition law, has accelerated its pace and has moved quickly towards an expansion of its powers and of the importance of its decisions, in economic terms too.

There are enough doubts, set out in this work, for perorating the cause of greater fairness and impartiality in infringement procedures and for more steadfast respect of the right to defence, faced with which the reassurances of the Court of Justice and of the Commissions must not silence us like Flaubert's Sphinx.

Indeed, the inconsistencies noted here among the principles of a free trial and the rules of the European proceedings for infringements of the antitrust rules lead to demanding a reform of the litigation in this area, following which the Commission would retain the investigative and fact-finding powers, but the judging stage would be remitted to a proper court who could be a specialized section of the Court of First Instance.

In this way, leaving unaffected the attribution of the fact-finding powers to a body such as the DG, which has the human resources and the specific skills for dealing with antitrust cases in the preliminary stage of the proceedings, the right to a third-party and impartial judge would be guaranteed as requested by the European Convention on Human Rights. The creation of a new *ad hoc* section of the Court of First Instance would, finally, be a guarantee of competence in a highly technical sector and would prevent the risk of overwhelming the ordinary work of the Court because of the mass of procedures which would pass from the Commission to the Court.

It is of course possible to imagine different—more precise and detailed—changes which would not distort the mechanism for enforcing the competition rules. For example, it would be possible to reinforce the powers of the Hearing Officer, envisage the right to be heard in the presence of the Commissioner for Competition and extend the Court's judicial review powers. These would all unquestionably be appropriate solutions, but would not be so incisive in the sense of aligning European antitrust proceeding with the jurisdictional model of the rule of law on a par with an effective and definitive separation of

investigative and judging powers which for its part would render all other changes to the details of the process vain.

Only such a reform, justified moreover by the diversity of the current institutional and economic context compared with that at the time when the supervisory system was created, could guarantee respect for the principles behind the jurisdictional guarantees of a rule of law, with the practical and certainly not irrelevant consequence of ensuring the certainty of the legal system and the trust in its institutions which are preliminary conditions for the untroubled course of economic relations.

Let the reasoned illustration of the doubts regarding the current European process regarding competition therefore help to give the Chimera of the infringement procedure the sense not of a terrifying monster but of a realizable utopia of fairness and transparency.

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L'Istituto Bruno Leoni (IBL), intitolato al grande giurista e filosofo torinese, nasce con l'ambizione di stimolare il dibattito pubblico, in Italia, promuovendo in modo puntuale e rigoroso un punto di vista autenticamente liberale. L'IBL intende studiare, promuovere e diffondere gli ideali del mercato, della proprietà privata, e della libertà di scambio. Attraverso la pubblicazione di libri (sia di taglio accademico, sia divulgativi), l'organizzazione di convegni, la diffusione di articoli sulla stampa nazionale e internazionale, l'elaborazione di brevi studi e briefing papers, l'IBL mira ad orientare il processo decisionale, ad informare al meglio la pubblica opinione, a crescere una nuova generazione di intellettuali e studiosi sensibili alle ragioni della libertà.

Cosa Vogliamo

La nostra filosofia è conosciuta sotto molte etichette: "liberale", "liberista", "individualista", "libertaria". I nomi non contano. Ciò che importa è che a orientare la nostra azione è la fedeltà a quello che Lord Acton ha definito "il fine politico supremo": la libertà individuale. In un'epoca nella quale i nemici della libertà sembrano acquistare nuovo vigore, l'IBL vuole promuovere le ragioni della libertà attraverso studi e ricerche puntuali e rigorosi, ma al contempo scevri da ogni tecnicismo.

Istituto Bruno Leoni – Piazza Cavour 3 - 10123 Torino – Italy
T: +39 (011) 1978 1215 – F: +39 (011) 1978 1216 – www.brunoleoni.it – info@brunoleoni.it