CASE NOTE

CONSTITUTIONALIZING COMPREHENSIVELY TAILORED JUDICIAL REVIEW IN EU COMPETITION LAW

JUDGMENTS OF THE COURT (SECOND CHAMBER) IN CASE C-272/09 P, KME GERMANY, KME FRANCE SAS AND KME ITALY SPA V EUROPEAN COMMISSION, CASE C-386/10 P, CHALKOR AE EPEXERGASIAS METALLON V EUROPEAN COMMISSION AND CASE C-389/10 P, KME GERMANY, KME FRANCE SAS AND KME ITALY SPA V EUROPEAN COMMISSION OF 8 DECEMBER 2011, NYR

Pieter Van Cleynenbreugel *

I. INTRODUCTION

The intensity of judicial review by the Court of Justice of the European Union[1] has recently been problematized in the field of EU competition law.[2] The imposition

* Fellow Research Foundation Flanders, Research Unit Economic Law, Faculty of Law, KU Leuven – University of Leuven, Belgium. LL.M. (Harvard University); LL.M., LL.B. (KU Leuven – University of Leuven).

[1] According to Article 19(1) TEU, the Court of Justice of the European Union shall include the Court of Justice, the General Court and specialized courts. In this annotation, I will refer to the Court of

of increasingly elevated fines on market operators[3], the binding force of the Charter of Fundamental Rights (CFR)[4] and the impending accession of the European Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR)[5] are commonly considered to have reinvigorated criticism in that regard.

Responding to these critics, the Second Chamber of the Court of Justice first of all confirmed the constitutionality of the present EU judicial review system in its December 2011 *KME Germany* and *Chalkor* judgments.[6] In addition to confirming

---

Justice as either the Court, the ECJ or the Court of Justice, and to the General Court as General Court or GC.

[2] Problems related to judicial review of EU competition law decisions are not new however. See for critical examples at the national level, L. Hiljemark, Enforcement of EC Competition Law in National Courts—The Perspective of Judicial Protection, 17 Yearbook of European Law (1997), 83-134. More recent critical contributions to this debate can be found in I. Forrester, A Bush in Need of Pruning: The Luxuriant Growth of Light Judicial Review in EUROPEAN COMPETITION LAW ANNUAL 2009: THE EVALUATION OF EVIDENCE AND ITS JUDICIAL REVIEW IN COMPETITION CASES (C.D. Ehlermann & M. Marquis (eds.), 2011), 407-452; I. Forrester, A challenge for Europe's judges: the review of fines in competition cases, 36 European Law Review (2011), 185-207; D. Gerard, Breaking the EU antitrust enforcement deadlock: re-empowering the courts?, 36 European Law Review (2011), 457-479. See also I. Forrester, Due process in EC competition cases: a distinguished institution with flawed procedures, 34 European Law Review (2009), 817-843 for an overview as to why so-called light judicial review is insufficient at the EU level.

[3] Fines of tens of millions of Euros have now become 'routine' according to I. Forrester, note 2, (2011), 185.See the Directorate-General for Competition's Statistics of cartel enforcement demonstrating the increasing amount of competition law fines imposed available at http://ec.europa.eu/competition/cartels/statistics/statistics.pdf (last consulted March 28, 2012). In 2007, the Commission imposed a total amount of 3.313.427.700 euros in fines. Although the total amounts have since diminished to a 'mere' 614.053.000 euros in 2011, the total amount of fines imposed during the period between 2000 and 2010 is significantly larger than the amount of fines imposed between 1990 and 2000.

[4] Charter of Fundamental Rights of the European Union, 2010, O.J. (C 83), 389. See Article 6(1) TEU, granting the Charter the same legal value as the Treaties. The EU's Charter of Fundamental Rights (CFR) additionally guarantees the rights incorporated in the ECHR, Article 47 CFR guaranteeing the right to an effective judicial remedy. The Court directly relied on the Charter to derive particular procedural obligations imposed on national legal orders, for an example in that regard, see Case C-279/09, Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland, judgment of 22 December 2010, not yet reported, para 30–33. See also J. Engström, *The principle of effective judicial protection after the Lisbon Treaty. Reflection the light of case C-279/09 DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH*, 4 Review of European Administrative Law (2011), 53–68.

[5] On the importance of the ECHR, I. Forrester, note 2, (2009), 820–821. See also Article 6(2) TEU holding that The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. On the impending accession of the EU to the ECHR, see T. Lock, *Walking on a tightrope: the draft ECHR accession agreement and the autonomy of the EU legal order*, 48 Common Market Law Review (2011), 1034 and T. Lock, *EU accession to the ECHR: implications for the judicial review in Strasbourg*, 35 European Law Review (2010), 797–798. For an early appraisal of the ECHR compatibility of the EU competition law enforcement system, see D. Waelbroeck and D. Fosselard, *Should the Decision-Making Power in EC Antitrust Procedures be left to an independent judge?, - The Impact of the European Convention on Human Rights on EC Antitrust Procedures*, 14 Yearbook of European Law (1994), 111–142.

[6] Case C-272/09 P, KME Germany, KME France SAS and KME Italy SpA v European Commission (hereafter referred to as Case C-272/09 P), Case C-386/10 P, Chalkor AE Epexergasias Metallon v European Commission (hereafter referred to as Case C-386/10 P) and Case C-389/10 P, KME Germany, KME France SAS and KME Italy SpA v European Commission (hereafter referred to as Case C-389/10 P), judgments of 8 December 2011, not yet reported.

the constitutionality of the present review system, these judgments also expressed a preference for a *comprehensive review* system in which appellate parties, the European Commission and the General Court engage in a meaningful *adversarial* debate. A system grounded in adversarial proceedings operationalizes the European Court of Human Rights' (ECtHR's) understanding of full jurisdiction and tailors it to the particular constitutional features of judicial review enshrined in the EU's Treaty framework.[7]

II. FACTUAL AND LEGAL BACKGROUND

It is well-known that the European Commission can adopt decisions imposing fines of up to ten per cent of an undertaking's total turnover in the preceding business year if that undertaking infringes EU competition rules.[8] The annotated judgments originated in such Commission decisions fining undertakings participating in copper industrial tubes[9] and copper plumbing tubes price-fixing cartels.[10] The fined undertakings included *KME France, KME Germany* and *KME Italy* (*KME*) and *Chalkor*. Whilst *Chalkor* participated only in the copper plumbing tubes cartel, *KME* was involved in both the copper industrial and plumbing tubes cartels.[11]

In its copper tubes fining decisions, the Commission relied on its 1998 fining guidelines to calculate the specific amount of fines to be imposed.[12] The 1998 Guidelines projected the determination of a basic fining amount depending on the gravity and duration of the infringement.[13] Claiming that the implementation of the

---

[7] On the Treaty framework as a 'constitutional charter', see among others Case 294/83, Parti écologiste Les Verts v European Parliament, [1986] ECR 1339, para 23 ; Case C-2/88, Zwartveld, [1990] ECR I-3365, para 16 ; Opinion 1/91,[1991] ECR I-6079, para 1 ; Case **C-314/91**, Beate Weber v European Parliament, [1993] ECR I-1093, para 8.

[8] See Article 15(2) Council Regulation 17 implementing Articles 85 and 86 of the Treaty, 1962 O.J. (L 13) 204 (English Special Edition, Chapter 1959–1962, 87), hereafter referred to as Regulation 17/62, now replaced by Article 23(2) of Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, 2003 O.J. (L1), 1, according to which The Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently: (a) they infringe Article [101] or Article [102 TFEU]. The fine shall not exceed 10 % of an undertaking's total turnover in the preceding business year.

[9] Commission Decision C(2003) 4820 Final of 16 December 2003 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-1/38.240 – Industrial tubes), 2004 O.J. (L125) 50. The summary reference in the Official Journal indicates the Decision as bearing the number C(2003) 4820, whilst the Commission decision refers to number C(2002) 4820. The Courts referred to Decision C(2003) 4820. I will also refer to the latter number in the following references.

[10] Commission Decision C(2004) 2826 of 3 September 2004 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-1/38.069 - Copper Plumbing Tubes), 2006 O.J. (L 192) 21.

[11] For the KME Group, see Article 1(d), (e), (f) Decision C(2003) 4820 and Article 1(k), (l), (m) Decision C(2004) 2826; for Chalkor, see Article 1(f) Decision C(2004) 2826.

[12] Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation No 17 and Article 65 (5) of the ECSC Treaty, 1998 O.J. (C9) 3. These guidelines have been replaced by the more recent Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, 2006 (C210) 2.

[13] See the 1998 Guidelines, 3.

cartel resulted in relatively stable market shares and took place between operators active in the same market, the Commission identified the cartels as very serious infringements of EU competition law.[14] In addition, the Commission considered the infringements to be of long duration. It therefore increased the amount of the fines determined by gravity by an additional 10% per year.[15] In the copper industrial tubes case, *KME* was fined a total of 39.81 million Euros.[16] In the copper plumbing tubes case, the Commission imposed a total fine of 67.08 million Euros on *KME*[17] and of 8.99 million Euros on *Chalkor*.[18]

In reaction to the Commission fining decisions, both *KME* and *Chalkor* asked the General Court to reconsider the calculation of fines imposed on them.[19] In so doing, they (implicitly[20]) relied on Article 261 TFEU and its application in Article 17 of Regulation 17/62 granting the Court unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment.[21] Unlimited jurisdiction allows the Court to cancel, reduce or increase the fine or periodic penalty payment imposed. *KME* and *Chalkor* developed numerous claims, the most important ones arguing that the Commission failed to take sufficient account of the actual impact of the cartel, inadequately assessed the size of the sector affected by the infringement, committed an error in increasing the fine for reasons of duration, failed to consider particular attenuating circumstances and set the fine at a disproportionate level.[22]

Before addressing these specific claims, the General Court developed some preliminary observations, clarifying the intensity of judicial review against fining decisions.[23] The judgment first of all reiterated the undisputed assumption that the

---

[14] Decision C(2003) 4820, recital 320; Decision C(2004) 2826, recital 680.

[15] In compliance with the 1998 Guidelines, 4; Decision C(2003) 4820, recitals 338, 342 and 347; Decision C(2004) 2826, recital 710–713.

[16] Article 2(c), (d), (e) Decision C(2003) 4820.

[17] Article 2(g), (h), (i) Decision C(2004) 2826.

[18] Article 2(d) Decision C(2004) 2826.

[19] See cases T-127/04, KME Germany AG, KME France SAS, KME Italy SpA v Commission of the European Communities, [2009] ECR II-1167 (hereafter referred to as Case T-127/04); T-21/05, Chalkor AE Epexergasias Metallon v Commission of the European Communities, [2010] ECR II-1895 (hereafter referred to as case T-21/05) and T-25/05, KME Germany AG, KME France SAS, KME Italy SpA v Commission of the European Communities, [2010] ECR II-91 (summary publication). Since the three cases follow a similar pattern, I will for simplicity's sake only refer to the observations made in case T-127/04, unless a specific point in another case merits attention.

[20] The applicants erroneously referred to the predecessors of Article 263 rather than Article 261 TFEU in order to substantiate their claims, see Opinion of Advocate General Sharpston in Case C-272/09 P, para 77–78 (hereafter referred to as Opinion). The form of order sought nevertheless clearly indicated they were seeking to have the amount of the fine directly reduced, see case T-127/04, para 29 for an example.

[21] Article 17 Regulation 17/62 has now been replaced by Article 31 Regulation 1/2003, which reads that the Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed.

[22] For an overview of pleas, see Case T-127/04, para 31; case T-21/05, para 58; case T-25/05, para 49.

[23] Case T-127/04, para 32, case T-21/05, para 59; case T-25/05, para 50.

Commission determines the amount of the fines imposed by applying the methodology defined in the fining guidelines. In so doing, it confirmed earlier case law in which the Court of Justice confirmed both the validity of the very principle of fining guidelines and of the method which is indicated therein.[24] The General Court additionally stated that '[w]hilst the guidelines may not be regarded as rules of law, they nevertheless form rules of practice from which the Commission may not depart in an individual case without giving reasons which are compatible with the principles of equal treatment'.[25] Since the Commission retains a significant margin of appraisal under the fining guidelines, the Court should assess whether the Commission conducted that appraisal in accordance with the method set out in the Guidelines. Should it be found to have departed from that method, the Court is to verify whether that departure is justified, supported by sufficient legal reasoning and does not manifestly transgress reasonable boundaries of assessment[26] As a result, the Court mainly assesses the legality of a decision on the basis of the provisions contained in the guidelines. According to the General Court, this limited intensity of review did not prejudge the exercise of unlimited jurisdiction, understood as the mere empowerment to annul, increase or reduce the fine imposed by the Commission.[27]

On the basis of these general observations, the General Court continued to assess the specific claims brought by *KME* and *Chalkor*. It held that the Commission could reasonably presume the presence of a cartel on the basis of limited market information available, could reasonably maintain that some attenuating circumstances should not have been included, and did not consider the duration calculation to go against the Guidelines.[28] In the case of *Chalkor*, the General Court nevertheless considered that the Commission infringed the principle of equal treatment of cartel offenders, by failing to take into consideration the fact that *Chalkor* had participated in only one branch of the price fixing cartel.[29] It consequently held that, although the Commission's methodology was not faulty, the basic amount of the fine should have been 10% lower. Leaving the Commission Decision finding the infringement in place, the General Court decreased the amount of the fine imposed on *Chalkor* to 8.2467 million Euros.[30]

Both *KME* and *Chalkor* initiated appellate proceedings against the General Court's judgments. The undertakings claimed that the General Court misapplied the law by deferring its judgment to the Commission without extensive *de novo* analysis[31] of the conditions in which a fine had been imposed. In addition, the

---

[24] Case T-127/04, para 32.
[25] Case T-127/04, para 33.
[26] Case T-127/04, para 36.
[27] Case T-127/04, para 34 and 37.
[28] For an example, see case T-127/04, para 74 and 105.
[29] Case T-21/05, para 90–113.
[30] Case T-21/05, para 185.
[31] As the Advocate General pointed out however, the appellants did not directly demand the General Court to conduct a full *a novo* analysis of the case at hand; they rather requested the adjustment of the amount of the fine, see Opinion, para 79.

judgments were said to be vitiated by a deficient statement of reasons.[32] More fundamentally however, *KME* and *Chalkor* also argued that the General Court violated the constitutional right to full and effective judicial review by failing to examine the undertakings' arguments thoroughly and closely and by showing a biased deference to the Commission's discretion.[33] *KME* in particular posited that 'by accepting that various assessments in the Commission's determination of the fines fell within the Commission's discretion and by not seeking, therefore, to make its own assessment in those regards, the General Court failed to subject the decision at issue to the scrutiny required by the Charter of Fundamental Rights and the ECHR'.[34] The latter argument directly questioned the scope of review exercised by the General Court in the light of the constitutional system of judicial protection established by the EU Treaty framework.

III. OPINION OF THE ADVOCATE GENERAL

Advocate General Sharpston's opinion in the copper industrial tube's *KME* case commenced by examining the infringement of the fundamental right to full and effective judicial review, 'since the view which the Court takes on the general question of the scope, degree and nature of the review which must be carried out by the General Court in cases of this kind will colour the approach to be taken to' the more specific grounds of appeal, 'each of which criticises a different specific application of that review.[35]

The Advocate General first of all commenced by directly considering the compatibility of the EU judicial system with the requirements imposed by Article 6 ECHR.[36] She identified the European Court of Human Rights (ECtHR)'s consistent case law requiring more stringent procedural guarantees and higher standards of review for criminal than for civil proceedings and, within the sphere of criminal law, for 'hard core' than for other proceedings.[37] Referring to these ECtHR precedents[38], the Advocate General had 'little difficulty in concluding that the procedure whereby a fine is imposed for breach of the prohibition on price-fixing and market-sharing agreements in Article [101] TFEU falls under the criminal head of Article 6 ECHR.[39] As a result, fines may be imposed by an administrative or non-judicial body which does not itself comply with the requirements of Article 6 ECHR,

[32] Case C-272/09 P, para 19; C-386/10 P, para 33; C-389/10 P, para 31.

[33] Case C-272/09 P, para 83; C-386/10 P, para 34; C-389/10 P, para 108.

[34] Opinion, para 60.

[35] Opinion, para 40.

[36] The Advocate General does not however seem to presuppose the ECtHR case law is *per se* binding on the European Court of Justice. In para 61, she just highlights that the *most relevant guidance* in that respect is found in the ECtHR's case law. In so doing, the Advocate General confirms a long line of cases where the Court drew inspiration from the ECHR, for a notable example, see Case C-112/00, Schmidberger, 2003 ECR I-5659, para 72–73.

[37] Opinion, para 63, referring to the so-called *Engel* criteria. For more elaboration on these criteria, see note 119.

[38] Opinion, para 65–67.

[39] Opinion para 64.

'provided that the decision of that body is subject to subsequent control by a judicial body that has full jurisdiction and does comply with that provision.[40]

The opinion subsequently held that the notion of unlimited jurisdiction meets the requirements of full jurisdiction reflected in the ECtHR's case law, at least in theory.[41] The Advocate General indeed maintained that it cannot necessarily be concluded from references to the degree of discretion, choice or latitude available to the Commission that the General Court failed in its duty to assess, in response to KME's arguments, the way in which the fine was set. On the other hand however, a mere reference to unlimited jurisdiction does not imply an adequate exercise of the powers of assessment included in that notion.[42]

At this point, the Advocate General adopted a crucial position. She held that 'since the proceedings before the General Court are *adversarial* in nature, the exercise of the Court's unlimited jurisdiction must be measured against the content of the arguments on which it was asked to adjudicate'.[43] The opinion therefore directly sided with the Commission's position that 'however well KME may have put the general case for an assiduous exercise by the General Court of its unlimited jurisdiction in cases such as the present, it has failed to identify a specific standard of review which should have been observed, or the passages of the judgment under appeal in which that standard was not observed'.[44] The inadequacy of a review standard should therefore be considered in the light of the nature of arguments put forward in specific appellate submissions.[45]

The opinion subsequently tested to what extent the specific arguments adduced by *KME* highlighted a lack of thoroughness that would negate adequate judicial review provided by the Court. Assessing the scope of arguments brought by *KME* and the General Court's response in that regard, the Advocate General maintained that nothing indicated that the General Court did not itself carefully scrutinize the amount of the fine and the conditions that led to its imposition.[46] The General Court's reliance on or confirmation of the Commission's discretion[47] in relation to particular submissions did not prevent it from correctly examining and responding to *KME's* arguments, nor did it impede it to reach a conclusion on the basis of a real appraisal of the facts and arguments before it.[48]

The Advocate General did not issue separate opinions in the copper plumbing tubes cases. The Court of Justice nevertheless stated that since the appellants put forward a similar ground of appeal alleging an error of law in that the General Court applied a limited standard of judicial review, Advocate General Sharpston's position

---

[40] Opinion para 67.
[41] Opinion Para 70.
[42] Opinion para 73.
[43] Opinion para 74.
[44] Opinion para 80.
[45] Opinion para 82.
[46] Opinion para 113–116, para 123, para 145, para 168, para 186–187.
[47] That discretion had in particular circumstances even been acknowledged by the applicants, see Opinion, para 144.
[48] Opinion para 187 provides an example of that argument.

developed in the opinion to the copper industrial tubes judgment would be relevant here as well.[49]

IV. FINDINGS OF THE COURT

The Court's judgments in *KME* and *Chalkor* follow a similar pattern of reasoning. In all judgments, the Court of Justice indirectly agreed with the Advocate General that the system of judicial protection established at the EU level complied with the requirements of Article 6 ECHR.[50] It also clearly stated that it was not required to carry out of its own motion a full review of the judgment under appeal.[51] Given the adversarial nature of the EU's judicial review proceedings, the General Court – and on appeal, the Court of Justice – should merely 'respond to the grounds of appeal raised by the appellant'.[52]

The Court first and foremost directly addressed the general constitutional 'effective judicial protection' claims.[53] It grounded its analysis in Article 47 CFR, which expresses the fundamental right to an effective remedy and to a fair trial.[54] According to the Court, that provision reflects the general principle of effective judicial protection in EU law.[55] Effective judicial protection has in particular been operationalized in the Treaty provisions allowing for legality review through both the annulment jurisdiction incorporated in Article 263 TFEU and the unlimited jurisdiction presented in Article 261 TFEU.[56]

The judgments subsequently enlightened the constitutional status of the EU's system of legality review. In assessing the legality of (Commission) decisions, the Court clarified its fundamental review role of the Commission's decision-making process. Whilst in areas giving rise to complex economic assessments, the Commission has a margin of discretion with regard to economic matters, that does not mean that the Courts of the European Union must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must those Courts establish, among other things, whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all

---

[49] Case C-386/10 P, para 32; Case C-389/10 P, para 30.

[50] Case C-386/10 P, para 45.

[51] Case C-272/09 P, para 56 and 104; Case C-386/10 P, para 49 and 64; Case C-389/10 P, para 63 and 131.

[52] Case C-386/10 P, para 49.

[53] Only in the C-386/10 P judgment did the Court commence by addressing the more general ground of appeal comprising a lack of adequate judicial protection. In the other annotated judgments, that ground only appears as the fifth (Case C-272/09 P) or sixth (Case C-389/10 P) ground of appeal.

[54] Article 47 states that [e]veryone 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. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

[55] Case C-272/09 P, para 92; Case C-386/10 P, para 52; Case C-389/10 P, para 119. In Case C-386/10 P, para 51, the Court states that Article 47 CFR implements the requirements of Article 6(1) ECHR in EU law. The Court therefore considered it necessary only to refer to Article 47 in its analysis.

[56] Case C-272/09 P, para 93; Case C-386/10 P, para 53; Case C-389/10 P, para 120.

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.[57]

In particular instances, the Court continued, the review of legality is supplemented by the unlimited jurisdiction which the Courts of the European Union were afforded by Article 17 of Regulation 17/62, in accordance with Article 261 TFEU. Unlimited jurisdiction empowers the Courts, in addition to carrying out a mere review of the lawfulness of the penalty, to substitute their own appraisal for the Commission's and, consequently, to cancel, reduce or increase the fine or penalty payment imposed.[58] The Court confirmed the Advocate General's position by stating that the exercise of unlimited jurisdiction does not occur on the Court's own motion. Proceedings before the Courts of the European Union are essentially *inter partes*. With the exception of pleas involving matters of public policy which the Courts are required to raise of their own motion, it is therefore for the applicant to raise pleas in law against that decision and to adduce evidence in support of those pleas.[59] To the extent that the applicants adduce these elements, the General Court may proceed to review both the law and the facts, and has the power to assess the evidence, to annul the contested decision and to alter the amount of a fine imposed depending on the plea made in the case at hand.[60] Such a system is essentially compatible with Article 47 CFR.[61]

The Court poignantly emphasized the appealing parties' responsibilities in that regard: 'it should be borne in mind that in an action on a decision relating to a competition matter, it is for the applicant to formulate his pleas in law and not for the General Court to review of its own motion the weighing of the factors taken into account by the Commission in order to determine the amount of the fine'.[62] From that perspective, the Court had no difficulty to consider that the General Court's consideration of the limited pleas developed by *Chalkor* and *KME* was sufficiently thorough in scope. Claims that the Court did not reconsider all the elements that guided the Commission in setting the fine were therefore rejected.[63] As a result, the appeal was dismissed.[64]

V. COMMENTS

The *Chalkor* and *KME* judgments almost pedagogically clarify the EU judicial review framework and its application in competition law disputes. Critics have long argued that the scope of judicial review against Commission infringements decisions in the realm of competition law is at best unclear and potentially unconstitutional in the light of the EU's Charter of Fundamental Rights. The annotated judgments refute those claims and in so doing clearly highlight a constitutional preference for

[57] Case C-272/09 P, para 94; Case C-386/10 P, para 54; Case C-389/10 P, para 121.
[58] Case C-272/09 P, para 103; Case C-386/10 P, para 63.; Case C-389/10 P, para 130.
[59] Case C-272/09 P, para 104; Case C-386/10 P, para 64; Case C-389/10 P, para 131.
[60] Case C-272/09 P, para 106; Case C-386/10 P, para 67; Case C-389/10 P, para 133.
[61] Case C-272/09 P, para 105; Case C-386/10 P, para 66; Case C-389/10 P, para 132.
[62] Case C-272/09 P, para 56; Case C-389/10 P, para 63.
[63] Case C-386/10 P, para 70–80 and 96–101 for examples.
[64] Case C-272/09 P, para 111; Case C-386/10 P, para 103; Case C-389/10 P, para 138.

comprehensive judicial review (5.1.). That constitutional preference flows directly from the ECtHR's interpretation of 'full jurisdiction' and operationalizes the ECHR standard of judicial review in the EU context (5.2.).

A. Comprehensive judicial review in the wake of KME and Chalkor

The *KME* and *Chalkor* judgments express a direct preference for comprehensive judicial review. Comprehensive judicial review does not *per se* reject judicial deference to the Commission's margin of appreciation, but rather frames the intensity of judicial review in a particular conceptual framework balancing law, fact and discretion (5.1.1.). The role of unlimited jurisdiction in that framework is merely to provide a supplementary and more flexible tool to adjust the amount of fines or penalty payments in situations of illegality and inaccuracy (5.1.2.).

1. The intensity of judicial review in EU competition law

The scope and intensity of judicial review directly flow from the EU Treaty framework. Article 263 TFEU projects the review of binding EU measures on the 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. Article 264 TFEU additionally states that if the action is well founded, the Court of Justice of the European Union shall declare the act concerned to be void. It is well-accepted that the Court executes a so-called objective 'legality review' of the measure at hand.[65] Whilst the Court could annul the measure adopted, it cannot directly replace it with a judicial decision.[66]

The application of that objective legality review framework to competition law has proven especially complex because of the intricate relationship between the application of the law, which falls in the mandate of judicial review, and the underlying factual and economic analysis, on which legal solutions necessarily have to be based.[67] Reliance on facts to establish the infringement of law allows particular leeway or room for appraisal to institutions called upon to supervise and enforce the

---

[65] A. Meij, *Judicial Review in the EC Courts: Tetra Laval and Beyond* in NATIONAL COURTS AND THE STANDARD OF REVIEW IN COMPETITION LAW AND ECONOMIC REGULATION (O. Essens, A. Gerbrandy and S. Lavrijssen (eds.), 2009), 9.

[66] See Article 266(1) TFEU. According to the case law, the Courts have no power to indicate what measures institutions should adopt. These institutions should nevertheless comply with the judgment and in so doing, the Courts could provide significant guidance in that regard. The Courts cannot directly 'legalize' an otherwise illegal EU act, see T-68/89, T-77/89 and T-78/89, SIV v Commission [1992] ECR II-1407, para 319: although a Community Court may, as part of the judicial review of the acts of the Community administration, partly annul a Commission decision in the field of competition, that does not mean that it has jurisdiction to remake the contested decision. See for an additional example, Case 34/86, Council v European Parliament [1986] ECR 2155, para 42, in which the Court stated that it may not intervene in the process of negotiation between the Council and the Parliament resulting in a general budget. In partially annulling a measure related to that budget, the Court would directly intervene and re-adopt its own view on the general budget as binding law. For an overview of case law and issues, see K. Lenaerts, D. Arts and I. Maselis, PROCEDURAL LAW OF THE EUROPEAN UNION (R. Bray, (ed.), London, Sweet & Maxwell, 2006), 320–321.

[67] F. Cengiz, *Judicial Review and the Rule of Law in the EU Competition Law Regime after Alrosa*, 7 European Competition Journal (2011), 128.

legal framework.[68] Craig in that regard captures the complexities of administrative decision-making by identifying a judicially controlled balance between law, facts and discretion.[69]

The categories of law, fact and discretion determine the *intensity* of judicial review entertained by the Court. Craig argues that the law and fact stages are the Courts' speciality and warrant particularly detailed and extensive judicial review. According to Craig, the EU Courts have the final say on legal categories and legal issues: the Courts can substitute judgment on these questions of law.[70] At the same time however, these questions of law have to be assessed from the framework of facts. The Courts will in that regard merely be called upon to determine whether all the facts on which a decision could be based have been taken into account. The Court's substitution powers do not however extend to this field. Regarding the finding of facts, the Court adopts a deferential position, allowing the Commission to establish the facts enabling it to base particular legal conclusions on. The Courts will not directly be able to substitute the facts of the Commission for new facts. At the same time however, judicial review of the establishment process includes a full review whether or not all facts have been elaborated on and have been duly taken into account.[71] In so doing, the Court can modify or structure the factual basis upon which a decision will be taken.[72] The scope of judicial review is more limited when it comes to appraising these facts.[73] The appraisal of facts requires a particular margin for an administrative body to assemble and structure them in the light of particular economic or technical circumstances.[74] That margin is rather extensive. An administrative body could choose any solution conceived within an area of reasonable alternatives at its disposal.[75] The Courts will intervene only when the solution opted for cannot reasonably be found within that area.[76]

In the realm of EU competition law, Bailey complemented Craig by positing a distinction between comprehensive and limited judicial review.[77] Comprehensive

---

[68] On discretion in the overall regime of competition law enforcement, see W. Wils, *Discretion and Prioritisation in Public Antitrust Enforcement, in Particular EU Antitrust Enforcement*, 34 World Competition (2011), 354. See also A. Fritschze, *Discretion, Scope of Judicial Review and Institutional Balance in European Law*, 47 Common Market Law Review (2010), 361–403. On the difference between discretion and a margin of appraisal encapsulating some *elements* of discretion, see D. Bailey, *Scope of Judicial Review under Article 81 EC*, 41 Common Market Law Review (2004), 1337–1338.

[69] P. Craig, *EU Administrative Law* (Oxford, Oxford University Press 2006), 429–481.

[70] P. Craig, note 69, 435.

[71] H. Schweitzer, *The European Competition Law Enforcement System and the Evolution of Judicial Review* in C. D. Ehlermann and M. Marquis (ed.), note 2, 92.

[72] M. Schimmel and R. Widdershoven, *Judicial Review after Tetra Laval. Some Observations From a European Administrative Law Point of View* in O. Essens, A. Gerbrandy and S. Lavrijssen (ed.), note 65, 64.

[73] J. Ratliff, *Judicial Review in EC competition cases before the European Courts: Avoiding double renvoi*, C. D. Ehlermann and M. Marquis (ed.), note 2, 461.

[74] P. Craig, note 69, 478. H. Schweitzer, note 71, 106.

[75] P. Craig, note 69, 433; M. Schimmel and R. Widdershoven, note 72, 61.

[76] M. Schimmel and R. Widdershoven, note 72, 65.

[77] The Court itself directly referred to its two stages of review in among others case 42/84, *Remia v Commission*, [1985] ECR 2545, para 34: *although as a general rule the Court undertakes a comprehensive review of the question whether or not the conditions for the application of article 85 (1)*

review comprises the maximum extent to which the Union Courts could stretch their Article 263 jurisdiction.[78] It encapsulates an exhaustive review of both the Commission's substantive findings of fact and its legal appraisal of those facts.[79] Limited review on the other hand implies that the judge will confine its review to whether the lawfulness of the decision is vitiated by an error of law or fact, procedural impropriety, defective reasoning or a manifest error of assessment.[80] In that perspective, the Courts merely police the boundaries of appraisal by the Commission and leaves the latter a significant margin of assessment. To the extent that a Commission assessment is so patently unreasonable that no reasonable decision could adopt the position under scrutiny, the measure will be considered to violate the Commission's margin of appraisal and result in annulment.[81] According to Bailey, the EU courts have always combined a comprehensive and a limited review approach when reviewing EU competition law decisions. To the extent that the establishment of facts and their classification into legal concepts are concerned, the Courts have been relying on a comprehensive approach. A more limited review position nevertheless seems to have taken place in cases where the Commission could rule on the application of those facts in differentiated or nuanced ways. In particular, when complex economic assessments have proven necessary to establish the scope of appraisal of particular facts presumably classified in a legal concept, the Courts have granted more deference.[82] A problematic aspect of the division between comprehensive and limited judicial review at the outset of any division is that it presupposes particular subcategories to integrate comprehensive and limited review into. The picture Bailey presents merely provides a blurring line between comprehensive and limited review and basically leaves the scope of that review in the Court's power of decision to be decided on a case-by-ease basis.[83]

The frameworks of understanding proposed by Craig and Bailey are complementary, as the categories of fact and law require comprehensive review, whereas the realm in which the Commission purportedly enjoys a larger margin of appreciation mandates only limited review. To the extent that pleas in law clearly focus on the way in which the Commission classified facts or applied the law,

---

are met, it is clear that in determining the permissible duration of a non-competition clause incorporated in an agreement for the transfer of an undertaking the Commission has to appraise complex economic matters. the Court must therefore limit its review of such an appraisal to verifying whether the relevant procedural rules have been complied with, whether the statement of the reasons for the decision is adequate, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or a misuse of powers.

[78] In Lasserre's terminology, comprehensive review equates full review. Pure legality review and unlimited review jurisdiction would constitute the exception to that rule, see B. Lasserre, 'The European Competition System in Context: Matching Old Constitutional Principles and New Policy Challenges' in C.D. Ehlermann and M. Marquis (ed.), note 2, 64. See also J. Ratliff, note 73, 455, linking limited and unlimited review together as 'thorough' review.

[79] D. Bailey, note 68, 1332–1333.

[80] D. Bailey, note 68, 1333.

[81] A. Meij, note 65, 14. Ratliff refers to maximum control over the legality (and not the opportunity) of an act, see J. Ratliff, note 73, 455.

[82] D. Bailey, note 68, 1355.

[83] D. Bailey, note 68, 1356. See for a contemporary, similar perspective, N. Wahl, *Standard of Review – Comprehensive or Limited?* in C.D. Ehlermann and M. Marquis (ed.), note 2, 285–294.

comprehensive review would be triggered. If pleas in law do not directly classify as either contesting the legal classification of facts or the misapplication of the law, the Courts will more directly rely on the margin of appraisal vested in the Commission. The following table outlines the interaction between both frameworks.

	Fact	Legal classification	Appraisal
Comprehensive	X	X	
Limited			X

The Court of Justice confirmed these conceptual differences in review intensity in its case law in *Tetra Laval*, *Alrosa* and the annotated judgments. In *Tetra Laval*[84] – a case focused on the EU concentration control regime[85] – the ECJ held that 'whilst the Court recognises that the Commission has a margin of discretion with regard to economic matters, that does not mean that the [Union] Courts must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must the [Union] 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'.[86] In emphasizing the importance of the establishment of facts by the Commission, the Court was reported to have limited the scope for deferential judicial review but heightened the standard of proof by paying increasing attention to intensive review in the fact finding process underlying the investigation of concentrations.[87]

The Court's judgment in *Alrosa* more particularly focused on the Commission's margin of appraisal. Article 9 Regulation 1/2003 allows the Commission to accept commitments from undertakings subject to competition law investigations and to make these binding on the undertakings concerned. In this case, the General Court examined and proposed alternative and less onerous solutions that would have resulted in the adoption of adapted commitment decisions.[88] In putting forward its own assessment of complex economic circumstances, the Court nevertheless maintained that the General Court unlawfully substituted its own assessment for that of the Commission.[89] The Court held that 'since the Commission is not required itself to seek out less onerous or more moderate solutions than the commitments

[84] Case C-12/03, Commission v Tetra Laval, [2005] ECR I-987.

[85] On the specifics of the scope of review in that respect, see D. Bailey, *Standard of Proof in EC Merger Proceedings: A Common Law Perspective*, 40 Common Market Law Review (2003), 845–888; B. Vesterdorf, *Standard of proof in merger cases: reflections in the light of recent case law of the Community courts*, 1 European Competition Journal (2005), 3–33; M. Nicholson, S. Cardell and B. McKenna, *The Scope of Review of Merger Decisions under Community Law*', 1 European Competition Journal (2005), 123–152.

[86] Case C-12/03 P, Commission v Tetra Laval, para 39.

[87] A. Meij, note 65, 19.

[88] Case C-441/07 P European Commission v Alrosa Company Ltd. [2010] ECR I-5949, para 65.

[89] Case C-441/07 P, para 67.

offered to it'[90], 'the General Court could have held that the Commission had committed a manifest error of assessment only if it had found that the Commission's conclusion was obviously unfounded, having regard to the facts established by it'.[91] The *Alrosa* judgment has been read as a confirmation of the Court's deferential stance towards Commission action in times when the latter gets ever more powers of appraisal.[92] Since the General Court adopted a particular non-deferential, comprehensive review approach to this case, it has even been argued that a clash between the General Court and the Court of Justice on the scope of review had materialized.[93] It could nevertheless also – and less dramatically – be argued that the choice whether or not to accept particular commitments as part of an ongoing Commission inquiry forms part of the margin of appraisal for the Commission. From that point of view, the law and facts would still be covered by comprehensive judicial review. It could therefore be argued that the *Alrosa* judgment does not alter the overall scope of judicial review, but merely clarifies the extent of the tenets of law, fact and discretion, granting the Commission a significant margin of appraisal in the determination of commitment decisions.

KME and *Chalkor* reject the overall deferential judicial review posture read into *Alrosa*. In the judgments, the Court confirmed that the Commission to carry out a thorough examination of the circumstances of the infringement.[94] The Court also stated that the Union Courts must carry out the review of legality incumbent upon them on the basis of the evidence adduced by the applicant in support of the pleas in law put forward. In carrying out such a review, the Courts cannot use the Commission's margin of discretion as a basis for dispensing with the conduct of an in-depth review of the law and of the facts.[95] The margin of appraisal justifying judicial deference therefore only relates to a limited part of Commission decision making. The Court even went on to hold that 'although the General Court repeatedly refers to the 'discretion', the 'substantial margin of discretion' or the 'wide discretion' of the Commission, such references should not prevent the General Court from carrying out the full and unrestricted review, in law and in fact, required of it'.[96]

Differences in the *Alrosa* and *KME Germany/Chalkor* approaches mainly highlight that the creation of a coherent framework is notoriously difficult to achieve, for reasons attributed to the specificity of each case.[97] The Court appears

---

[90] Case C-441/07 P, para 61. See on the prospects for commitment decisions following this case, R. GarcíaValdecasas and A. Montesa Lloreda, *A New Life for Commtiment Decisions under Article 9 of Regulation 1/2003? The Aftermath of the ECJ Judgment of 29 June 2010 in Case C-441/07P, Commission v. Alrosa* in TODAY'S MULTI-LAYERED LEGAL ORDER: CURRENT ISSUES AND PERSPECTIVES (T. Baumé, E. Oude Elferink, P. Phoa and D. Thiaville (eds.), 2011), 97–114.

[91] Case C-441/07 P, para 63.

[92] See F. Cengiz, note 67, 150.

[93] F. Cengiz, note 67, 151.

[94] Case C-272/09 P, para 94; Case C-386/10 P, para 54; Case C-389/10 P, para 125.

[95] Case C-272/09 P, para 102; Case C-386/10 P, para 62; Case C-389/10 P, para 129.

[96] Case C-272/09 P, para 109; Case C-386/10 P, para 82; Case C-389/10 P, para 136.

[97] See also in that regard D. Gerard, *EU cartel law and the shaking foundations of judicial review* in CONSACRÉ À LA CONCURRENCE: IN HONOREM BERNARD VAN DE WALLE DE GHELCKE (D. Gerard, P. Goffinet, T. Joris, P. Nihoul and P. Wytinck (eds.), 2011), 11 -23.

both to promote comprehensive and limited judicial review, without clearly demarcating the boundaries between both. The extent to which competition law review subscribes to a full review or manifest error standard is unclear, not in the least because the standards upon which the margin of appraisal of the Commission is established themselves remain a subject of judicial interpretation. The scope of judicial review therefore only comes to being through the judicial identification of particular, more or less clear-cut obligations and standards determining the margin of appraisal the Commission enjoys.

The *KME* and *Chalkor* judgments confirm that stance and emphasize an important precondition for comprehensive judicial review. In order for the Court to be able to conduct meaningful review, appellants should develop nuanced and detailed claims in their review applications. As the Court held, 'it is for the applicant to formulate his pleas in law and not for the General Court to review of its own motion the weighting of the factors taken into account by the Commission in order to determine the amount of the fine'.[98] The way in which these pleas in law will be formulated determines the extent to which the Court will be obliged to respond to them. More detailed pleas arguing that the Commission transgressed its margin of appreciation in particular circumstances would enable the Court more directly to review these arguments and to dig deeper into the factors that actually contributed to the Commission's position in that particular instance. Appealing parties are therefore able partially to guide and steer the thoroughness of legality review.

The confusing supplementary role of unlimited jurisdiction

KME and *Chalkor* unrepentantly confirm the supplementary role of the unlimited jurisdiction framework posited in Article 261 TFEU and Article 31 Regulation 1/2003. Unlimited jurisdiction is interpreted as merely allowing the Courts to determine and adapt the amount of a fine or to repeal it altogether.[99] The Courts can indeed have a fresh look at the factual circumstances and remain at liberty to appraise the imposition and extent of a fine. Elements to be taken into account include the duration of the infringements and of all the factors capable of affecting the assessment of their gravity, such as the conduct of the undertakings, the role played by each of them in the establishment of the concerted practices, the profit which they were able to derive from those practices, their size, the value of the goods concerned and the threat that infringements of that type pose to the European Union.[100] Unlimited jurisdiction empowers the Courts, in addition to carrying out a mere review of the lawfulness of the penalty, to substitute their own appraisal for the Commission's and, consequently, to cancel, reduce or increase the fine or penalty payment imposed.[101]

The Courts' unlimited jurisdiction is nevertheless significantly restricted by three general evolutions that reflect potentially increased deference on the side of the EU courts in determining their unlimited scope of interference with Commission

[98] Case C-272/09 P, para 56; Case C-386/10 P, para 49; Case C-389/10 P, para 63.
[99] See also J. Ratliff, note 78, 465.
[100] Case C-272/09 P, para 96; Case C-386/10 P, para 56; Case C-389/10 P, para 123.
[101] Case C-272/09 P, para 103; Case C-386/10 P, para 63; Case C-389/10 P, para 130.

fining practices. First, the Commission guidelines establish legitimate expectations in the eyes of undertakings that the Commission will base its calculation and determination of the fine on the basis of their provisions. As such, the guidelines create a legal instrument that *in principle* regulates and confines the scope of Commission action.[102] The Court has recognized the quasi-binding force of formally non-binding guidelines from a legitimate expectations point of view.[103] Second, in so recognizing however, the Court implicitly confined its 'unlimited' review to whether or not the Commission has indeed complied with the guidelines in the determination of the fine or periodic penalty.[104] In its own words, 'it is [...] for the Court to verify, when reviewing the legality of the fines imposed by the contested decision, whether the Commission exercised its discretion in accordance with the method set out in the Guidelines and, should it be found to have departed from that method, to verify whether that departure is justified and supported by sufficient legal reasoning'.[105] According to the General Court, it should in that respect be noted that the Court of Justice has confirmed the validity, first, of the very principle of the Guidelines, and, secondly, the method which is indicated there.[106] Although unlimited jurisdiction allows the Court to vary fines in accordance with its own position and rules on the matter, the availability of particular guidelines invited the Courts to withdraw from adopting a different and specific legal framework. In so doing however, the Court basically adopts a legality review approach of fines.[107] Third, the varying of the amount of fines is not a matter of public policy. The Courts cannot vary the amount of fines on their own motion, but will have to assess the matter on the basis of pleas made by the parties involved.[108]

Despite these shortcomings, the constitutional availability of unlimited jurisdiction has been hailed as a panacea against the substitutability limits attached to Article 263 TFEU review.[109] Damien Gerard recently advocated that the EU Courts have shown willingness even to extend the unlimited jurisdiction beyond the mere determination of the amount of fines. He argues that the Court's referral to

---

[102] See recital 37 2006 Fining Guidelines: Although these Guidelines present the general methodology for the setting of fines, the particularities of a given case or the need to achieve deterrence in a particular case may justify departing from such methodology. According to the Court, guidelines ensure certainty to parties involved, see Case C-266/06 P Evonik Degussa v Commission and Council [2008] ECR I-81, para 53.

[103] Among others Case C-561/06, Archer Midland Daniels Co v Commission [2009] ECR I-1843, para 60. See also Opinion, para 33. For an analysis of this standard as 'unlimited within borders', see M. Jaeger, *Standard of Review in Competition Cases: Can the General Court Increase Coherence in the European Union Judicial System?* in T. Baumé, E. Oude Elferink, P. Phoa and D. Thiaville (eds.), note 90, 119–130.

[104] See D. Gerard, note 2, 461–462. For a critique in that regard, I. Forrester, note 2, (2011), 192–197.

[105] Opinion of Advocate General Sharpston Case C-272/09 P, para 41. See Joined Cases 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 [2005] ECR I-5425, paragraphs 252 to 255, 266, 267, 312 and 313.

[106] Case T-127/04, para 34.

[107] D. Gerard, note 104, 461.

[108] Opinion of Advocate General Sharpston Case C-272/09 P, para 74.

[109] I. Forrester note note 2, (2011), 207 mainly posits this as a *potentialis* that the Court should consider but so far refuses to accomplish.

unlimited jurisdiction when *reviewing* the decision imposing a fine could also amount to a full review of the legal and factual circumstances resulting in the imposition of a fine.[110] To the extent that a Commission decision imposing a fine would thus be contested before the Courts, the Courts would have to engage upon a factual and legal analysis, resulting in the variation, reduction or increase of the fine *as well as the legal and factual attributions and the appraisal of these facts as a matter of law.* Doing so would re-empower the Courts in an era where the Commission enjoys ever farther reaching discretion.[111] Gerard poses this semantic suggestion as a mere possibility. In referring to a similar situation under the European Coal and Steel Community Treaty, he argued that the Courts should consider themselves capable of intervening as direct market supervision bodies capable of adopting competition law decisions at variance with those adopted by the Commission.[112]

The Court of Justice for its part firmly rejected that approach. It does not read into the unlimited jurisdiction provision a general obligation to scrutinize all aspects of a Commission infringement decision beyond its comprehensive review posture. In *KME* and *Chalkor*, the Court clearly distinguished the classical legality review prong from the unlimited jurisdiction prong. It stated that the review of legality is only *supplemented* by the unlimited review of fines.[113] As a result, the Court does not appear willing to extend the scope of unlimited review beyond the assessment of the amount of a fine or periodic penalty.

An additional question arises in that regard. To the extent that unlimited review is merely supplementary, the Court would seem to read the scope of unlimited jurisdiction in a rather narrow fashion. In that reading, unlimited jurisdiction would only come into play once the illegality of a Commission infringement decision has been established following comprehensive legality review.[114] Only when the setting of a fine in a Commission decision would thus be vitiated by an error of law, the Court could proceed and adopt a replacement fining decision. That reading did not support the understanding of unlimited jurisdiction the General Court adhered to in *Chalkor* and confirmed on appeal by the Court. In the GC judgment, a particular attenuating or aggravating circumstance that did not in itself affect the legality of the calculation of a fine unlimited jurisdiction immediately was considered to remain within the realm of judicial adaptation.[115] The Court of Justice subsequently held that the General Court could indeed, while respecting the broad logic of a decision imposing a fine and the methods for calculating it, adjust the amount of the fine.[116] The supplementary understanding of the unlimited jurisdiction mandate should therefore be understood to cover at least situations of illegality and situations in

[110] At least by D. Gerard, note 2, 475.

[111] D. Gerard, note 2, 478.

[112] D. Gerard, note 2, 477.

[113] Case C-272/09 P, para 103; Case C-386/10 P, para 63; Case C-389/10 P, para 130.

[114] See for that position, K. Lenaerts, D. Arts, I. Maselis, note 66, 450–451.

[115] Case T-21/05, para 105.

[116] Case C-386/10 P, para 97. See also para 99: 'the General Court adjusted the fine while respecting the broad logic of the contested decision and the method used by the Commission to determine the amount of the fine.

which the Commission incorrectly or inaccurately *calculated* a fine as part of an otherwise legally determined fining basis. The Court does not however seem to propose a broad reading of unlimited jurisdiction, in which unlimited review comprises an independent review mechanism. Unlimited jurisdiction is not indeed perceived as transforming the intensity of judicial review.

B. Towards comprehensively tailored judicial review

The Court's preference for comprehensive judicial review supplemented by unlimited review as explicated in *KME* and *Chalkor* potentially conflicts with the requirements of *full jurisdiction* that can be found in the European Court of Human Rights' case law on administrative sanctions. Revisiting that case law and its application to national competition law regimes nevertheless allows for a reading of the *KME* and *Chalkor* judgments as projecting a comprehensively *tailored* judicial review system that complies with the basic requirements posited by both the EU Treaties and the ECHR. Comprehensively tailored judicial review not only accommodates for a distinction between annulment jurisdiction and unlimited jurisdiction, it also diminishes the importance of such a distinction by directly mandating appellate parties clearly to guide the Court in the exact scope of the intended remedy. In order to substantiate that argument, this section first sketches the full jurisdiction standard in the ECtHR's case law (5.2.1.). The adversarial nature the full jurisdiction standard presupposes provides the intellectual groundwork for an understanding of comprehensively *tailored* judicial review (5.2.2.).

1. The *sufficient* jurisdiction standard in the ECtHR's case law

Article 6(1) ECHR states that '[i]n 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'. The ECtHR considered that provision to incorporate the right of access to justice or to a court as essential in order to enjoy the rights and benefits included in its provision.[117] The distinction between civil rights and criminal charges is important for the application of paragraphs 2 and 3 of Article 6, which only apply to criminal charges and criminal procedures. The notion of criminal charge remains autonomous from national law delineations of the criminal and could therefore also encompass particular national administrative proceedings as well.[118] The so-called Engel criteria are guiding in that respect.[119]

---

[117] ECtHR, Golder v United Kindgom, judgment of 21 February 1977 , para 35.

[118] On the notion of 'criminal' in relation to competition law, see ECtHR Société Stenuit v. France, judgment of 27 February 1992. The case was in fact withdrawn from the European Court of Human Rights before a decision was adopted. It should however be remembered that the then-existing European Commission for Human Rights considered the case admissible. The Court therefore continued to refer to the case in order to maintain that antitrust proceedings are covered by Article 6.

[119] ECtHR, Engel v The Netherlands, judgment of 8 June 1976, para 83. These criteria determine that a sanction should be deemed criminal if one of either three conditions has been fulfilled. A sanction is criminal when (1) the offence it relates to is deemed criminal in accordance with national law, (2) the nature of the offence determines the criminality of a sanction or (3) the degree of severity of the penalty a

Whether a charge is deemed criminal or not, the involvement of an independent and impartial tribunal comprises a quintessential condition for ensuring compliance with Article 6 ECHR.[120] To the extent that these charges would be deemed 'criminal', all guarantees identified in Article 6 should be applied in both the first instance and appellate stage of a procedure, resulting in significant reform of national procedure.[121] The ECtHR recently confirmed that competition law fines could be captured by the ECHR's definition of 'criminal'.[122] As a result, competition law fines should be imposed by an independent and impartial tribunal in the meaning of Article 6 ECHR. However, given the particularities of national administrative decision-procedures and for reasons of administrative efficiency, the ECtHR accepted that the involvement of an impartial tribunal should not always occur at the actual decision-making or fining stage in areas not covered by 'hard core' or 'real' criminal law provisions in the national legal orders.[123] These cases most notably involve administrative or disciplinary sanctions.[124] In those instances,

---

person risks might also point towards criminal sanctions. See also I. Forrester, note 2, (2011), 201. In Bendenoun v France, judgment of 24 February 1994, the ECtHR entertained different criteria. It held that a sanction is criminal if 'the law setting out the penalties covered all citizens in their capacity as taxpayers; that the surcharge was not intended as pecuniary compensation for damage but essentially as a punishment to deter re-offending; that it was imposed under a general rule whose purpose is both deterrent and punitive; and that the surcharge was substantial'. In later cases however, the ECtHR more consistently referred to Engel, see Janosevic v Sweden judgment of 23 July 2002, para 67 and Jussila v Finland, judgment of 23 November 2006, para 36.

[120] On the scope of that provision in an EU context, H. Schweitzer, note 71, 81–82, also referring to the non-criminal nature of EU merger control regulations.

[121] See J. Flattery, *Balancing Efficiency and Justice in EU Competition Law: Elements of Procedural Fairness and their Impact on the Right to a Fair Hearing*, 7 The Competition Law Review (2010), 76. See on the scope of criminal law guarantees in the ECHR, P. Mahoney, *Right to a Fair Trial in Criminal Matters under Article 6 E.C.H.R.*, 4 Judicial Studies Institute Journal (2004), 107–123.

[122] ECtHR, A. Menarini Diagnotics S.R.L. v Italy, judgment of 27 September 2011 (hereafter referred to as *Menarini*).

[123] On the notion of hard core criminal sanctions, see Jussila v Finland. In para 43 of that case, the Court maintained that *'[n]otwithstanding the consideration that a certain gravity attaches to criminal proceedings, which are concerned with the allocation of criminal responsibility and the 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. What is more, 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 administrative penalties (*Öztürk, *cited above), prison disciplinary proceedings (*Campbell and Fell v. the United Kingdom, *28 June 1984, Series A no. 80), customs law (*Salabiaku v. France, *7 October 1988, Series A no. 141–A), competition law (*Société Stenuit v. France, *27 February 1992, Series A no. 232–A), and penalties imposed by a court with jurisdiction in financial matters (*Guisset v. France, *no. 33933/96, ECHR 2000–IX). Tax surcharges differ from the hard core of criminal law; consequently, the criminal-head guarantees will not necessarily apply with their full stringency (see* Bendenoun *and* Janosevic, *§ 46 and § 81 respectively, where it was found compatible with Article 6 § 1 for criminal penalties to be imposed, in the first instance, by an administrative or non-judicial body, and,* a contrario, Findlay, *cited above)'*. That position gave rise to significant debates among EU competition law scholars as to whether or not Commission fines would be included among 'hard core' sanctions, which as a result would require imposition by a tribunal at first instance. I. Forrester maintains that Commission fines are indeed hard core (see I. Forrester, note note 2, (2011), 202), while W. Wils argues the contrary (W. Wils, *The Increased Level of Antitrust Fines, Judicial Review and the ECHR*, 33 World Competition (2010), 5–29).

[124] See in the realm of non-criminal disciplinary sanctions, ECtHR, Albert and Le Compte v Belgium, judgment of 10 February 1983, para 29; in the realm of criminal sanctions, ECtHR, Öztürk v Germany, judgment of 21 February 1984, para 56.

it suffices that judicial review is available following the decision taken by an non-adjudicative body.[125] Ex post judicial review requires the reviewing court to have full jurisdiction to re-investigate the merits of the matter.[126] The exact scope of full jurisdiction appears highly dependent on the factual circumstances of the case. It refers to the ability of a reviewing judge to settle the case conclusively or to determine the outcome of a case in such manner as to leave an administrative authority but one (broad) choice in adopting a compatible administrative decision.[127]

In Menarini, the ECtHR was directly confronted with a national system of competition law enforcement. The Italian competition authority, the Autorità Garante della Concorrenza e del Mercato imposed a fine on the Menarini corporation for its participation in a prohibited cartel agreement. In seeking to have the Autorità's decision annulled, Menarini appealed to the competent Italian administrative tribunal and argued that it did not participate in the agreement. The tribunal dismissed Menarini's action for lack of competence, since the administrative tribunal could only conduct a 'legality review' with regard to the qualification of particular facts into legal categories.[128] Meranini's claim was purely factual instead.[129] Arguing that the scope of review confined to a legality assessment does not correlate to the Article 6 ECHR notion of 'full jurisdiction', Menarini questioned the compatibility of the Italian review structure.[130] The ECtHR in that regard held that, despite the criminal nature of competition law sanctions[131], subsequent appeals to the administrative tribunal and the Council of State were sufficient once these organs had full jurisdiction to consider the Autorità's decision. The availability of legality review as entertained in Italy were sufficient in that respect. In particular, the ECtHR held that the administrative tribunal could verify whether, in the light of the specific circumstances of the case, the Autotira used its powers of assessment appropriately. The tribunal could also evaluate the well-foundedness of the Autorita's claim and the legal classifications it relied on.[132] Additionally, the administrative tribunal remained free to vary the amount of fines imposed by the

[125] See D. Slater, S. Thomas and D. Waelbroeck, *Competition Law Proceedings before the European Commission and the Right to a Fair Trial: No Need for Reform?*, 5 European Competition Journal (2009), 125–126 for an overview in that regard.

[126] ECtHR, Albert and Le Compte, para 29.

[127] See for that approach, ECtHR, Kingsley v United Kingdom, judgment of 7 November 2000, para 59, in which the inability to refer a case back to an administrative authority with a view to adopt a new decision was held to violate the scope of full jurisdiction. See for more information, S. Jansen, *Towards an Adjustment of the Trias Politica: the Administrative Courts as (Procedural) Lawmaker; a Study of The Influence of The European Human Rights Convention and the Case Law by the European Court Of Human Rights on the Trias Politica, in particular the Position of Dutch Administrative Courts in relation to the Administration* in JUDICIAL LAWMAKING AND ADMINISTRATIVE LAW (F. Stroink and E. Van der Linden (eds.), 2005), 41–43.

[128] *Menarini*, para 9.

[129] *Menarini*, para 13.

[130] *Menarini*, para 17.

[131] *Menarini*, para 59.

[132] *Menarini*, para 64.: *la compétence des juridictions administratives n'était pas limitée à un simple contrôle de légalité. Les juridictions administratives ont pu vérifier si, par rapport aux circonstances particulières de l'affaire, l'[Autorità] avait fait un usage approprié de ses pouvoirs. Elles ont pu examiner le bien-fondé et la proportionnalité des choix de l'[Autorità] et même vérifier ses évaluations d'ordre technique'*

Autorità.[133] As a result, the administrative tribunal's jurisdiction was sufficient since it enabled a meaningful review of the legal classification of the facts comprising the subject of a competition law inquiry.

The particular interpretation granted to 'full jurisdiction' in Menarini demonstrates that the ECHR does not mandate unlimited jurisdiction as a minimum review standard. In the Sigma Radio judgment, the ECtHR preferred to rely on the notion of 'sufficient jurisdiction' to qualify the intensity of full jurisdiction.[134] The concept of sufficient jurisdiction grants significant room for institutional choice to national legal orders, but at the same time outlines at least some basic guidelines. First, judicial review against administrative decisions should be organized. Second, the reviewing court should be able both to consider the issues of fact and of law. On the one hand, administrative authorities may enjoy a particular margin of appraisal that needs not necessarily form part of the reviewing court's full jurisdiction, as long as it can police the boundaries of reasonable administrative action. On the other, the ECHR does not impede a national court acting as a supervisory body, capable of adopting a new judicial decision that would replace the annulled administrative act. Third, in cases where a reviewing court is only competent to annul a particular administrative decision, it should be able to refer the case back to that authority or another authority that can adopt a decision complying with the outcome of judicial review. In addition, particular elements such as the equality of arms, incorporating the right for both the administration and the individuals concerned to be heard also comprise essential elements for effectuating judicial review.[135]

2. Sufficient jurisdiction as comprehensively *tailored* judicial review in EU competition law

The interpretation of Article 6 ECHR directly impacts the way in which judicial review is perceived at the EU level. Four distinctive arguments illustrate that claim. First, the EU's Charter of Fundamental Rights is binding by virtue of Article 6 TEU. Article 52(3) CFR explicitly states that [i]n so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. Article 6 TEU additionally projects the accession of the EU to the ECHR.[136] Second, Article 47 CFR, which grants the right to effective judicial review, generally corresponds to

[133] *Menarini*, para 65.

[134] ECtHR, Sigma RadioTelevision Ltd. v Cyprus, judgment of 21 July 2011, para 153: the requirement that a court or tribunal should have "full jurisdiction" will be satisfied where it is found that the judicial body in question has exercised "sufficient jurisdiction" or provided "sufficient review" in the proceedings before it

[135] These arguments are incorporated in Article 6(1), which reads that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

[136] See on that matter the references provided in note 5.

Article 6 ECHR. The explanations to the Charter explicitly confirm that point.[137] Third, Advocate General Sharpston's and the Court's direct references to Article 6 ECHR as a constitutional benchmark for the assessment of the EU's judicial review system in *KME* and *Chalkor* are testament to that importance.[138] Fourth, as a follow-up to the *Menarini* judgment, the EU Director-General for Competition directly referred to resemblances between the Italian system and the supranational Commission-based system of market supervision and judicial review. He fittingly concluded that the EU system of review would as a matter of course also comply with the ECHR standards of full jurisdiction.[139]

The Court's reasoning in *KME* and *Chalkor* should therefore also be comprehended as expounding on Article 6 ECHR in the EU context. From that perspective, the Court's reasoning not only outlines the tenets of sufficient jurisdiction to be applied by the General Court, it also presupposes a particular institutional framework of adversarialism underlying Article 6 ECHR review. That framework precisely explains the Court's preference for comprehensively tailored judicial review in *KME* and *Chalkor*.

In order to capture the nature of comprehensively tailored review, it is necessary to consider the institutional-adversarial framework in which judicial review against Commission infringement decisions operates. A judicial review procedure necessarily builds upon an administrative Commission procedure during which particular procedural guarantees – such as the right to be heard and the right of access to the Commission's file[140] - are guaranteed. These administrative procedures breathe adversarialism. Procedures take place between the investigating DG Competition officials and the investigated undertakings, while procedural rights compliance is at first overseen by a somewhat independent Hearing Officer.[141] In ensuring some kind of adversarial debate between the investigating officials and the undertakings concerned, Hearing Officer involvements aim to provide a forum in

---

[137] See *Text of the explanations of the Charter of Fundamental Rights of the European Union*, 2007 O.J. (C303), 17, at 30.

[138] Opinion para 61; Case C-386/10 P, para 51.

[139] Speech by A. Italianer, Director-General of the Directorate-General for Competition at the OECD Competition Committee Meeting, Paris, 18 October 2011, 3, http://ec.europa.eu/competition/speeches/text/sp2011_12_en.pdf.

[140] On these procedural rights in Commission competition infringement pocedures, see Articles 17–22 Regulation 1/2003. For an early account of procedural rights, *The Right to be Heard in EEC Competition Procedures*, 15 Fordham International Law Journal (1991–1992), 16–90; See for recent overviews R. Nazzini, *Some Reflections on the Dynamics of Due Process Discourse in EC Competition Law*, 2 The Competition Law Review, (2005), 5–30; J. Flattery, note 121. On procedural rights in general, see K. Lenaerts and J. Vanhamme, *Procedural Rights of Private Parties in the Community Administrative Process*, 34 Common Market Law Review (1997), 531–569; F. Bignami, *Creating European Rights: National Values and Supranational Interests*, 11 Columbia Journal of European Law (2004), 258–292.

[141] On the Hearing Officer's role, see N. Zingales, *The Hearing Officer in EU Competition Law Proceedings: Ensuring Full Respect for the Right to be Heard?*, 7 The Competition Law Review (2010), 137; M. Albers and J. Jourdan, *The Role of Hearing Officers in EU Competition Proceedings: A Historical and Practical Perspective*, 12 Journal of European Competition Law & Practice (2011), 185–200. For a recent extension of the Hearing Officer's mandate, see the Decision of the President of the European Commission 2011/695/EU of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, 2011 O.J. (L 275), 29.

which an adversarial debate can engender on the merits of the case at hand.[142] The imperfectness of the adversarial nature in Commission proceedings has long been acknowledged.[143] One of the essential aims of judicial review as perceived by Article 6 ECHR in these types of cases is to compensate for the lack of full-fledged adversarial debate at the administrative level.[144] The need for fact-intensive deliberative review discussions have generally been highlighted as a justification for the establishment of a General Court that would be most competent to conduct proceedings in these disputes.[145] A reviewing court should indeed be able to ensure and police a meaningful discussion on the merits between the Commission and the undertakings concerned.

The Court's role is therefore to compensate for the lack of a meaningful adversarial debate between the Commission and the undertakings concerned. At the same time however, the Court not merely functions as a moderator, but also as a direct interlocutor in those adversarial debates. The Court is called upon to assess and determine the well-founded nature of the claims brought before it and to consider whether alternative claims proposed by the appellants should indeed have been taken into account by the Commission. In so doing, the Court should respond to the claims or points made by the appellants and the Commission. The more detailed a claim or point is being developed, the more thorough the Court's response to that point needs to be.[146] From that perspective, appellate parties bear a significant responsibility in bringing forward issues relating to the classification of

---

[142] See to that extent Articles 10–12 Decision 2011/695/EU on the organization of the Hearing. On the limits of the Hearing Officer's function in that respect, see M. Van der Woude, *Hearing Officers and EC antitrust procedures; the art of making subjective procedures more objective*, 33 Common Market Law Review (1996), 545.See also A. Andreangeli, EU COMPETITION ENFORCEMENT AND HUMAN RIGHTS (Cheltenham, Edward Elgar, 2008), 51.

[143] Among many others in J. Joshua, note 140, 65; I. Forrester, note 2 (2009), 823; N. Zingales, note 141, 148–149. For more background analysis, see R. Brent, '*The Binding of Leviathan? – The Changing Role of the European Commission in Competition Cases*, 44 International and Comparative Law Quarterly (1995), 255–279; W. Wils, *The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis*, 27 World Competition (2004), 201–224.

[144] That point has particularly been emphasized by Judge Pinto de Albuquerque in his dissenting opinion to the *Menarini* judgment. In his dissenting opinion, Judge Pinto precisely for this reason advocated a more full review system than the 'sufficient review' standard maintained by the majority, see para 8–9 and in particular his claim that *[s]ur le plan des principes, l'application des sanctions publiques déborde les fonctions traditionnelles de l'administration et doit relever d'un juge. Si la vérification des conditions de fait de l'application d'une sanction publique pouvait être réservée à un organe administratif, sans un contrôle postérieur rigoureux de la part des tribunaux, lesdits principes auraient été totalement faussés.*

[145] On that point and its present obscolescence in the wake of an incrementally non-competition docket at the General Court, see C. Bellamy, *An EU Competition Court: the Continuing Debate* in THE REFORM OF EC COMPETITION LAW. NEW CHALLENGES (I. Lianos and I. Kokkoris (eds.), 2010), 33–52.

[146] Opinion, para 74: *the General Court's exercise of its unlimited jurisdiction must be measured against the content of the arguments on which it was asked to adjudicate.* On the emergence of an adversarial system in the wake of ECHR case law, R. D. Kelemen, EUROLEGALISM. THE TRANSFORMATION OF LAW AND REGULATION IN THE EUROPEAN UNION (Cambridge, Harvard University Press, 2011), 52–56, framing the rise of procedural rights in a broader movement of legal adversarialism that is permeating the EU legal architecture.

facts into legal categories, the faulty reliance on these categories in assessing the matter at hand and the failure to take the law seriously.

The claim that applicant parties should clearly state their claims is almost too futile to be taken seriously. Article 44 of the General Court Rules of Procedure require applicants to the General Court to state a summary of the pleas in law on which the application is based, as well as the form of order sought by the applicant.[147] The General Court's practice directions further state that '[l]egal arguments should be set forth'[148], without however providing more detailed information. The Court refined these notions by stating that the applicants' specific complaints and the legal and factual particular on which they are based, should be outlined in the application, in order for the Court to carry out judicial review.[149] That requirement could be understood as requiring the applicant to provide not only its complaints as such, but also the alternative assessment it wants the Commission to adopt. That posture will allow the Court to assess what ultimately made the Commission adopt its particular position in the case at hand.

In order to render the adversarial system truly operational, appellate parties are responsible to provide a detailed submission of their complaint, supported by an alternative conception that they believe the Commission should have taken into account. By providing a more detailed submission in that regard, the Court will have to respond as to why it accepts or rejects that submission. Appellate parties therefore have a primary responsibility in *tailoring* the thoroughness of the judicial review approach adopted in a particular case by allowing the Court meaningfully to participate in the review conversation. To the extent that parties content themselves with references to a 'lack of sufficient reasoning' or inadequate classification, without providing detailed substantiations of these claims and supporting alternatives, the Court can only summarily respond to the pleas and classify the matter as falling in the Commission's margin of appraisal. To the extent that they provide an alternative claim or method of assessment, the General Court will feel less compelled to defer to the Commission's assessment. It will rather have to balance and justify the arguments put forward by both parties in a more direct and detailed way. *KME* and *Chalkor* strongly adhere to the latter position. In positing that the Court will not of its own motion consider elements of review, it presents a direct and obligatory invitation to appellate parties to tailor their arguments to ensure a more comprehensive review taking place.

The responsibility parties bear in outlining the points of law and in thus determining the intensity of judicial review even more fundamentally gains constitutional importance in the wake of *KME* and *Chalkor*. In these judgments, the Court directly identified the obligation to provide detailed claims in order to invite more thorough judicial review as a necessary constitutional precondition for the EU system of judicial review to function properly. The constitutional status of

[147] Article 44(1) (c) and (d) Rules of Procedure of the General Court, available at http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/txt7_2008-09-25_14-08-6_431.pdf (last accessed March 29, 2012).

[148] Practice Directions to Parties Before the General Court, 2012 O.J. (L68), 23, at 28, recital 21.

[149] Case C-386/10 P, para 66. See also Case C-272/09 P, para 104 and Case C-389/10 P, para 131 for a more implicit statement of that argument.

adversarial proceedings first and foremost implies that these proceedings should always be available at the EU level. Even more fundamentally however, it would seem to imply that the Court is under an obligation thoroughly to review the claims adduced by the parties in support of their pleas in law. Appellate parties can thus enable a more thorough review through the formulation and structure of their pleas in law. To the extent that parties tailor their claim by proposing alternative assessments the Commission did not accept, the Court is under a constitutional obligation not to defer to the Commission's margin of discretion without conducting an appropriate and in-depth inquiry into these tailored alternatives. Only in that way will the review system supporting an Article 6 ECHR-compatible adversarial framework escape potential future ECtHR scrutiny.[150]

The constitutional nature of the obligation to respond to pleas in law as reflected in the annotated judgments in no way contrasts the Court's comprehensive judicial review and supplementary unlimited jurisdiction approach and the differentially intense standards of review it suggests. The conceptual categories of law, fact and discretion firmly remain in place and guide the appellate parties in structuring their claims. As the Court directly argued in *KME* and *Chalkor*, 'it is for the applicant to raise pleas *in law*'.[151] By clearly referring to pleas in law, the Court invites parties to develop claims focused on whether or not the Commission properly classified the facts into legal categories or whether the Commission applied the law correctly. To the extent that a party develops a claim that the Commission failed in doing so, it should not refer to any abuse of a margin of appraisal, but rather point out how the Commission should have proceeded correctly. The General Court would then be obliged – by virtue of its constitutional mandate – to address these shortcomings. To the extent that the pleas in law focus on the setting of a fine, the Court should be able to adjust the amount of that fine. In the wake of *Chalkor*, the same goes for an incorrectly classified basic fining amount that otherwise remains legal.[152] In that case, a plea arguing the incorrect legal classification of a fact giving rise to the determination of a fine should be developed. In all instances, the appellate parties should proceed in presenting the Commission's factual and legal defects as remediable failures, which the Court is able directly to address and remedy by annulling the decision or adjusting the fine.

It would follow from the above mentioned that the limited review entertained in relation to the Commission's margin of appraisal category merely serves as an additional general category. In instances where the applicants do not formulate their

---

[150] See for that perspective, ECtHR, Radio Sigma, para 154: the Court will consider *(a) the subject-matter of the decision appealed against, in particular, whether or not it concerned a specialised issue requiring professional knowledge or experience and whether it involved the exercise of administrative discretion and if, so, to what extent; (b) the manner in which that decision was arrived at, in particular, the procedural guarantees available in the proceedings before the adjudicatory body; and (c) the content of the dispute, including the desired and actual grounds of appeal.* The Court directly makes clear that the desired and actual grounds of appeal are at least as essential as the exercise of discretion by an administrative body. To the extent that appellate parties claim that a particular exercise of discretion was unwarranted, the reviewing court will be called upon to engage in an in-depth assessment of that claim, resulting in a more thorough review than mere references to discretion would warrant.

[151] Case C-272/09 P, para 104; Case C-386/10 P, para 64; Case C-389/10 P, para 131.

[152] Case C-386/10 P, para 99.

plea as a remediable failure to classify facts in a legally correct fashion or a misapplication of the law, the General Court will be more inclined to defer to the findings of the Commission, as no meaningful adversarial and interlocutory debate would be possible. To the extent however that applicants classify a matter as a problematic legal classification of facts or a misapplication of law, the Court would be under a constitutional obligation directly to respond to the remediable failures brought forward in the applicants' pleas. Applicants are therefore capable of directly limiting the category of limited 'margin of appraisal' review. As a result, the Court directly posited a comprehensively tailored judicial review standard in its competition law case law.

The tailored scope of review projected in *KME* and *Chalkor* only refers to first instance review and is further complicated at the appellate level. It should be remembered that the General Court acts as the review court against any decision of the European Commission in accordance with Article 256(1) TFEU.[153] The Court of Justice in those instances acts as an appellate court. Appeals to the Court of Justice in those instances are limited to points of law only. That implies that the Court of Justice is capable of reviewing the legal characterization of facts established by the General Court and the legal conclusions it has drawn from them.[154] The Court of Justice on the other hand has no jurisdiction to establish the facts or, in principle, to examine the evidence which the General Court accepted in support of those facts. Only where the clear sense of the evidence is distorted, that appraisal does not constitute a point of law which is as such subject to review.[155] As a result, the Court of Justice grants additional margin of appreciation to the General Court to establish the relevant facts in a particular case. Only to the extent that these facts are distorted or classified erroneously should the Court of Justice intervene in these matters. It cannot reassess correctly established and classified facts. Once again, the parties initiating the appeal will bear a significant responsibility in that respect to specifically tailor the arguments they want the Court of Justice to respond to.

VI. CONCLUSION

The *KME* and *Chalkor* judgments provide a welcome clarification to lingering debates on the scope of judicial review exercised over Commission decisions imposing fines in competition proceedings. The Court recognized the important constitutional shadow cast by the ECHR on the EU judicial review system and the

[153] The General Court shall have jurisdiction to hear and determine at first instance actions or proceedings referred to in Articles 263, 265, 268, 270 and 272, with the exception of those assigned to a specialized court set up under Article 257 and those reserved in the Statute for the Court of Justice. Article 51 of the Statute of the Court of Justice reads that '[b]y way of derogation from the rule laid down in Article 256(1) of the Treaty on the Functioning of the European Union, jurisdiction shall be reserved to the Court of Justice in the actions referred to in Articles 263 and 265 of the Treaty on the Functioning of the European Union when they are brought by a Member State against: (a) an act of or failure to act by the European Parliament or the Council, or by those institutions acting jointly [...] or (b) against an act of or failure to act by the Commission under the first paragraph of Article 331 of the Treaty on the Functioning of the European Union. That provision does not capture Commission decisions in the field of competition law.

[154] Case C-90/09 P, General Quimica and others v Commission, nyr, judgment of 20 January 2011, para 71. See also J. Ratliff, note 73, 471.

[155] Case C-90/09 P, para 72.

ways in which it imposes particular obligations on the reviewing judges and appellate parties. It directly and explicitly confirmed the compatibility of the EU framework with Article 47 CFR and indirectly with Article 6 ECHR. In clearly distinguishing between the general legality review and 'unlimited jurisdiction' prongs highlighted in the Treaty, the Court decided to continue along its comprehensive review track, according to which unlimited jurisdiction merely serves as a supplementary device to adapt the amount of the fine in cases of illegality or inaccuracy. The comprehensive review approach adopted in *KME* and *Chalkor* also directly promotes a tailored review of facts, law and margin of assessment.

Given the adversarial nature of that tailoring process, appellate parties will more than ever play a crucial role in guiding the *modus operandi* of the Court's comprehensive review approach. The increased responsibility granted to appellate parties is nevertheless problematic in itself, as the Court refrains from clarifying the boundaries of its fact, law and margin of appraisal categories. The extent to which appellate parties' alternative submissions can and will indeed be accounted for as not falling within the Commission's margin of appraisal therefore remains highly unclear. As a result, it is still to be seen whether a real change in mindset of both parties and judges will emerge in the wake of impending ECHR accession.

Whilst *KME* and *Chalkor* refer to comprehensively tailored judicial review as a constitutional feature of EU law in the realm of competition law, the operations of Article 6 ECHR and Article 47 CFR necessarily extend beyond the realm of competition law. The actual application requirements resulting from the direct constitutional recognition of an adversarial and comprehensively tailored judicial review framework could indeed easily pervade other sectors of EU law. It could therefore be expected that the Court of Justice will develop similar rhetorical arguments and practical modifications in other fields of EU law.