Due process in competition cases: is *Menarini* the last word?

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In affectionate tribute to a friend who enjoys the good things of life, and who is excellent company while they are being consumed, this reflection addresses a problem which, like a classic dish, never fails to provoke discussion and debate. I regret that the institutional timidity of the European Union to expose itself to the critical examination of the Strasbourg Court has meant that I have not had the stimulating challenge of arguing these questions before President Spielmann on the bench. The problem is this: when a competition authority investigates an alleged breach of the EU competition rules and imposes a sanction, these days usually a heavy sanction, what requirements are imposed by the Convention on Human Rights and Fundamental Freedoms (the “Convention”) in terms of due process and judicial review? Have the requirements of due process altered as the penalties and opprobrium attached to findings of anti-competitive conduct have become harsher?

When I started my career as a lawyer in Brussels, fines of the order of the equivalent of EUR 40,000 were noteworthy; today tens of millions are almost moderate, and hundreds of millions are not unknown. The deterrent and punitive and repressive characteristics of the last stages of the process cannot be doubted. It is not my purpose to regret the existence of a rigorous competition policy, nor the desirability of a competition authority imposing sanctions. The importance of competition law as a factor in the economic governance of our society is evident. Competition law enforcement can assuredly include the enforcement of public law obligations and the imposition of penalties. The question lies in whether a regime which relies heavily on punishment of offences for achieving its regulatory objectives is constrained to accord due process privileges established by the Convention, and at what stage.

**Competition procedures in Brussels**

Officials, scholars and practitioners have written extensively about the status of the procedures of the European Commission in enforcing the competition rules. In this long-running debate, each side of the debate has invoked Article 6 of the European Convention on Human Rights, which states:

"1. 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. Judgment shall be pronounced publicly ...
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
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(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;”

The problematic rights accorded by Article 6 thus would include the right to a “fair” “public” “hearing” before an “independent and impartial” “tribunal”, to “be presumed innocent”, the right to obtain the attendance and examination of witnesses, and the “right to call witnesses”. To start by stating the obvious, an enterprise charged by the European Commission with a breach of Articles 101 or 102 TFEU\(^5\) does not receive these rights.

When the European Commissioner responsible for competition announces that a company has been found guilty of price fixing, or abuse of dominance, and has been fined EUR 40,000,000 partly as a warning to other malefactors and partly as punishment, that is the final stage in an administrative process by which the European Commission enforces the competition rules after first hearing of an alleged infringement. It is not a *contradictoire*, bipartisan process in which a neutral adjudicator compares two opposing views and decides.

In 1962, it was natural that the new rules established under Regulation 17/62 would be applied by an administrative process. The administrative and inquisitorial method of prosecution remains in force today. It is, I believe, unique in the world. (I note in the by-going that it has been suggested that the difficulty of proving cartel offences might be a reason to have robust procedures. Occasionally, it has been suggested\(^6\) that finding evidence of competition law infringements is particularly difficult, because of the intrinsically secret nature of cartels. I query whether burglars, arsonists or cyber-fraudsters are less careful about covering their tracks than cartelists.)

It is clear that, even if staffed by zealous saints, an administrative enforcement agency is not what Article 6 of the Convention calls for. It may be fair-minded, scrupulous and diligent, but it is not a tribunal staffed by impartial or independent judges. Nor are the twenty-eight European Commission members who are present when the decision drafted by the civil service is formally adopted. To the *justiciable* accused company, the members of the case-team look like prosecutors, not like judges. And there is no right to a hearing at which opposing witnesses present their differing accounts of the facts to a decision-maker. The hearing is presided over by a Hearing Officer (a valuable, experienced, respected and competent but under-used official) whose role is to ensure the company’s right to be heard, rather than to choose which side is right. There is indeed *no* hearing by a decision-maker. There is no presumption of innocence in the sense that the prosecutor’s case is equiparated with the accused’s case. The hearing is not public. Functionally, the hearing serves as an opportunity for the accused company to say to the case-team (which has worked on the matter for years), in front of an audience of officials and co-accused, that the sceptical case-team is, after all, mistaken. The accused company cannot procure the attendance of witnesses against it. The hearing is not an appropriate vehicle for resolving disputed facts. Those who come expecting a trial are very disappointed.

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\(^5\) Consolidated version of the Treaty on the Functioning of the European Union, OJ 2012 C 326/47.

Article 6 and its application

Now, there are many occasions where the state’s capacity to take a negative decision for the citizen is deemed, as a matter of Convention law, to be subject to Article 6 of the Convention in the sense that the state must follow a minimum of proper procedure when acting. A distinction is made between civil and criminal matters; the term ‘quasi-criminal’ has been used by commentators, though it has not been blessed by the Strasbourg Court. Thus where the state removes the right to refugee lodging, or denies a pension, or orders a soldier to be detained, or levies a charge for parking too long, the procedures by which it takes its negative decision are caught by Article 6. In some cases, the decision need not be taken by a tribunal, but if taken by an official it must be subject to second-level appeal on the merits to a proper court.

Where does a competition law decision stand in these circumstances? In older cases, the EC/EU Courts have confidently found that the procedures followed by DG Competition are acceptable. That has not silenced the debate as the penalties have become more severe, the stigma of public condemnation more sharp, and the phenomenon of ‘light’ judicial review of legality (rather than a non-deferential review of the merits and substance) in Luxembourg rather frequent, though not universal.

I venture to suggest that very few practitioners in Brussels would regard the current regime as satisfactory; but they would have to agree that their concerns have been consistently rejected by courts and the administration charged with enforcement. The judgment of the Strasbourg Court in Menarini is said by some to put an end to the debate. I suggest that this is not necessarily the case.

Civil matters and criminal matters: the notions of ‘soft criminality’

As the state’s regulation or intervention or intrusion or assistance regarding many aspects of daily life became more intense, so did the number of challenges about how that power was exercised. Burdens or even penalties can be imposed in situations not involving charges or moral obloquy (withdrawal of free transport as the child’s needs are not grave enough), or for morally trivial offences (putting out rubbish on the wrong day, or obtaining diabetic prescriptions without a special certificate), or for small offences (back late from military leave; an erroneous customs declaration), or for a more serious offence (concealing income to avoid tax), or for a well-recognised crime (burglary, assault, drunk driving). The citizen in each case enjoys rights under Article 6 when dealing with the authority. Unfair treatment has been found in a long succession of cases under both the civil and criminal heads.

There have been many cases where citizens with a grievance against a public authority complained of how they were treated and how their grievance was dealt with. The scope of Article 6 rights for the citizen has steadily expanded. Thus where the citizen loses the right to stay in refugee housing or to receive a pension for reserve army members, the citizen is entitled to certain procedural minima in challenging that setback. As to what is criminal, there are a number of situations where the citizen is engaged in a battle with the administration, but

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8 See, for example, Case T-446/05 Amann & Söhne and Cousin Filterie v Commission ECLI:EU:T:2010:165, §327.

where the field is not evidently criminal, as the term is usually used. Where the state punishes while administratively regulating and also deciding the citizen’s particular controversy, does the state have to accord criminal procedural privileges when a sanction is inflicted? What if the sanction is labelled ‘administrative’? When finding and punishing a breach of the competition rules, can the authority act as if the matter was a civil, non-criminal offence? Does every enforcement of the rules deserve the full procedural apparatus of a murder trial?

Thirty-five years ago the European Court of Human Rights (ECtHR)\(^\text{10}\) set out the criteria by which the ‘criminality’ of an offence could be judged for purposes of assessing the state’s duty of fairness. The *Engel* case involved four Dutch soldiers who were given minor detention sentences for minor breaches of army rules (late back from leave, writing disrespectfully). The so-called *Engel* criteria require that, in order to be considered criminal, an offence must either (i) be classified as criminal by the charging authority, (ii) be by its very nature criminal, or (iii) result in a sufficiently severe penalty to be considered criminal. Though the criteria are alternative, an offence may be considered criminal if more than one of the criteria (in practice both the second and third) is satisfied to some degree. No single criterion is sufficient alone.\(^\text{11}\) The consequence of being labelled ‘criminal’ was important: if the classical process for establishing guilt or innocence were to be applicable to any ‘criminal’ matter, then summary condemnation at first instance would become inadequate, even if there were genuine appellate review. This was a major expansion of the reach of Article 6 of the Convention. It became credible and convincing to regard as ‘criminal’ a matter which was not on its face obviously penal. In *Engel*, it was not unreasonable to treat the cases as criminal even if the army disagreed. The *Öztürk*\(^\text{12}\) case, in which there were several dissents, concerned a very small payment for a moving traffic violation, yet the state was nonetheless not dispensed from its duty to accord procedural safeguards — in this case interpretation.

In *Öztürk*, however, the Court did endorse the practice of the German authorities of issuing criminal penalties by an administrative procedure. Similarly in *Bendenoun*\(^\text{13}\), it was held to be compatible with Article 6 for ‘criminal’ penalties (tax surcharges) to be issued by the revenue authorities. In both cases, it was a condition of compatibility with Article 6 that the defendant have the right to seek redress before a tribunal affording the protections of Article 6. One can understand the rationale of the Court. Some offences are rather trivial (parking, speeding) and occur very frequently. It seems unrealistic to accord a full ‘trial’ before a magistrate to everyone who is accused of parking the car too long. Some ‘penalties’ are modest, just high enough to create an economic incentive not to park in the wrong place. Indeed, I doubt if many motorists would respect a hortatory request to park for not longer than one hour, without knowing that they risk a penalty if they stay too long.

Some other matters involve the punctuation with disciplinary sanctions of a relationship ongoing between the citizen and the state. Tax and customs are two such areas, where penalty payments are frequently imposed on those who have paid too little. But where is the line between the minor or commonplace criminal offences considered in *Öztürk* and *Bendenoun*, and those which do require a proper hearing before the penalty is imposed?

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\(^{10}\) *In Engel v The Netherlands*, nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, Series A no. 22, § 82.

\(^{11}\) *See Ezeh & Connors v United Kingdom*, nos. 39665/98 and 40086/98, ECHR 2003, § 107 (where the ECtHR held that Article 6 § 1 applied in relation to prison disciplinary offences and that the Applicants’ right to legal representation had been infringed).

\(^{12}\) *Öztürk v Germany*, no. 8544/79, Series A no. 73.

\(^{13}\) *Bendenoun v France*, 24 February 1994, Series A no. 284.
In *Jussila*,\(^\text{14}\) the Court clarified when an oral hearing may not be necessary in a criminal case. The ECtHR reviewed the case law before concluding that tax penalties imposed by the Finnish authorities in the form of a surcharge did fall within the sphere of criminal penalties. The taxpayer had to pay a small penalty, determined administratively by the tax authority. The maximum surcharge was 20%; the actual surcharge levied on Mr Jussila was the equivalent of EUR 308.80. The Court was impressed by the notion that the surcharges in question were a means of punishment to deter re-offending, and concluded that the deterrent and punitive aspects of the penalty were sufficient to establish the criminal law nature of the offence.\(^\text{15}\) That consideration was sufficient to override the fact that the surcharge was of a minor nature. Having established that the tax surcharge had been imposed as punishment for a criminal offence, the Court went on to consider whether it was a breach of Article 6 to refuse the Applicant an oral hearing to determine his appeal against the tax penalty. Mr Jussila had not suffered public criticism. The Court concluded that a hearing at first instance was not necessary and it noted that, by the application of the *Engel* criteria, there had been a "gradual broadening"\(^\text{16}\) of the definition of criminal offences to encompass administrative penalties. In the Court’s view,

> "Tax surcharges differ from the hard core of criminal law; consequently, the criminal-head guarantees will not necessarily apply with their full stringency..."\(^\text{17}\)

The Court appeared to identify one particular quality that marked out certain offences as being within the hard core of criminal law – the stigma of the offence:

> "Notwithstanding the consideration that a certain gravity attaches to criminal proceedings, which are concerned with the allocation of criminal responsibility and imposition of a punitive and deterrent sanction, it is self-evident that there are criminal cases which do not carry any significant degree of stigma. There are clearly criminal charges of differing weight."\(^\text{18}\)

The Court found that there had been no breach of Article 6 by Finland. There was a dissent by Judge Loucaides in *Jussila* which was joined by Judge Spielmann (then only a judge), and Judge Župančič.\(^\text{19}\)

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\(^\text{14}\) *Jussila v Finland*, no. 73053/01, ECHR 2006.

\(^\text{15}\) Ibid., §38.

\(^\text{16}\) Ibid., §43.

\(^\text{17}\) Ibid.

\(^\text{18}\) Ibid.

\(^\text{19}\) The dissent is short but robust:

> "... criminal proceedings are more serious than civil proceedings and entail the attribution of criminal responsibility with the consequent stigma – a stigma which exists in any event, regardless of the severity of the relevant criminal charge, even though it may be more or less serious depending on the degree of such severity ... in a criminal trial there is a confrontation between on the one side the State, exercising its power to enforce the criminal law, and on the other side the individual(s) …"

> "I find it difficult in the context of a fair trial, to distinguish, as the majority do in this case, between criminal offences belonging to the "hard core of criminal law" and others which fall outside that category. Where does one draw the line? ... No person accused of any criminal offence should be deprived of the possibility of examining witnesses against him or of any other of the safeguards attached to an oral hearing. Moreover to accept such distinctions would open the way to abuse and arbitrariness."

> "Therefore, once it was found (correctly) that the relevant proceedings in this case were criminal, the requirement of a public hearing in respect of them became a sine qua non." *Jussila*, Partly Dissenting Opinion of Judge Loucaides joined by Judges Župančič and Spielmann.
I suggest that a reasonable interpretation of the state of the law after Jussila was that in a controversy between the citizen and the state, if a penalty was imposed, then the criminal-head procedural privileges required under Article 6 “do not apply with their full stringency” if the charge is not very serious morally, and if it does not carry any significant degree of stigma. The Court was evidently impressed by the notion of stigma being a significant dividing line for the purpose of determining whether the protections of Article 6 will apply “with their full stringency”. So if I am charged with putting my rubbish out on the wrong day or failing to be in possession of the appropriate certificate when collecting the medicine prescribed for my diabetes, there need not be a hearing at first instance, and my due process rights can be accomplished on appeal. By contrast, something falling within “the hard core of criminal law”, which carries a “significant degree of stigma”, cannot be handled by an administrative process.

**Are EU antitrust fines criminal? Are they hard or soft criminal?**

So assessing the compatibility with the Convention of the EU enforcement regime depends on what kind of criminality is involved. The fact that competition law did not escape the Convention has been established for years\(^\text{20}\). There have been a few competition cases, which confirmed that when competition rules were enforced, the Convention was not irrelevant.

**The Menarini case**

The question of where competition law penalties fall was examined by the ECtHR in *Menarini*, which raises a number of queries about the supposed compatibility of the EU system, which is of course yet to be directly tested before the ECtHR. The case concerned a decision by the Italian Competition Authority to fine an Italian pharmaceutical company on novel grounds for a violation of competition law. The ECtHR confirmed, by a majority, that it was not incompatible with Article 6 for an administrative authority to impose a fine on an undertaking, provided that the undertaking had the possibility to appeal the decision of the authority to a judicial authority with full power of review over the administrative decision.

Some commentators\(^\text{21}\) have argued that the judgments in *Jussila* and *Menarini* finally settle the debate on whether EU competition law procedures are compatible with Article 6. I respectfully disagree. I suggest that what is required is a fresh assessment of whether competition law infringements have the qualities of hard core criminal offences (an analysis that was lacking in the *Menarini* judgment), and the relevance of that determination. Two strands of debate present themselves: firstly, whether EU competition law infringements properly belong outside the hard core of criminal offences, and secondly, if they do, whether the standard of review practised by the courts in Luxembourg in accordance with their mandate under the Treaty of Rome as amended provides the appropriate intensity of judicial scrutiny.

Regulations 17/62 and 1/2003 label as administrative the fines which are imposed by the European Commission for antitrust infringements, a consideration which has been repeatedly relied on by Commission representatives. I suggest that the title is irrelevant, and that the word ‘administrative’ is by no means dispositive or even very helpful to decide what is an

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\(^{20}\) See the Cases cited at Fn. 7.

appropriate level of procedure. That question was addressed in Luxembourg more than twenty years ago. More delicately, following Jussila and the cases leading up to it such as Bendenoun and Janosevic, it was argued that antitrust fines fell outside the category of hard core criminality, with the result that the protections of Article 6 as to criminal cases do not apply fully. Jussila concerned tax surcharges; there was therefore at least some doubt as to whether competition law infringements should be assessed in the same manner.

The conditions for hard core criminality

What is it that makes an offence ‘hard core’? Following the logic of the Engel criteria, the severity of the penalty has some bearing on this assessment, even if the infringement is called fiscal or administrative or regulatory. Let us assume that an offence carrying a penalty of imprisonment will fall within the hard core of criminality on account of the severity of the penalty. That seems to match the logic of Engel and Jussila. In the antitrust context, a corporation cannot be imprisoned, but it can be fined and fined very heavily; and employees who are found to have engaged in anti-competitive conduct are at risk of criminal prosecution in many countries, and are at risk of fines or imprisonment if convicted. The level of penalty which can be inflicted will commonly be different from the level of penalty that is inflicted. In Jussila, the maximum surcharge could have been 20%, a large chunk of the taxpayer’s income, but it actually was much less. In some rare but celebrated competition cases, insolvency has been the consequence of a competition law fine. The Commission is naturally sceptical about inability to pay, but if convinced it will accept payment in instalments to avoid the obloquy of putting a firm out of business.

Can an actual fine (as opposed to a theoretical maximum) be so severe that it takes the offence into the realm of hard core criminality? There has been a steady increase in the level of antitrust fines typically imposed by the European Commission: today’s fines are maybe twenty-five times heavier than those of 1990. Wouter Wils has argued that, notwithstanding the increase in the actual amount of fines, the maximum possible fine has always been subject to a ceiling of 10% of the relevant undertaking’s turnover in the preceding business year; on this theory, the increase in the level of the actual fines imposed is not a factor militating in favour of a ‘hard core’ classification. However, this argument seems difficult to reconcile with the smallness of the actual penalties, which were deemed definitely relevant by the Strasbourg Court, imposed in Oztürk and Jussila. I wonder if a fine of 10% of turnover, or a penalty of tens of millions or hundreds of millions might be a sufficiently severe penalty to take the offence into the ‘hard core’ category. The question has never been considered by the ECtHR, although a variety of parallel arguments have been made to the Luxembourg Courts.

In Jussila, one of the other factors referred to by the Court for determining whether offences fell outside the hard core category was whether they carry any significant degree of stigma. Are competition law infringements comparable to tax offences in the level of stigma they attract? Those who receive tax penalties, or indeed other administrative penalties, are not

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23 Bendenoun v. France, see note 13 above (where the ECtHR held that Article 6(1) applied to the imposition of a tax surcharge but there was no breach).
24 Janosevic v Sweden, no. 3461/97, ECHR 2003 (where the ECtHR also held that Article 6(1) applied to the imposition of tax surcharges and that the Applicant’s right of access to a court has been infringed).
generally subject to public ridicule (indeed in the tax context, ridicule is nowadays reserved for companies which avoid paying tax legitimately by using ‘loopholes’ in the law). Antitrust offenders are subjected to large fines and their offences may be widely publicised to deter them and others. At the moment of announcing a condemnation, the Commissioner will typically describe the fate of the wrongdoer as a warning to others. Some controversy has arisen about negative public statements before the investigation has been completed. The consequences of an adverse finding may be additionally severe, as the offender is exposed to claims for damages in the civil courts. Moreover, the competition authorities now actively encourage the pursuit of follow-on claims against antitrust offenders. I raise the question of whether the encouragement of civil damages as a consequence of a condemnation tends to show the hard criminality of the offence.

Nearly all adult persons and all or nearly all corporate entities have to pay tax and declare to the tax authorities information about their income. The tax authorities can sanction false declarations or impose penalties for late payment, and in rare cases they may prosecute for tax fraud. Thus tax liability is universal and routine. By contrast, the enforcement of the competition rules against a company is exceptional. The scale, expense and complexity of a competition case before the European (or other) authority can be huge, and is rarely modest. The judgment in Menarini did not address the question of whether antitrust offences are part of the hard core of criminal behaviour; it is apparently assumed that they are not, or rather that they are similar in nature to other administrative penalties such as tax surcharges. For the reasons set forth above, I suggest the question requires further study.

Every enterprise engaged in economic activity has to deal with tax obligations; only a very small number are accused of competition law breaches.

The intensity of judicial review

In the same year that the ECtHR was considering Menarini, the Court of Justice of the European Union (CJEU) was itself considering whether the EU judicial review system complied with the principle of effective judicial protection. The judgments in Chalkor and KME emerged less than a month before the Menarini judgment. I argued the Chalkor/Halcro case, and Mario Siragusa argued KME.

The Commission had imposed fines on several companies for their alleged participation in cartels on the markets of copper industrial tubes and copper plumbing tubes. KME was fined under both decisions. Chalkor (spelled ‘Halcro’ at first instance) was fined under the copper plumbing tubes decision, despite its marginal involvement: it contended that it had been the victim of a collective threat, not a participant in the cartel. The companies appealed to the

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26 In 1997, Commission officials apparently leaked the content of correspondence sent to Formula 1 racing’s governing body (FIA). The then Competition Commissioner, Karel Van Miert, made several public statements, including an interview with the Wall Street Journal in which he described broadcasting arrangements for Formula 1 as the “single worst case of anti-trust violation” he had ever seen. At the time the Commission had not reached a final decision in the case. These events ultimately gave rise to a claim by FIA against the Commission in the European Courts, leading to the Commission issuing an apology. Commissioner Almunia earned a rebuke from the European Ombudsman for a number of comments which appeared to prejudge the outcome of the Commission’s investigation of banks regarding the Euribor market. Commissioner Kroes remarked (after the publication of the Commission inquiry into the pharmaceutical sector) that “something rotten” was in the pharmaceutical sector.


General Court, which upheld KME’s fines but reduced Chalkor’s fine by 10%, finding that the Commission had infringed the principle of equal treatment. The General Court dismissed Chalkor’s arguments relating to the proportionality of the fine as irrelevant, reasoning that these arguments were “indirectly aimed at calling into question the scheme for the calculation of fines established by the Guidelines”\textsuperscript{29}. The Court noted the perverse result of applying the Guidelines: the companies which participate in a cartel for the shortest period of time will have the largest fine imposed on them per month of participating in the infringement or per cartel meeting\textsuperscript{30}. The question then was whether, in light of all the circumstances of the case, the fine imposed on Chalkor was correct in light of the duration and gravity of its conduct. Instead of carrying out its own assessment of the fine taking account of the individual circumstances in this case, the Court said that it would limit itself to verifying whether the Commission had correctly applied its Fining Guidelines. Now, whether the method of calculating fines adopted by the Fining Guidelines is appropriate is a separate matter from whether the fine imposed by the Commission in this particular case is proportionate. As Advocate General Tizzano commented in Dansk Rørindustri A/S,\textsuperscript{31}

“129. ... the calculation method used by the Commission is not without risk as far as the fairness of the system is concerned.

130. It does not seem to me to be fully consistent with the requirements of individualisation and progressiveness of the ‘penalty’ – two principles of cardinal importance in any punitive system, both in the criminal and the administrative spheres – that, as in the present cases, some of the calculation operations are essentially formal and abstract in character and therefore do not have concrete repercussions on the final amount of the fine ...

131. I would add that those situations are not in fact exceptional and indeed run the risk of becoming ever more frequent. When the Guidelines were adopted in 1998, the Commission’s policy on fines for infringements of competition law entered a new phase which, for reasons which it is not for me to judge, is certainly more rigorous and has led to an increase in the level of fines, particularly for more serious infringements. In addition, that intensification, deriving as it does from a calculation method based on flat-rate amounts, is liable for the most part to hit small and medium-sized undertakings ...”\textsuperscript{32}

Chalkor then appealed to the CJEU, arguing that the General Court had deferred to the Commission’s discretion rather than reviewing its fine on the merits, and that this was inconsistent with the Convention and the Charter of Fundamental Rights (the “Charter”). This ‘deferential’ level of judicial review was therefore inadequate for purposes of the unlimited jurisdiction accorded by the Treaty. Chalkor argued that the General Court had followed the wrong test when it stated:

“It is therefore for the Court to verify, when reviewing the legality of the fines (...), whether the Commission exercised its discretion in accordance with the method set out in the Guidelines. (...) In areas where the Commission has maintained a discretion (...),

\textsuperscript{29} Chalkor, §177.

\textsuperscript{30} Chalkor, §179.

\textsuperscript{31} Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P Dansk Rørindustri and Others v Commission, ECLI:EU:C:2005:408.

\textsuperscript{32} Opinion of Advocate Tizzano in Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P Dansk Rørindustri and Others v Commission, ECLI:EU:C:2004:415.
review of the legality of those assessments is limited to determining the absence of manifest error of assessment." 33.

Chalkor argued to the CJEU that the General Court had used the wrong legal criteria, an incurable error. KME also filed an appeal on similar grounds. The oral argument was stimulating and robust. This came after the conclusion of the Lisbon Treaty, which conferred on the Charter a status equivalent to the EU Treaties and required that EU law accord at least the same protection for fundamental rights as that prescribed in the Convention.

Advocate General Sharpston argued that, though the General Court had said it was constrained to perform only a light review, in fact it had done a thorough one. The CJEU held that in competition cases the EU Courts must make a full review of the law and the facts. This implies the power of the reviewing court to assess the evidence, annul the contested decision and alter the amount of the fine.

The advocates of Chalkor and KME were successful in the sense that the CJEU agreed that the General Court cannot use the margin of administrative assessment which the Commission enjoys as a basis for dispensing with an in-depth review of the law and the facts. Although the Commission has a margin of assessment for complex economic matters and the General Court should not substitute its own economic assessment for that of the Commission “not only must [the EU courts] establish, among other things, whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the relevant 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” 34.

However, the advocates were unsuccessful in that the CJEU concluded that the General Court had, notwithstanding its own declarations to the contrary, carried out its review of the Commission’s Decision to the required standard.

There have been other cases where the words of deferential review were used but the judgment survived 35. In Chalkor and KME the CJEU considered that the General Court’s repeated references to the substantial margin of discretion of the Commission, although wrong, had not prevented it “from carrying out the full and unrestricted review, in law and in fact, required of it” 36. So in Kone, 37 the CJEU considered the General Court’s statement that its review was limited to analyse whether the Commission manifestly went beyond the bounds of its margin of discretion in applying the 2002 Leniency Notice as “not consonant with the case-law” 38 but went on to cite the KME and Chalkor formula to hold that such statement had not prevented the General Court from performing the full review required of it and did not annul the judgment 39.

A fresh approach? Cartes Bancaires

34 Case C-386/10 P, Chalkor AE Epe rgasias Metallon v European Commission, ECLI:EU:C:2011:815, §54.
38 Ibid., §44.
39 Ibid., §56.
In *Cartes Bancaires*, the CJEU annulled a judgment of the General Court for failing to review the case to the required legal standard. The CJEU applied the *Chalkor/KME* formula, on this occasion holding the standard had not been met. It found “a general failure of analysis by the General Court and therefore [...] the lack of a full and detailed examination of the arguments of the appellant and of the parties”\(^4^1\). The Court noted that the judgment was “simply reproducing on a number of occasions [...] the contents of the decision at issue”, thereby failing to review “whether the evidence used by the Commission in the decision at issue enabled it correctly to conclude that the measures at issue [...] displayed a sufficient degree of harm to competition to be regarded as having as their object a restriction of competition [...] and, consequently, whether that evidence constituted all the relevant data which had to be taken into consideration for that purpose”\(^4^2\). The significance of this judgment will take time to become clear. At the least, it confirms the need for intense judicial review.

**Where does this leave our analysis?**

*Jussila* for the first time held that it was not unacceptable for the first instance infliction of a criminal penalty to be an administrative action, provided that there was the possibility of appeal to an impartial tribunal. *Jussila* created a distinction between ‘hard’ and ‘soft’ criminal charges. *Jussila* relied on the presence of stigma. In *Menarini*, the question of whether competition law punishments fitted under ‘hard’ or ‘soft’ criminal charges was not rigorously considered, as most of the discussion focused on the intensity of judicial review of competition decisions in Italy.

Now, I am not an Italian lawyer, still less an expert on Italian judicial review. But I submit that it is not necessary to be an Italian legal expert to observe that there remains a problem from the viewpoint of the Convention. On the one hand, *Menarini* lays stress upon the rigour of the appellate process. On the other hand, the Treaty accords to the EU Courts the duty to perform a review of legality, with unlimited jurisdiction in the case of penalties. There are some particular difficulties as to fines. The Treaty of Rome conferred on the Court unlimited jurisdiction as to penalties but review of legality as to substance. The Regulation speaks of ‘duration’ and ‘gravity’ as the criteria for deciding penalties, but the criteria normally used today are arithmetic administrative guidelines which have received neither legislative endorsement nor judicial testing of their validity. The phenomenon of deference has been considered in the academic literature\(^4^3\) and the language of deference or ‘light judicial review’ frequently appears in judgments. The Commission’s guidelines are not binding on the Courts, as the basic text speaks merely of gravity and duration. Yet it is not easy for the Courts to decide consistently and satisfactorily when their assessment of the factual and legal underpinnings of the decision is supposedly limited to a review of legality while their assessment of the penalty is unlimited.

In *Menarini*, Judge Pinto de Albuquerque queried in his dissent whether the courts had really any chance of contesting the facts established by the competition authority. The Italian


\(^{41}\) Ibid., §89.

\(^{42}\) Ibid., §90.

judicial system managed to survive the scrutiny of the majority, but – I suggest – it was lucky to do so. Indeed, there is a tension: the authority may decide that the relevant market for computer servers is not all servers but cheap and simple servers; not all nail-guns but Hilti nail-guns; not all fruit but bananas. Is that crucial determination, which may be harsh, fair or arguable, a valid one? Is the non-compete clause of three years valid or invalid? The authority has the power to reach such a decision. It will never have no basis for such a determination. Review of legality does not normally catch the exercise of discretion, but then the determination (using discretion) of dominance and abuse can lead to a finding of guilt and maybe a fine of hundreds of millions, calculated on a mechanical basis by reference to turnover affected. So, is the Court entitled to verify if the Commission had some basis to make the determination (easy), or to verify (delicate) if, in light of the entirety of the context, the relevant market was broader or the proper length of the non-compete clause should have been two years or four years?

**Thoughts for the future**

I suggest that there are two uncertainties which deserve to be treated separately. First, if we accept that the state may impose penalties without a trial at first instance (and in our world of increasing regulation I do not regard that as unacceptable), is it correct to deem competition decisions taken by the European Commission as in the same category as offences like parking in the wrong zone, putting out rubbish on the wrong day, or wilfully miscalculating one’s taxes? The stigma, the public naming of the offender as having acted dishonourably or illegally, and the gigantic fines, suggest to me that first instance trial may be necessary. Second, even though the judgment in *Cartes bancaires* is to be welcomed, it remains the case that there is a tension between the TFEU’s provisions on appellate jurisdiction and the need for full judicial review.

Dean Spielmann recommends that when deciding on compatibility with the Convention, we should consider the entirety of the steps in the dispute between citizen and authority. So I would further observe that where the procedures at the administrative stage are vulnerable to procedural criticism, uncertainties as to the nature of the consequential judicial review become more preoccupying.

So, one day we may see a revisiting of *Jussila* and a sharper drawing of lines to decide what regulatory or administrative penalties are so severe and so embarrassing that they must be inflicted by an independent and impartial tribunal. And we may see a formal confirmation that ‘mere’ judicial review of legality is no longer the acceptable test for the validity of Commission decisions, since the Charter and the Convention demand a higher standard.

These fundamental questions deserve to be given academic attention, robust debate, and judicial reflection. I repeat that it is a pity not to have had the privilege of arguing them before President Spielmann.