

## Discussion Points

Presented by the *Business at OECD* Competition Committee to the  
OECD Competition Committee  
Working Party No. 3

### *Standard of Review by Courts in Competition Proceedings*

June 4, 2019

#### **I. Introduction**

1. *Business at OECD* welcomes the opportunity to submit observations to the OECD Competition Committee WP3's Roundtable on the Standard of Review by Courts in Competition Proceedings. This topic runs to the core of the functioning and the legitimacy of competition enforcement regimes. Effective judicial oversight makes for better law; it ensures not only respect for the rights of the parties but the continual improvement of procedures, stronger decision-making and greater legal certainty. Effective judicial oversight will increase competition compliance, in particular for the newer jurisdictions, where business knows what the law permits.
2. *Business at OECD* supports the efforts of the OECD Competition Committee to get a deeper understanding and appreciation of judicial oversight of competition enforcement decisions. It is an issue of growing importance given the extension of competition law into newer areas of economic activity and the increasingly significant sanctions that are being imposed across OECD competition enforcement jurisdictions. In these observations, *Business at OECD* will focus on some of the important progress that has been made as courts have applied standards of review more stringently, and authorities have responded positively to these standards. In particular, we explore the progress of the courts and authorities of the European Union, given the European Court's nearly 60 years' experience in reviewing competition decisions.<sup>1</sup>
3. These observations build on *Business at OECD's* contribution to the December 2017 Global Forum on Competition roundtable on judicial perspectives on competition law.<sup>2</sup>

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<sup>1</sup> *Business at OECD* notes that the title of the Roundtable refers to "competition proceedings" which encompasses different areas of enforcement (such merger review, unilateral conduct or collusive behavior); different legal acts (including settlements or commitment decisions); and different enforcement entities, whether the enforcing authority or agency is a competition authority or other sectoral regulator. In this contribution, *Business at OECD* will limit comments to overarching principles related to standards and intensity of judicial review.

<sup>2</sup> See OECD, Global Forum on Competition, Judicial Perspectives on Competition Law—Contribution by BIAC, DAF/COMP/GF/WD(2017)2 (Nov. 16, 2017), available at [https://one.oecd.org/document/DAF/COMP/GF/WD\(2017\)2/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2017)2/en/pdf) [hereinafter *BIAC Judicial Perspectives Note*].

## II. Principles for Meaningful Judicial Oversight

4. In the courts' review of competition proceedings, business will nearly always be the principle applicants or respondents. Therefore, it is appropriate to restate some core elements that businesses rely on when considering the availability of judicial oversight of competition cases.
5. Judicial oversight must be meaningful. In this context, *Business at OECD* would like to stress the following points:
  - That a right of appeal can effectively identify and rectify any flaws in an enforcement decision. This implies that the reviewing tribunal has the ability to detect such flaws and has the authority to overturn them. Courts must, therefore, be able to review those elements of the authority's decision that applicant(s) consider to be flawed and may require judicial correction. In particular, courts should be able to have access to all the relevant elements needed to be able to take a considered view. Given that the competition investigative authority in many "administrative" jurisdictions is also the first instance decision maker, courts should have the ability to have access to the complete factual record, given that courts rarely have their own investigative powers. This runs to the core of the *equality of arms* principle, which requires that courts should ensure that one party is not at a substantial disadvantage vis-à-vis the other and that the parties have an equal opportunity to present their case.
  - In competition law systems based on the administrative model, the same authority will house within it the investigatory, prosecutorial and decision-making functions. Authorities have different approaches to separations of activities, ranging from internal processes to structural separation, but they can be subject to danger of "confirmation bias."<sup>3</sup> Independent oversight in such situations is, therefore, of particular importance.
  - To be meaningful, judicial proceedings must be accessible to affected parties, including third parties, so that the *locus standi* rules must not be too restrictive. Practically, the costs of access to the courts must be reasonable, so as not to put access to justice out of reach of potential plaintiffs.
  - Court proceedings and the granting of judicial remedies, where warranted, must be timely, as the parties need legal certainty where the law is not clear. As noted by the OECD, "the timing of judicial review is also an important factor when evaluating whether judicial review has genuine supervisory functions over the competition authority."<sup>4</sup> From a practical perspective, timeliness is critical where parties may need to make significant investment decisions in markets that increasingly move faster than administrative or judicial processes.
  - Key features which any effective judicial control structure must have are "expertise, fairness, impartiality, independence and accountability."<sup>5</sup> Most importantly, courts must have both the capacity and competence to effectively review complex issues of competition law and economics, especially as cases are increasingly so. As former Judge of the Court of Justice of the EU, José Luis da Cruz Vilaça, noted: "[I]t is crucial that the interpretation of the rules and

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<sup>3</sup> A. Douglas Melamed, *Good Competition Law Enforcement Requires Good Process*, 11 COMPETITION L. INT'L 51, 55-56 (2015).

<sup>4</sup> OECD, Global Forum on Competition, Investigative Powers in Practice, Breakout session 3: Due Process in relation to Evidence Gathering—*Issues Note by the Secretariat*, DAF/COMP/GF(2018)9, ¶ 48 (Oct. 25, 2018), available at [https://one.oecd.org/document/DAF/COMP/GF\(2018\)9/en/pdf](https://one.oecd.org/document/DAF/COMP/GF(2018)9/en/pdf) [hereinafter *Investigative Powers Secretariat Note*].

<sup>5</sup> Peter Freeman CBE, QC, Competition Decision Making and Judicial Control – The Role of the Specialised Tribunal, Address Before the Centre For Competition Policy UEA Annual Conference 2 (June 7, 2013), available at [www.catribunal.org.uk/sites/default/files/2018-01/Competition\\_Decision\\_Making\\_and\\_Judicial\\_Control-The\\_Role\\_of\\_the\\_Specialised\\_Tribunal\\_06-070613.pdf](http://www.catribunal.org.uk/sites/default/files/2018-01/Competition_Decision_Making_and_Judicial_Control-The_Role_of_the_Specialised_Tribunal_06-070613.pdf).

principles in this field [of competition law] are based on sound economic principles, requiring the courts to be finely attuned to economic realities and to have a good command of basic economic concepts.”<sup>6</sup> Whether this requires specialised courts, specialised chambers, expert panel members or court appointed experts is a matter for each jurisdiction. It is, however, incumbent on the state to ensure that courts are sufficiently resourced in order to guarantee effective access to justice.

### III. Judicial Oversight and Due Process

6. As highlighted by the OECD, “[j]udicial review is one of the building blocks of a fair process.”<sup>7</sup> Not only is it the role of the courts to ensure that the enforcement process and decisions are lawful, but also that the fundamental rights of parties engaged are upheld during competition proceedings. By closely scrutinizing competition authorities, effective judicial oversight by an independent judiciary further encourages rigor within the authority's proceedings and conformity to due process rights. It is well understood that effective judicial oversight contributes to guaranteeing the rule of law and the credibility of the competition law enforcement system.
7. *Business at OECD* has noted:

A review procedure that does not provide a practical opportunity to challenge authority decisions, or under which the authority never loses an appeal, does not promote the reputation of the authority or the credibility of the law, any more than one under which the authority always loses. A well-balanced review underlines the legitimacy of authority decisions and, as a public process, enhances the overall standing and respect for enforcement efforts.<sup>8</sup>
8. As a supplemental matter *Business at OECD* would like to highlight that, in seeking effective and flexible enforcement measures, competition authorities should be cautious when using instruments that are de-facto non-appealable, such as the use of settlement or commitment decisions, and ensure that such measures are entirely voluntary and not subject to duress or other abridgement of rights. This is especially true where such measures are used in precedent-setting cases and novel theories applied. Otherwise, courts would effectively be prevented from reviewing the theories pursued and assessing whether these are in line with the law.<sup>9</sup>
9. As is discussed further below, the requirements to observe fundamental rights—notably, access to court, fair hearing and presumption of innocence—are critical in appreciating the required standard and scope of judicial oversight.

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<sup>6</sup> José Luís da Cruz Vilaça, *The Intensity of Judicial Review in Complex Economic Matters—Recent Competition Law Judgments of the Court of Justice of the EU*, 6 J. ANTITRUST ENFORCEMENT 173, 187 (2018).

<sup>7</sup> *Investigative Powers Secretariat Note*, supra note 4, ¶ 47. Additionally, The International Competition Network’s 2019 Framework on Competition Agency Procedures includes, as a principle, the availability of the independent review of competition enforcement proceedings: “No Participant will impose on a Person a prohibition, remedy, or sanction in a contested Enforcement Proceeding for violation of applicable Competition Laws unless there is an opportunity for the Person to seek review by an independent, impartial adjudicative body (e.g. court, tribunal, or appellate body).” INT’L COMPETITION NETWORK, FRAMEWORK ON COMPETITION AGENCY PROCEDURES 7 (2019), available at [www.internationalcompetitionnetwork.org/wp-content/uploads/2019/04/ICN\\_CAP.pdf](http://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/04/ICN_CAP.pdf).

<sup>8</sup> *BIAC Judicial Perspectives Note*, supra note 2, ¶ 5.

<sup>9</sup> See, e.g., Douglas Ginsburg & Joshua Wright, *Antitrust Settlements: The Culture of Consent*, in WILLIAM E. KOVACIC: AN ANTITRUST TRIBUTE—LIBER AMICORUM (VOL. I) (Charbit et al eds., Feb. 2013), available at [www.ftc.gov/sites/default/files/documents/public\\_statements/antitrust-settlements-culture-consent/130228antitruststlmt.pdf](http://www.ftc.gov/sites/default/files/documents/public_statements/antitrust-settlements-culture-consent/130228antitruststlmt.pdf); Philip Marsden, *The Emperor’s Clothes Laid Bare: Commitments Creating the Appearance of Law, While Denying Access to Law*, CPI ANTITRUST CHRONICLE (Oct. 2013), available at [www.competitionpolicyinternational.com/assets/Uploads/MarsdenOct-2.pdf](http://www.competitionpolicyinternational.com/assets/Uploads/MarsdenOct-2.pdf); and Frederic Jenny, *Worst Decision of the EU Court of Justice: The Alrosa Judgement in the Context and the Future of Commitment Decisions*, 38 FORDHAM INT’L L.J. 701 (2015).

#### IV. Standards of Judicial Oversight and Deference

10. Whether a court exercises either a full review of an authority's decision by carrying out a review of economic and legal assessment undertaken by the competition authority or engages in a review of the appropriateness of the authority's acts, partly—but by no means exclusively—depends on the judicial architecture of the individual jurisdiction. In this context, there are significant differences between jurisdictions that have adopted an administrative competition law system where the authority is both prosecutor and primary decision maker (as in many civil law jurisdictions) or whether the competition jurisdiction is a judicial one, where the authority has to bring its case before an independent tribunal (such as in the U.S.). In the former case, the role of the court is more significant in applying *ex post* review of the primary decision maker.
11. The standard of judicial review applied is, in part, conditioned by the level of judicial deference granted to the authority when that authority is exercising its discretion under the competition statutes (and that requires particular expertise and skill, as is often the case in competition law cases).
12. There tend to be two overarching approaches relating to judicial deference. The first is where the court exercises unlimited jurisdiction and conducts a *de novo* analysis of the issues that the party(ies) are appealing. Essentially, the reviewing court substitutes its assessment of the facts for that of the authority's and thereby affords very limited deference to the authority. If the authority's decision is found to be flawed, the remedy is typically for the original decision to be set aside or corrected. In competition proceedings, this full review can sit uncomfortably where the authority has primary decision taking powers that are delegated to it by the legislature. In such a scenario the court may be, in effect, usurping the authority's role (which is particularly delicate where the reviewing court is not a specialist competition court). *Business at OECD* believes that a judicial review should be sufficiently comprehensive to protect the rights of the parties and ensure that the law is observed. *Business at OECD* does not believe that such a review is a usurpation of the role of competition authorities but rather a judicial filter on the basis of the court's competence.
13. However, there are instances where courts need to have the ability to conduct such reviews, notably i) where the authority is taking a view on matters outside its core specialization; ii) where the matter raises clear constitutional law issues, for example balancing competing fundamental rights;<sup>10</sup> or iii) where a decision has a broader impact or raises public policy issues going beyond those affecting the parties.
14. The second approach to judicial deference relates to where the standard of review is one of legality (more usual, notably for civil law jurisdictions) where the reviewing court limits its review to whether the authority's decision was procedurally sound and justified under law, but the court does not review the authority's assessment of the facts. In principle, the wider the authority's discretion granted by the legislature, the greater the deference.<sup>11</sup> However, as there may exist different levels of authority discretion (e.g. which facts to rely on, what economic theory to apply,

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<sup>10</sup> For example, José Luís da Cruz Vilaça opined that “a strict standard of review will normally apply when the EU Charter is engaged.” José Luís da Cruz Vilaça, Challenges to the Judiciary in the Enforcement of Competition Rules in the Digital Age, Address Before the V Lisbon Conference on Competition Law and Economics 35 (Oct. 18, 2018), available at [www.concorrenca.pt/vPT/Estudos\\_e\\_Publicacoes/Revista\\_CR/Documents/CR36\\_CruzVilaca.pdf](http://www.concorrenca.pt/vPT/Estudos_e_Publicacoes/Revista_CR/Documents/CR36_CruzVilaca.pdf) (citing Joined Cases C-293/12 and C-594/12, Digital Rights Ireland and Others, EU:C:2014:238, ¶¶ 47-48 and Case C-362/14, Schrems v. Data Protection Commissioner, EU:C:2015:650, ¶ 78).

<sup>11</sup> See, e.g., the Supreme Court of Canada discussion on standards of review in administrative law cases in *Dunsmuir v New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9 (CanLII).

what test to apply, how to interpret the law), the exact standard of review may in fact be rather fluid.

15. What the role of authorities should be in setting out the standard and intensity of judicial review is controversial. While court procedures should always be improved to manage increasingly complex cases, the general principle of separation of powers would argue that an authority should not be proposing what standard of review it believes courts should apply to its own activities, especially where the proposals include a loosening of judicial oversight and potentially limiting fundamental rights of defense. *Business at OECD* therefore takes seriously the criticisms expressed by the UK's Competition & Markets Authority to the effect that the UK appeals regime has become too challenging and therefore requires reform. However, *Business at OECD* is concerned at this approach. If the courts have, after a review of the facts and submissions of the parties, found that an authority is unable to establish a claim, then it seems logical that the authority should review its tools and practices. Maintaining effective judicial review is all the more important where authorities are seeking wider powers to impose remedies following.

16. As noted by Peter Freeman:

What matters is not the label attached to different standards of review, but the reality. The courts' essential task on appeal is to examine the disputed decision and decide whether it "stacks up". Full merits and judicial review are simply different ways of achieving this. This is not to usurp the authority's function, merely to establish whether it has been properly discharged. It is the intensity of scrutiny that is the key. This can be heavy or light, according to the nature of the case, regardless of which sort of appeal standard is being applied.<sup>12</sup>

17. Of course, standards of review invariably mutate and evolve to reflect the increasing seriousness liability for a finding of breach of competition law, that include not only fines but also mandating changes to business policies and practices which have a significant cost to the business concerned as well as consumers and the economy. Standards of review are also mutating to take into account the increasing complexity of competition law and economic theory, which often requires authorities to exercise their discretion in how the law is applied.

## V. Evolving Standards of Judicial Oversight in the European Union

### a. Introduction

18. The evolution of the standard and intensity of review by courts of the European Union (EU) is an instructive exercise, given the European Court's nearly 60 years' experience of reviewing competition decisions covering now 28 jurisdictions with differing legal traditions, and given the influence of European competition law around the world. It is particularly relevant given that the EU, its member states, and many OECD countries share an administrative law system of competition enforcement.
19. European Commission competition decisions are subject to oversight by the EU Courts. This would principally be the General Court of the EU, considered as a "de facto specialist tribunal,"<sup>13</sup> and then on appeal to the Court of Justice of the European Union, Europe's supreme court. Oversight standard is technically that of judicial review, being limited to a review of the legality of European Commission competition decisions, notably reviewing jurisdiction and procedural conformity, whether there have been errors of law, defective reasoning, manifest error of appraisal, or error

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<sup>12</sup> Freeman, *supra* note 5, at 8.

<sup>13</sup> See Michael Harker, Sebastian Peyer & Kathryn Wright, *Judicial Scrutiny of Merger Decisions in the EU, UK and Germany*, 60 INT'L & COMPARATIVE L.Q. 93, 103 (2011).

of fact.<sup>14</sup> A finding of illegality will lead to the impugned decision being annulled. On the other hand, the EU Courts have expressly unlimited jurisdiction in respect of fines and penalties, where they can substitute their own appraisal for the Commission’s.<sup>15</sup> This reflects a classic approach to judicial review of an administrative decision as found in most civil law jurisdictions, focused on a standard of ensuring that the competition authority’s decision accords with the principle of legality—either on procedural or substantive grounds.

*b. Evolution of Standards of Review—An Increase In Intensity*

20. On matters related to the legality of Commission competition decisions, the EU Courts initially adopted a relatively “hands off” approach in cases classified by the EU Courts as involving “complex economic appraisals.”
21. However, this approach dates back to 1966, in *Consten and Grundig*, where the Court found that  

[T]he exercise of the Commission’s powers necessarily implies complex evaluations on economic matters. A judicial review of these evaluations must take account of their nature by confining itself to an examination of the relevance of the facts and of the legal consequences which the Commission deduces therefrom. This review must in the first place be carried out in respect of the reasons given for the decisions which must set out the facts and considerations on which the said evaluations are based.<sup>16</sup>
22. It is relevant to recall that sanctions for findings of competition law abuse have increased very sufficiently, which has a bearing on how the European courts approach judicial oversight of competition decisions. During the years 2014-2018, the Commission imposed the following fines for a breach of article 102 TFEU:<sup>17</sup>

Case	Date of Decision	Fine
COMP/39612—Perindopril (Servier)	July 9, 2014	€ 1,270,000 <sup>18</sup>
COMP/39984—OPCOM/Romanian Power Exchange	March 5, 2014	€ 1,031,000
COMP/39523—Deutsche Telekom/Slovak Telekom	October 15, 2014	€ 38,838,000
COMP/39759—ARA	September 20, 2016	€ 6,015,000
COMP/39740—Google Search (Shopping)	June 27, 2017	€ 2,424,495,000
COMP/40220—Qualcomm	January 24, 2018	€ 997,000,000
COMP/40099—Google (Android)	July 18, 2018	€ 4,340,000,000

<sup>14</sup> See Treaty on the Functioning of the European Union (TFEU), 2012 O.J. (C 326) 47, art. 263 (“The Court of Justice of the European Union shall review the legality of [. . .] acts [. . .] of the Commission [. . .] on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.”).

<sup>15</sup> See TFEU, art. 261 (“Regulations adopted jointly by the European Parliament and the Council, and by the Council, pursuant to the provisions of the Treaties, may give the Court of Justice of the European Union unlimited jurisdiction with regard to the penalties provided for in such regulations.”). Here, the EU Courts have generally limited themselves to verifying that the Commission has correctly applied its own fining guidelines, which the EU Courts consider to be binding on the Commission. See, e.g., *Joined Cases C-189/02 P etc, Dansk Rørindustri and Others v. Comm’n*, ¶¶ 209-211, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62002CJ0189&rid=1>.

<sup>16</sup> Case C-56/64, *Consten and Grundig v. Comm’n*, p. 347, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61964CJ0056&rid=1>. For a more recent statement of review in cases involving “complex economic appraisals,” see Case T-336/07, *Telefónica v. Comm’n*, ¶¶ 69-72, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62007TJ0336&rid=1>.

<sup>17</sup> Thomas Graf & Alexander Waksman, *European Union*, in *ANTIMONOPOLY & UNILATERAL CONDUCT 2018*, available at <https://globalcompetitionreview.com/jurisdiction/1005118/european-union#answer50>.

<sup>18</sup> Fine relates to breach of article 102 TFEU; separate fines were imposed in respect of Art. 101 TFEU breaches.

23. There have been three major trends that have seen the European Courts evolve their jurisprudence on the standard of review to be applied to competition decisions: i) the fundamental rights obligation to ensure effective judicial oversight; ii) the very high penalties for serious infringements of cartel and abuse of dominance law; and iii) the increase breadth of competition law and the complexity of economic theory.
24. The European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights of the EU (the Charter) establish fundamental protections for individuals and legal entities, notably the right to a fair trial<sup>19</sup> that imposes limits on the exercise of state power, including on the European Commission in exercising its competition jurisdiction. Indeed, it is clear that competition law matters fall within the fair trial protection of Article 6 ECHR, following the *Menarini* case<sup>20</sup> and later recognised by the EU Courts.<sup>21</sup>
25. The importance of this development on the standard of review is significant. In *Janosevic*, the ECHR court held, in the context of tax surcharges, that ECHR Contracting States may empower authorities to impose significant fines so long as the individual subject to the fine may bring the decision before “a judicial body that has full jurisdiction, including the power to quash in all respects, on questions of fact and law, the challenged decision.”<sup>22</sup> Where an authority imposes quasi-criminal sanctions, but is not *strictu sensu* an “independent and impartial tribunal,”<sup>23</sup> there must therefore be the possibility of effective judicial review if such acts are to be consistent with fundamental rights protections in Europe.
26. The Court of Justice of the EU has upheld these principles. In *KME Germany*, the Court held that, in reviewing the Commission’s competition decisions, European Courts cannot use the Commission’s margin of discretion as a basis for dispensing with the obligation to conduct an in-depth review of the law and of the facts when reviewing the legality of the Commission’s actions. The Court also recognised that while the General Court had repeatedly referred to the “discretion,” the “substantial margin of discretion” or the “wide discretion” of the Commission, this “did not prevent the General Court from carrying out the full and unrestricted review, in law and in fact, required of it.”<sup>24</sup> In *Galp*, the Court of Justice of the EU noted that “the scope of judicial review

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<sup>19</sup> European Convention on Human Rights, art. 6(1), available at [www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf) [hereinafter ECHR] (“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.” (emphasis added)); Charter of Fundamental Rights of the European Union, 2012 O.J. (C 326), art. 47 (“Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.” (emphasis added)).

<sup>20</sup> Judgment of the ECtHR of 27 September 2011 in Case *Menarini Diagnostics v Italy*, Application no. 43509/08, ¶¶ 38-44, available in French at <http://hudoc.echr.coe.int/eng?i=001-106438>; Judgment of the ECtHR of 23 October 2018 in *Produkcija Plus storitveno podjetje d.o.o. v. Slovenia*, Application no. 47072/15 (“Produkcija Plus”), ¶ 46, available at <http://hudoc.echr.coe.int/eng?i=001-187199> (note that this case concerned a fine imposed for a procedural matter – obstruction of an inspection).

<sup>21</sup> Case T-286/09, *Intel v. Comm’n*, ¶¶ 61-68, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62009TJ0286&rid=1>.

<sup>22</sup> Judgment of the ECtHR of 23 July 2002 in Case *Janosevic v Sweden*, Application no. 34619/97, ¶ 81, available at <http://hudoc.echr.coe.int/eng?i=001-60628>.

<sup>23</sup> ECHR art. 6(1).

<sup>24</sup> Case C-272/09 P, *KME Germany v. Comm’n*, ¶¶ 102-109, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62009CJ0272&qid=1558448590791&from=EN>. See also Case C-389/10 P, *KME v. Comm’n*, ¶¶ 29-133, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62010CJ0389&rid=1>;

provided for in Article 263 TFEU extends to all the elements of Commission decisions relating to proceedings applying Articles 101 TFEU and 102 TFEU which are subject to in-depth review by the General Court, in law and in fact, in the light of the pleas raised by the appellants.”<sup>25</sup> It would, therefore, seem that the extent of the European standard of review for competition cases has been clarified and made expressly compatible with ECHR and Charter obligations, as the scope of these instruments extend to competition law.

27. Converging and consistent with the “KME Germany standard,” the Court of Justice reaffirmed in *MasterCard* that, in carrying out a review of legality of a Commission decision, the General Court could not use the Commission’s margin of discretion as a basis for dispensing with an in-depth review of both the law and of the facts, despite the role assigned to the Commission in competition policy by the European Union and Treaties. The Court of Justice also noted that while the General Court may have used the expression “limited review,” such a doctrinal label did not mean that the General Court undertook a review that was more limited than that required by the case-law.<sup>26</sup> As a result, no matter what the textual wording of the standard of review may be, fundamental rights obligations require the court to undertake a review that is sufficiently comprehensive to ensure that the review is meaningful and effective.
28. As summarized by Professor Nazinni, the EU Courts’ judicial review tests allow for a “standard of correctness” to be applied “to the establishment of the facts and the respect for the law, whether substantive or procedural, whereas the appraisal of the facts is subject to the more deferential standard of ‘manifest error’”<sup>27</sup> and that while the EU Courts apply the standard of correctness cautiously, they do so when “it is necessary to uphold the rule of law.”<sup>28</sup> Indeed, Professor Nazinni goes even further noting that by placing the judicial oversight in the context of the principle of effective judicial protection in *KME Germany*, “the Court of Justice may have signalled the demise of deferential review of Commission decisions on Article 101 or 102.”<sup>29</sup> The recognition of the constitutional nature of judicial oversight matches the core function of the European Courts under Article 19 of the Treaty on the European Union that they “shall ensure that in the interpretation and application of the Treaties the law is observed.”<sup>30</sup> In the competition context, to ensure that competition proceedings are conducted in a manner consistent with the relevant competition provisions but all the relevant Treaty rules and principles as well.

### c. Re-Assessment of ‘Complex economic appraisals’

29. In addition to the fundamental rights and obligations imposed by the Charter and the ECHR, the standard of review applied by the European Courts has itself developed in line with modern legal and economic thinking. This has required a readjustment of the notion of courts’ deference to the European Commission and therefore of the intensity of judicial review when considering matters

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Case C-386/10 P, *Chalkor v. Comm’n*, ¶¶ 45-82, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62010CJ0386&rid=1>.

<sup>25</sup> Case C-603/13 P, *Galp and Others v. Comm’n*, ¶¶ 71-75, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62013CJ0603&rid=2>.

<sup>26</sup> Case C-382/12, *MasterCard v. Comm’n*, ¶¶ 156, 158, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62012CJ0382&rid=1>. See also Case C-67/13 P, *Groupement des cartes bancaires v. Comm’n*, ¶ 45, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62013CJ0067&rid=1>.

<sup>27</sup> Renato Nazinni, *Administrative Enforcement, Judicial Review and Effective Judicial Protection in EU Competition Law: A Comparative Contextual-Functionalist Perspective* 33 (King’s College London Dickson Poon School of Law Legal Studies Research Paper Series: Paper No. 2016-31), available at <https://ssrn.com/abstract=2117187>.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 36.

<sup>30</sup> TFEU, art. 19.

of “complex economic appraisals” (as set out in *Consten and Grundig* in 1966).<sup>31</sup> As Advocate General Sharpston noted in her opinion in *KME*, “it is arbitrary, dangerous and unfair to apply the same ‘judicial deference’ [as in 1966] to the Commission’s discretion in the context of the current EU competition law enforcement regime, characterised by increasingly large fines having inevitable economic and financial impact on companies, shareholders and employees, and leading to de facto ‘criminalisation’ of competition law.”<sup>32</sup>

30. A critical tipping point occurred in the European Courts’ review of a series of merger prohibitions in *Airtours*, *Schneider Electric* and *Tetra Laval*.<sup>33</sup> The General Court, while recognizing the Commission’s margin of discretion involving complex economic appraisals, was nevertheless willing to scrutinize the Commission’s interpretation of evidence of an economic nature, notably because novel economics theories were applied.<sup>34</sup> In *Tetra Laval*, the European Court of Justice further indicated that the General Court should go beyond strict assessments of “manifest error,” requiring “Not only must the [European] Community courts, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it.”<sup>35</sup>
31. Cases considered by competition authorities are now rarely focused on mere economic appraisals, but routinely raise complex issues of economic theory (increasingly relevant as the effects-based approach becomes the norm) and of factual and legal interpretations. The Commission’s discretion may, therefore, come into focus in the interpretation of legal rules, economic principles and the determination of facts, blurring the boundaries between them. As noted above, this has required the court to be adopt a more pragmatic approach to the standard of review to ensure effective scrutiny of administrative acts. As former European Judge José Luis da Cruz Vilaça noted,

[W]hen the exercise of the Commission’s powers under the rules of competition involves complex economic appraisals, the EU courts must respect this by limiting their review of such appraisals; nevertheless, that review is a complete review of legality in the sense that it extends to all the defects normally examined by those courts in the context of an action for annulment. This allows the courts to go far enough in verifying the legality of the Commission’s decisions in competition cases.<sup>36</sup>

The European Courts have already shown that that deference to the agency function of the Commission cannot stand in the way of a meaningful review, and this is specifically the case where the authority has a significant margin of discretion in choosing how to interpret fact and law.<sup>37</sup>

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<sup>31</sup> See Marc Jaeger, *The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of Marginal Review*, 2 J. EUR. COMPETITION L. & PRACTICE 295 (2011).

<sup>32</sup> C-272/09, *KME v. Comm’n*, ¶ 46, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62009CJ0272&qid=1558448590791&from=EN> (emphasis added).

<sup>33</sup> Case T-342/99, *Airtours plc v. Comm’n*, 2002 E.C.R. II-2585; Case T-310/01, *Schneider Electric SA v. Comm’n*, 2002 E.C.R. II-4071, upheld on appeal in Case C-440/07 P, *Schneider Electric SA v. Comm’n*, 2009 E.C.R. I-6413; Case T-5/02, *Tetra Laval BV v. Comm’n*, 2002 E.C.R. II-4381, upheld on appeal in Case C-12/03 P, *Comm’n v. Tetra Laval BV*, 2005 E.C.R. I-987.

<sup>34</sup> See Harker, Peyer & Wright, *supra* note 13.

<sup>35</sup> Case C-12/03 P, *Comm’n v. Tetra Laval*, 2005 E.C.R. I-987 [86]

<sup>36</sup> Cruz Vilaça, *supra* note 6, at 177. Cruz Vilaça further noted that “the ECJ also made it clear [in its *Intel* ruling] that the balancing of favourable and unfavourable effects on competition of the practice in question can be carried out only after the analysis has shown the intrinsic capacity of that practice to foreclose competitors that are at least as efficient as the dominant undertaking.” *Id.* at 186.

<sup>37</sup> As noted by Judge (and former Advocate General) Marc van der Woude, Vice-President of the General Court, “The issue that there should be a margin of discretion for the Commission because something is complex is over,” and “[t]he Court of Justice has made that clear in its case law.” Matthew Newman, Expert Witnesses Might See Revival at EU Court

#### d. Standard and Burden of Proof

32. In addition, the EU Courts have other important tools to ensure effective judicial review and judicial protection, notably reviewing whether the authority alleging the infringement has fulfilled its burden to establish a breach of competition law and adduced evidence capable of demonstrating, to the requisite legal standard, the existence of circumstances constituting an infringement. Based on the presumption of innocence (enshrined in Article 48 of the Charter), the General Court has held that

any doubt on the part of the Court must operate to the advantage of the undertaking to which the decision finding an infringement was addressed. The Court cannot therefore conclude that the Commission has established the infringement in question to the requisite legal standard if it still entertains any doubts on that point, in particular in proceedings for annulment of a decision imposing a fine.<sup>38</sup>

It is critical that the standard of review is distinct from the standard of proof, or there is a risk that the review of fact will “collapse into substitution of judgement” by the reviewing court of the primary decision maker.<sup>39</sup>

33. In order to discharge its obligations under the competition rules covering anticompetitive agreements or concerted practices, “the Commission must show precise and consistent evidence in order to establish the existence of the infringement and to support the firm conviction that the alleged infringement constitutes a restriction of competition within the meaning of Article 101(1) TFEU.”<sup>40</sup> The Commission is under an obligation to gather all available information<sup>41</sup> including evidence leading to doubts on the case and into which the Commission must enquire. Failure to enquire into exculpatory evidence can result in the Commission not meeting its burden of proof, which in turn might lead to the annulment of the decision.<sup>42</sup> The Commission is also under an obligation to disclose potentially exculpatory documents, as “it cannot be for the Commission alone to decide which documents are of use for the defence.”<sup>43</sup>

34. This approach imposes a duty on the Commission to carry out a thorough, diligent and impartial investigation especially as the Commission has the power of appraisal of the factual record, so that respects for the rights guaranteed in administrative procedures (e.g. Article 41 of the Charter on

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Following Revamp, Judge Says, MLEX (Nov. 23, 2016), available at [www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=845415&siteid=190&rdid=1](http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=845415&siteid=190&rdid=1).

<sup>38</sup> Case T-471/13, *Xellia Pharmaceuticals and Alpharma v. Comm’n*, EU:T:2016:460, ¶¶ 66-73.

<sup>39</sup> Paul Craig, *Law, Fact and Discretion in the UK, EU and the USA* 13 (Sciences-Politiques/Mutations de l' action public et du droit public), available at [http://www.sciencespo.fr/chaire-madp/sites/sciencespo.fr/chaire-madp/files/paul\\_craig.pdf](http://www.sciencespo.fr/chaire-madp/sites/sciencespo.fr/chaire-madp/files/paul_craig.pdf).

<sup>40</sup> *Xellia*, ¶ 70. The court also noted that undertakings concerned cannot not merely seek to prove circumstances pointing to another explanation for the facts found by the Commission but must challenge the existence of those facts established by the Commission on the basis of the documents produced by the Commission. *Id.*, ¶ 73.

<sup>41</sup> See Case C-300/16 P, *European Comm’n v. Frucona Košice*, ¶¶ 80-81, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62016CJ0300&rid=2> (where the Court of Justice of the EU observed that the Commission had failed to obtain all the relevant information and confirmed the annulment of the Decision).

<sup>42</sup> See Case T-865/16, *Fútbol Club Barcelona v. European Comm’n*, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1558449967366&uri=CELEX:62016TJ0865>.

<sup>43</sup> See Case T-314/01, *Avebe v. Comm’n*, ¶ 66, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62001TJ0314&rid=1>.

the Right to good administration) is of fundamental importance<sup>44</sup> in order to compile “the most complete and reliable information possible.”<sup>45</sup>

## VI. Conclusion: What Standards of Judicial Oversight implies for Competition Authorities

35. *Business at OECD* observes that the European Courts have evolved their understanding of what a standard of review should achieve, in order to fulfil the fundamental fair hearing requirements on the one hand and to address the increased complexity of applying legal rules to economic theory and commercial realities, on the other hand. This evolution is not entirely surprising and there are parallels with, for example, Canadian jurisprudence which “has been in a state of constant change with respect to the issue of the appropriate standard of judicial review to be applied to decisions of administrative tribunals and agencies.”<sup>46</sup>
36. From the above overview, *Business at OECD* believes that courts match their standard of review to the impact and influence of authorities’ decisions. *Business at OECD* hopes that this overview provides insight into the evolution of judicial oversight from a mature judicial system and provides guidance on how authorities should seek to fulfil their obligations to be in conformity with law and jurisprudence.
37. As competition sanctions increase in significance, competition regulation intervenes in other areas of law, and complex assessment of new economic or legal theories require authorities to make choices, it is entirely reasonable for courts to ensure effective scrutiny in order to enhance the viability of the system. Indeed, sound judicial review should provide the legal certainty and guidance to authorities to undertake their functions with more confidence and issue decisions that are increasingly stronger and more appeal-proof. In addition, it would be expected that cases raising novel theories will be scrutinized by the courts, which will result in greater stability in the law and establish precedent that can be followed.
38. The limits of a court’s jurisdiction and the standard of review the court should apply in any given instance lies outside the control of competition authorities. However, in *Business at OECD*’s view, authorities can continue the rigorous application of due process and procedural fairness norms, in order to immunize themselves against criticism by the courts.

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<sup>44</sup> See Case C-269/90, Technische Universität München, ¶ 14, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61990CJ0269&rid=1>.

<sup>45</sup> See Case C-290/07 P, Commission v. Scott, ¶ 90, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62007CJ0290&rid=1>.

<sup>46</sup> See OECD, Judicial Enforcement of Competition Law—Note by William P. Makeown & Marshall E. Rothstein, OCDE/GD(97)200 (1997) at 135, available at [https://one.oecd.org/document/OCDE/GD\(97\)200/en/pdf](https://one.oecd.org/document/OCDE/GD(97)200/en/pdf).