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The EU’s Accession to the ECHR and Due Process Rights in EU Competition Law Matters: Nothing New Under the Sun?

Dr Albert Sanchez Graells

I. INTRODUCTION

The foreseeable accession of the European Union (EU) to the European Convention on Human Rights (ECHR)¹ [as per art 6(2) of the Treaty on the European Union, TEU²] raises important questions regarding the extent to which amendments to the current EU competition law enforcement system are required³. In view of the future (clearer) possibility to bring challenges against judgments of the Court of Justice of the European Union (CJEU) before the European Court of Human Rights (ECtHR)—not least, in view of the envisaged co-respondent mechanisms discussed in detail in other contributions of this book—or, at least, the (clearer) mandate for the CJEU to apply the ECHR in full in all its jurisdictional activities⁴; an analysis of the current enforcement mechanisms in that light seems particularly relevant and has triggered substantial attention from academics and practitioners alike.

In my opinion, the most hotly disputed issue concerns whether due process rights are sufficiently protected through the review mechanisms in place for decisions of the European Commission in EU competition law matters⁵. Therefore, this paper

A Sanchez Graells (✉)
Law School, University of Hull, HU6 7RX, UK
e-mail A.Sanchez-Graells@hull.ac.uk

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1 European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols Nos. 11 and 14 as from its entry into force on 1 June 2010.
4 Until now, the ECHHR was only reviewing EU law and its application indirectly. After accession, the ECHR’s review of EU law and the judgments of the CJEU will be direct and, possibly, more intense. For discussion and a critical appraisal of the interaction between both courts, see V Tzevelekos ‘When Elephants Fight, It Is the Grass that Suffers: ‘Hegemonic Struggle’ in Europe and its Side-Effects for International Law’, in K Dzhehtsiaouro, T Konstandinides, T Lock and N O’Meara (eds) Human Rights Law in Europe: The influence, overlaps and contradictions of the EU and the ECHR (Routledge, forthcoming).
5 In similar terms, AE Beumer, ‘The Interplay between Article 6 ECHR & Article 47 Charter and the EU Competition Enforcement System—Is There a Need of ‘Reviewing’ the Standard of Review?’,
will focus on an analysis of the EU competition law enforcement system under Article 6(1) ECHR and, to the extent necessary, the corresponding Article 47 of the Charter of Fundamental Rights of the European Union (EUCFR). 

In order to ‘set the scene’ for the analysis of this research question, an outline of the ongoing discussion about the compatibility of the current EU competition enforcement system with Article 6(1) ECHR will be provided (§II). Then, this paper will aim to contribute to such debate in a threefold manner by: i) sketching the peculiarities of the enforcement of EU competition law, which basically derive from the complex and data intensive economic assessments required in most cases (§III); ii) critically appraising the requirements of Article 6(1) ECHR in the field of EU competition law in view of those peculiarities (§IV); and iii) assessing the impact of those requirements in terms of the potentially necessary amendments to the EU competition law enforcement system upon the EU’s accession to the ECHR (§V). Some brief conclusions will close the paper (§VI).

Suffice it to anticipate here that the basic contention of the paper is that, given the specific architecture of the EU competition law enforcement system under Regulation 1/2003, and as long as an effective (arguably, soft or marginal) judicial review mechanism is already available to the undertakings affected by sanctions derived from EU competition law infringements, no significant changes are required in order to make the system comply with Articles 6(1) ECHR and 47 EUCFR. This position will be further supported by the express normative assumption that undertakings (or companies) deserve a relatively more limited protection than individuals under the ECHR and, more specifically, under Article 6(1) ECHR—at least as regards non-core due process guarantees, such as the standard of review applicable to the revision of competition law decisions (as opposed to ‘core’ due process guarantees such as the presumption of innocence, the principle of equality of arms, the right to have full access to the evidence, or the right not to suffer undue delays which, due to space constraints, will not be discussed in full; see below §IV.B).

II. COMPETITION LAW ENFORCEMENT AND COMPLIANCE WITH ARTICLE 6(1) ECHR

Given the (apparently) increasingly heftier fines imposed by the European Commission on the basis of articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), there is no doubt that allegations of competition law infringements must be considered ‘criminal charges’ of sorts for the purposes of the ECHR—which, in principle, triggers the application of the due process


guarantees envisaged in Article 6(1) ECHR\textsuperscript{11}. However, the situation is not that simple since, as hinted by the ECtHR in \textit{Jussila},

the evolution of the notion of a «criminal charge» has underpinned a gradual broadening of the criminal head to cases not strictly belonging to the traditional categories of the criminal law, for example [...] competition law [...] which differ from the hard core of criminal law [so that] the criminal-head guarantees will not necessarily apply with their full stringency\textsuperscript{12}.

Therefore, there is an open question concerning the intensity and extent to which due process rights must be guaranteed in EU competition law enforcement \textit{i.e.} whether only paragraph 1 or also paragraphs 2 and 3, and to which extent, of Article 6(1) ECHR are applicable in these cases, and whether the current enforcement system complies with the ‘less than fully stringent’ requirements of Article 6(1) ECHR in ‘non hard core criminal cases’\textsuperscript{13}.

This has generated a wave of scrutiny and criticism of the enforcement and review mechanisms available at EU level in view of the institutional architecture of the European Commission and the possibilities for the review of its decisions before the General Court (GC) and the CJEU\textsuperscript{14}. Indeed, given the institutional design and the concurrent powers of investigation and decision-making of the European Commission in competition law matters (most notably, under Regulation 1/2003\textsuperscript{15}), it must be configured as a body not meeting the requirements of Article 6(1) ECHR for a ‘fair and public hearing within a reasonable time by an independent and impartial tribunal established by law’\textsuperscript{16}. From the perspective of the ECHR and its interpretation by the ECtHR, there is no question about it and, however less than ‘fully stringent’ are the requirements of Article 6(1) ECHR in the competition law field, the system would not be compliant.

However, it is also acknowledged that this must not be automatically seen as a sufficient justification for any major changes in the enforcement system of EU competition law. According to the majority interpretation of Article 6(1) ECHR, the requirement for a ‘fair and public hearing within a reasonable time by an independent and impartial tribunal established by law’ must not necessarily be met at first instance when an administrative body reaches an initial decision imposing fines (even if they qualify as ‘criminal charges’ under the ECHR). The guarantees mandated by Article 6(1) ECHR will be (if not absolutely, sufficiently) upheld if such initial ‘conviction’ can be challenged before a body meeting the requirements of Article 6(1) ECHR that can review it on the merits, both in facts and in points of

\textsuperscript{11} This was first declared in \textit{Société Stenuit v France} Series A no 232 (1992) 14 EHRR 509. Generally, see Harris, O’Boyle and Warbrick, \textit{Law of the European Convention on Human Rights}, 2nd edn (OUP, 2009) 201-299.


\textsuperscript{13} For the purposes of our discussion, this paper will only be looking at Article 6(1) ECHR as such and, more specifically, to the issue of the standard of judicial review required in EU competition law cases. Other issues, such as the right to a trial without unjustified delays, or the role and application of the presumption of innocence will not be discussed more than in passing.

\textsuperscript{14} For general discussion, see D Slater et al ‘Competition Law Proceedings before the European Commission and the Right to a Fair Trial: No Need for Reform?’ (2008) GCLC Working Paper 04/08 www.coleurope.eu/content/gclc/documents/GCLC%20WP%202004-08.pdf, as well as the special issue of the \textit{Competition Law Review} available at www.coleurope.eu/content/gclc/documents/GCLC%20WP%202004-08.pdf.


\textsuperscript{16} L Ortiz Blanco, \textit{European Community Competition Procedure} (OUP, 2006) 159.
law (below §IV.A). In my view, this is also in compliance with Article 13 ECHR, given that access to judicial review serves the purposes of being an effective remedy against any potential breaches of the fundamental rights of the undertakings involved in Commission-led investigations in such first ‘conviction’.

Hence, the discussion turns towards the actual possibilities to challenge decisions adopted by the European Commission before the GC and the CJEU and, more specifically, criticises the (potential) limitations imposed by Article 263 TFEU on the scope of review of the Commission’s Decisions in competition law matters, since the GC and the CJEU have jurisdiction for the following grounds for review: ‘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’ (which, in its literal tenor, does not include a full review on the facts). However, it should also be taken into consideration that, according to Article 31 of Regulation 1/2003, the European Courts have ‘unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment [and] may cancel, reduce or increase the fine or periodic penalty payment’.

At this point, the assessment whether or not Articles 263 TFEU and 31 of Regulation 1/2003 (and the practice developed by the GC and the CJEU on their basis) is sufficient to comply with the requirements of Article 6(1) ECHR becomes crucial. So far, this question has been brushed out relatively easily by the CJEU while, even if it has not been expressly tackled by the ECtHR, there are doubts that the Strasbourg Court will be equally supportive of EU competition law enforcement —particularly in terms of the scope and intensity of the judicial review available for challengers of Commission Decisions enforcing Articles 101 and 102 TFEU.

Indeed, according to the incipient CJEU case law in KME Germany v Commission and Chalkor v Commission, the question of whether any reforms to the review of EU competition law enforcement decisions are necessary in view of Article 6(1) ECHR has been (tentatively) answered in negative terms. In the CJEU’s view, the protection conferred by Article 47 EUCFR ‘implements in European Union law the protection afforded by Article 6(1) of the ECHR’, and ‘it is necessary, therefore, to refer only to Article 47 [EUCFR]’. In doing so, the CJEU concluded that the EU competition law system is compliant and that there is no infringement of the principle of effective judicial protection laid down in Article 47 EUCFR, since the review process before the Courts of the Union in fact involves review of both the law and the facts, and means that they have the power to assess the evidence, to annul the contested decision and to alter the amount of fines. Hence, the current

18 Indeed, the procedures before the GC and the CJEU do not make it excessively difficult or unreasonable to defend those rights. See Kudla v Poland App no 30210/96 (ECtHR, 26 October 2000).
system sufficiently guarantees the due process rights of undertakings involved in competition law investigations and/or having been found in breach of EU competition rules and, consequently, there is no need to promote a more protective system. Whether the CJEU has or not reached such a conclusion (implicitly) taking into account a ‘reduced’ set of fair trial requirements in view of the ‘non hard core’ nature of competition law as a ‘criminal charge’ remains unclear. But the legal position stands that, in general terms, the current system for the enforcement of EU competition rules and its review uphold the required due process rights of the undertakings involved and, more specifically, that there is no insufficiency in the scope or intensity of judicial review in EU competition law cases.

On its part, the ECtHR has so far not been expressly and directly confronted with the issue of compliance of the EU competition law enforcement system with Article 6(1) ECHR\(^{24}\), but it has already analysed the Italian system of competition law enforcement in *Menarini*\(^{25}\). Given the shared elements in the Italian and EU enforcement systems, the findings of the ECtHR in *Menarini* are considered highly relevant to the appraisal of the EU situation. Even if the majority decision in *Menarini* found that, in the case at hand, there had been no breach of due process rights under Article 6(1) ECHR because the initial ‘conviction’ had *de facto* been fully reviewed on appeal (again, despite a language similar to that of Article 263 TFEU, imposing judicial deference towards the exercise of administrative discretion by the Italian competition authority), the dissenting opinion by Judge Pinto De Albuquerque openly questioned that such degree of judicial deference towards administrative decisions based on complex economic assessments\(^{26}\) allows appellants to benefit from sufficient scrutiny of ‘the core of the reasoning of the administrative decision of conviction, namely the technical evaluation of the charges against the applicant’. Indeed, the dissenting opinion in *Menarini* reads Article 6(1) ECHR as requiring a full (hard) substantive judicial review of the core of the technical evaluations conducted in competition law procedures and clearly points to the need for an independent, specific and detailed evaluation of the illegality and culpability of the challenger’s behaviour by the review tribunal\(^{27}\)—hence, excluding any possible judicial deference or marginal review of the decision adopted by the competition authority (or, by implication or extension, the European Commission).

In this regard, the application of the test advanced by the *Menarini* dissenting opinion has been considered to leave some doubts in the air, since the (literal) wording of Articles 263 TFEU and 31 of Regulation 1/2003 may fall short of ensuring a full scrutiny of ‘the core of the reasoning of the administrative decision of conviction, namely the technical evaluation of the charges against the applicant’—regardless of whether in fact such full review is conducted by the European Courts,

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\(^{24}\) Although this issue was due to be considered by the ECtHR in *Senator Lines* [App no 56672/00 (ECtHR, 10 March 2004)], which hearing was cancelled in light of the judgment of the Court of First Instance (now the GC) setting aside the fine imposed by the European Commission. N Colneric, ‘Protection of Fundamental Rights through the Court of Justice of the European Communities’ [http://denning.law.ox.ac.uk/iocl/pdfs/working2colneric.pdf].

\(^{25}\) Prior decisions were reached in relation to the French enforcement system, but in those cases, they concerned the review available against an interlocutory decision, *ie* a challenge of a warrant authorising a raid of the premises of suspected cartelists; see *Canal Plus v France* App no 29408/08 (ECtHR, 21 December 2010) and *Primagaz v France* App no 29613/08 (ECtHR, 21 December 2010). Beuerm (n 5) 14.

\(^{26}\) Which is the general rule in the system of EU competition law enforcement (both at EU and decentralised levels); see R Thompson QC, ‘Judicial Review and the European Courts: Working with Our Partners. Part 1’ (24 July 2012) eutopialaw.com/2012/07/24/judicial-review-and-the-european-courts-working-with-our-partners-part-1/.

\(^{27}\) *A. Menarini Diagnostics S.r.l. c. Italie* App no 43509/08 (ECtHR, 27 September 2011), dissenting opinion, para 7.
as clearly found by the CJEU in *KME Germany v Commission* and *Chalkor v Commission*. Such doubts will be dispelled in this paper, which broadly sides with the position of the CJEU and will aim to show that the peculiarities and strengths of the current system of enforcement of EU competition law suffice to meet the standards of Article 6(1) ECHR—and, consequently, that there is no need for reform (either immediately, or upon accession of the EU to the ECHR).

In any case, it is worth stressing that, following the reported academic debate, a judicial debate between the CJEU and the ECtHR seems served regarding the extension of the requirements of Article 6(1) ECHR after the EU’s foreseeable accession to the ECHR and, additionally, concerning the extent of the duty of consistent interpretation of Article 47 EUCFR in its light—particularly in view of the ‘less than fully stringent’ requirements of Article 6(1) ECHR in ‘non hard core criminal cases’ such as competition law cases. All in all, and depending on the result of such debate, there seems to be room for a potential ‘re-reading’ (i.e. restriction) of the requirements of Article 6(1) ECHR in the field of EU competition law, particularly as regards the scope and intensity of the judicial review available for challengers of Decisions of the European Commission enforcing Articles 101 and 102 TFEU, in view of a joint construction based on *Jussila* and *Menarini*. This constitutes the focus of what will be attempted in the remainder of this paper.

### III. SOME PECULIARITIES OF COMPETITION LAW ENFORCEMENT

In order to further contextualize the discussion on due process and the implications of Article 6(1) ECHR in the field of competition law, particularly as regards the scope and intensity of the judicial review of administrative decisions, it is worth stressing some of the peculiarities of the EU competition law enforcement system. As shall be discussed in further detail (below §IV.A), the ECtHR is prepared to allow for relatively limited judicial review when the initial administrative procedure is robust—and, consequently, having a bird’s eye view on some features of the system of EU competition law enforcement can be helpful.

First of all, it should be taken into consideration that the Directorate General for Competition (DG COMP) of the European Commission is probably amongst the most sophisticated enforcement bodies and far exceed the level of resources and technical knowledge of most of its potential benchmarking counterparts. Therefore, if administrative bodies could be ranked by expertise and existing enforcement capacity, without doubt, the European Commission is one of the top competition law enforcement agencies worldwide. This is not to say that it is too big or too sophisticated to be subjected to effective judicial review, but I think that the existing level of enforcement capacity (even if always improvable, subject to resources availability) should be taken into consideration as a positive factor in favour of a relatively lenient approach towards the scrutiny of the system.

Secondly, the European Commission and the National Competition Authorities of the EU Member States (NCAs) are integrated in the European Competition Network (ECN), which serves both purposes of coordination and cooperation, and facilitates the exchange of information and best practices that contribute to the further refinement of enforcement mechanisms and operations.

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29 This perception is shared by most practitioners, although not all of them consider that these characteristics and the ensuing ‘good institutional reputation’ should in any way alleviate the requirements of the ECHR in the field of EU competition law enforcement; see Forrester (n 3).
30 However, it should be stressed that the European Commission does not oversee the enforcement activities of the NCAs. Indeed, as indicated in the Joint Statement of the Council and the Commission.
In that regard, there is a certain level of peer review in the enforcement activities of the European Commission, which can even trigger the attention of the competition authorities of other jurisdictions (notably, the United States of America) in high profile cases. Such scrutiny beyond the EU jurisdiction is further promoted by the International Competition Network (ICN) and the active participation in this forum of the main competition authorities worldwide. All this is to indicate that the European Commission’s enforcement activities are subject to a degree of (restricted) transparency and potential peer review that seem to work as an effective check and balance of the administrative discretion it exercises.

Thirdly, it should also be stressed that the community of EU competition law practitioners has grown significantly in recent years and that companies involved in competition law investigations tend to be represented by skilled and highly qualified teams of lawyers (and economists) that defend their interests effectively before the European Commission—that is, that competition law enforcement tends to involve lawyers from the very beginning of the investigative procedure and not only at judicial stage, which is not always the case in other areas of economic regulation (of a ‘criminal’ nature for the purposes of the ECHR, such as the conduct of disciplinary proceedings by professional bodies or the development of tax investigations and audits). Further than that, in many instances, it is not rare to see the enforcement team outnumbered by the group of lawyers and consultants engaged by the undertakings under investigation or challenging an infringement decision before the relevant courts (either individually or in the aggregate, particularly in cases with multiple defendants such as cartel cases). In that regard, it is hard to think of instances where the undertakings under investigation are not given a full, proper opportunity to present their case and defend from the charges eventually pressed by the European Commission. Again, this is not to say that the burden of ensuring fair trial rights can be discharged by the mere participation of lawyers in the procedure. However, this is to dispel the possible view of ‘inferiority’ of competition law defendants vis-à-vis the almighty competition authorities. In competition law procedures, the effective ‘strength’ of the parties tends to be much more balanced and, in the end, this should be taken into account in the analysis of the need for effective protection under Article 6(1) ECHR (below §IV.B).

Fourthly, and with potential far reaching consequences, I think that it must be stressed that competition law enforcement is not a neutral exercise of economic regulation, but a policy oriented one that rests on incomplete and broad rules. At the very end, the final decision to be reached will be (strongly) conditioned by the ultimate goal the competition authority wants to achieve. However standard or ‘textbook’ a case may be, it must be borne in mind that competition law is inherently subject to the underlying microeconomic theories and other insights derived from industrial economics and, consequently, subject to change and to policy drivers. Therefore, the complex economic assessments on which...
competition law enforcement unavoidably rests are not only complicated, but also not (policy) neutral. Further than that, given that enforcement resources are always limited, all competition authorities need to set their enforcement priorities and most of them also routinely disclose documents where they not only communicate such enforcement priorities, but also make public their theories of economic harm and their interpretation of the existing law (in the form of ‘soft law’). Such publication of soft law documents may not only contribute to the knowledge of the applicable laws, but also tends to bind the corresponding authorities in the conduct of their enforcement activities on the basis of general principles of legitimate expectations and estoppel. Therefore, there is a high degree of transparency and some increased foreseeability of the enforcement activities to be conducted by most advanced competition authorities.

Finally, it should also be taken into consideration that the enforcement procedures followed at EU level offer several opportunities for undertakings to challenge the views of the European Commission, including the conduct of hearings (which, however, tend not to be public due to confidentiality issues and basically in protection of the business interests of the investigated parties), and that they are designed on the blueprint of generally accepted administrative sanctioning procedures and their ensuing guarantees. These procedures are overseen by a Hearing Officer that acts as an independent arbiter where a dispute on the effective exercise of procedural rights between parties and DG Competition arises in antitrust proceedings. Ultimately, procedural flaws can also be reported to the European Ombudsman, who can open an investigation against the European Commission on the basis of the complaints raised by the undertakings concerned. Therefore, even if the enforcement of competition law has some peculiarities, from a procedural point of view, it is hard to see why or how the same or very similar rules on administrative sanctioning procedures would be valid in other areas of law enforcement (particularly at national level, such as securities regulation, taxation, or money laundering supervision) but not acceptable when it comes to EU competition law. In my view, as a matter of general appraisal, it should be considered that the administrative sanctioning procedures followed by the European Commission are sound and already offer a very advanced degree of procedural guarantees to the undertakings under investigation. Moreover, and in any case, the decisions of the European Commission are subjected to appeals procedures and, therefore, compliance with the right to a fair trial under Article 6(1) ECHR should be evaluated at this second stage, as discussed below.

or ES Rockefeller, The Antitrust Religion (Washington, Cato Institute, 2007). However, failing a complete dismantling of the competition rules, the intrinsic policy element must be emphasised and put in perspective.


36 Similarly, Beumer (n 5) 26-7.


IV. THE REQUIREMENTS OF ARTICLE 6(1) ECHR IN THE FIELD OF EU COMPETITION LAW ENFORCEMENT, WITH A FOCUS ON THE FACT THAT MOST DEFENDANTS ARE CORPORATIONS

As mentioned before (above §II), the ECtHR clearly indicated in Jussila that the criminal-head guarantees will not necessarily apply with their full stringency to competition law cases, since they do not belong to the hard core of criminal charges covered by the ECHR. This section aims to re-assess such requirements in the field of competition law enforcement taking into consideration the peculiarities just discussed (above §III) and the fact that most competition law defendants are corporate entities.

A. What requirements of judicial review should be derived from Article 6(1) ECHR in non hardcore criminal cases such as competition law investigations?

In my view, the ECtHR recognised in Jussila that a full transfer of the guarantees developed under Article 6(1) ECHR for ‘pure’ criminal proceedings to the field of competition law cases would be an excess in the interpretation and application of the Convention39. Following that (implicit) recognition of a risk of excessive extension of the guarantees recognised in Article 6(1) ECHR, it seems appropriate to reconsider the extent and intensity of protection in competition law cases40. My proposal is to re-read the requirements of Article 6(1) ECHR to depart from the stringent position concerning hardcore criminal cases and to get closer to the requirements of Article 6(1) ECHR regarding administrative procedures (however less developed or consolidated they may be at this point in time). In my view, what is required in this area is, simply put, that decisions adopted in the application of EU competition law are open to sufficient judicial review by a body that complies with Article 6(1) ECHR and that has jurisdiction to quash the decision in case it identifies material errors in fact or law41—i.e. the standard applicable to administrative decisions.

A limitation on the viability of this ‘light(er) judicial review’ approach may be found in the fact that the ECtHR declared that ‘on an application for judicial review, the courts do not review the merits of the decision but confine themselves to ensuring, in brief, that the authority did not act illegally, unreasonably or unfairly’42. Indeed, in this same line of argument, it should be taken into consideration that as a matter of general requirements of Article 6(1) ECHR, the reviewing tribunal must have ‘jurisdiction to examine all questions of fact and law relevant to the dispute before it’43. However, in my view, such a restrictive approach would disregard the indications of the ECtHR itself in Jussila and would imply a full extrapolation of the guarantees developed under Article 6(1) ECHR for ‘pure’ criminal proceedings in their full stringency to this type of non hardcore criminal cases.

On the contrary, I think that the case law of the ECtHR offers support for such a ‘light(er) judicial review’ approach in the field of administrative decisions. It

39 Contra, see Bellamy (n 3) 9.
42 Weeks v UK Series A no 114 (1987); 10 EHRR 293.
43 Terra Woningen v Netherlands 1996-VI; 24 EHRR 456, para 53.
is worth stressing that the ECtHR has found that, where: i) the administrative body adopting the initial decision follows a procedure that sufficiently complies with Article 6 ECHR \(^{44}\), and ii) the decision involves a ‘classic exercise of administrative discretion’ or, in other words ‘the issues to be determined [require] a measure of professional knowledge or experience and the exercise of administrative discretion pursuant to wider policy aims\(^{45}\); then, (mere) judicial review of the legality of the decision suffices, and a (full) right of appeal on the merits is not necessary\(^{46}\)—always provided that the reviewing tribunal can effectively grant a remedy to the appellant if successful\(^{47}\), which includes the possibility of quashing the decision and remitting the case for a new decision\(^{48}\).

With all these considerations in mind, it seems difficult to contend that the current mechanisms for the review of enforcement decisions in the field of EU competition law are not only compliant with, but already exceed the requirements of Article 6(1) ECHR as administrative decisions are concerned.

**B. Should corporate defendants in competition law cases obtain full protection under Article 6(1) ECHR, or are some limitations justifiable?**

On top of the former considerations, I think that in determining the extent and intensity of human rights protection in the enforcement of EU competition law, it should also be taken into consideration that, in my opinion, there is an inherently limited applicability of the ECHR to companies\(^{49}\) (and, more generally, to legal entities)\(^{50}\). Even if it has been submitted that ‘[s]ome rights have always and without discussion been regarded as applicable to companies, including the right to enjoyment of the procedural guarantees in Art 6(1)\(^{51}\), in my view, this maximalist position requires further scrutiny in light of the potential de facto configuration of the ECtHR as a third appellate instance in EU competition law cases\(^{52}\). Should the standard for review applied by the GC and the CJEU be deemed insufficient, all EU competition law cases would immediately be susceptible to be brought before the ECtHR [under art 6(1) ECHR and, potentially, art 13 ECHR as well]. If it then applied the standard of review indicated in the Menarini dissenting opinion, it

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\(^{44}\) *Bryan v UK* Series A no 335 (1995); 21 EHRR 342, para 47.

\(^{45}\) *Tsfayo v UK* App no 60860/00 (ECtHR, 14 November 2006)) para 46; see Wils (n 9), 23-4; and Beumer (n 5) 13-4 and 24-5.

\(^{46}\) *Zumtobel v Austria* Series A no 268 (1993); 17 EHRR 116, para 32.

\(^{47}\) *Kingsley v UK* 2002-IV GC; 33 EHRR 13.

\(^{48}\) For further details on these issues and the balance between full rights of appeal and limited judicial review in the analysis of Article 6 guarantees in the area of challenges against administrative decisions, see Harris, O’Boyle and Warbrick (n 11) 229-32.


\(^{52}\) Further than that, Article 6(1) is considered amongst a group of ECHR ‘provisions that apply ipso facto to corporate entities pursuing economic goals because they by their nature have collective aspects, economic facets, and/or are more or less objectively construed’, ibid. 63.

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would indeed be reviewing the substance of the case—which surely cannot be an outcome desirably derived from the guarantees built in Article 6(1) ECHR.

As a preliminary observation, it should be made clear that, in my opinion, not all fair trial or due process-related guarantees in Article 6 ECHR [even within Article 6(1) ECHR] carry the same weight and relevance. In this regard, the standard of review applied in the appeal of preliminary decisions adopted by a robust administrative body is a 'non-core' due process guarantee (since a relaxation of its requirements has already been accepted by the ECtHR, above §IV.A); as opposed to 'core' due process guarantees such as the presumption of innocence, the principle of equality of arms, the right to have full access to the evidence\textsuperscript{53}, or the right not to suffer undue delays\textsuperscript{54}. Admittedly, corporate defendants deserve proper protection of their core due process guarantees, as any other potential victim of (blatant or, at least, material) breaches of due process requirements. However, at least in the area of non-core guarantees, my view is that corporate defendants can see the scope of protection reduced under the ECHR; and that such limitation of (full, non-core) protections would not significantly diminish their (effective) legal position, nor substantially affect their possibilities to (actually) defend their legal interests. And this should not be seen as a discrimination against corporate entities as compared to individuals (i.e. natural persons) or other types of associations, since their effective or actual need of protection is lower and, in any case, the scope of this protection through non-core due process guarantees needs balancing against the potential risks for strategic abuse.

Indeed, given the sophistication of legal counsel that competition law defendants usually enjoy (above §III), it is not hard to see that there is an actual risk of the ECtHR becoming a sort of third appellate instance for competition law infringers whose challenges to the Commission's infringement decisions have already been dismissed by the GC and the CJEU. If the standard of review imposed was too stringent, and the ECtHR took on the task of enforcing it to its full and ultimate consequences, it would actually assume the task of reopening the case on its substance [which is questionably the purpose of Article 6(1) ECHR protections], it would need to reappraise the case in full and would make itself into a 'competition law court' (i.e. effectively, a third appellate instance in EU competition law cases—without it being clear that the ECtHR is in a good position to carry out such an undertaking without major changes and investments, particularly in terms of expertise or human capital; below §V). Or, in the alternative, the ECtHR could try to resend or refer back EU competition law cases for a fresh appraisal by the GC or the CJEU under a new (more demanding) standard—but with the same evidence before them (hence, with very limited possibilities for the European Courts to actually reach different position on the substance of the case), and all of that with the consequent delays and additional costs for the enforcement system. Other remedies, basically limited to a monetary compensation to the undertakings would be equally unsatisfactory, unless they covered the whole or part of the fines imposed—which the ECtHR should anyway not determine without a full reappraisal of the case. All in all, the system seems fundamentally incapable of satisfactorily addressing these situations.

\textsuperscript{53} This was analysed by the ECtHR specifically as concerns competition law enforcement in France and in terms of the general principle of equality of arms, and a violation of Article 6(1) ECHR was found were the corporate defendant was not given access to certain parts of the legal reports issued throughout the appeals process; see \textit{Lilly France v France} App no 53892/00 (ECtHR, 14 October 2003).

\textsuperscript{54} Cf. van Kempen 'Human Rights and Criminal Justice Applied to Legal Persons' (2010) 17, who considers that companies' position is more limited than individuals', in view of the different way in which legal persons and stakeholders are affected.
In this regard, I think that it is necessary to draw a line between situations where there is an actual need to protect a legitimate corporate interest derived from its due process rights (i.e. situations where corporate entities are true victims of an infringement of fundamental rights by an ECtHR Member State, such as cases of flagrant expropriation, or other instances of breaches of ‘core’ due process rights) and other situations (such as relatively theoretical discussions on the intensity of the standard of judicial review) where the system may be too openly exposed to abuse if corporations are fully equated to individuals (which affected rights, such as personal freedom, do deserve more demanding standards of protection). In my view, this justifies a restriction on the requirements concerning the scope and intensity of judicial review of competition enforcement decisions since the situation could otherwise become unmanageable—and such a restriction of non-core due process guarantees should not be seen as disproportionate, given the general level of protection of due process rights in EU competition law enforcement (above §III).

In the absence of other (material) breaches of ‘core’ due process rights (which protection may be subject to more stringent, almost absolute requirements), I think that it is worth taking into consideration that the ECtHR ‘is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective’ and that this is particularly true in the case of non-core due process-related guarantees. Therefore, the mere (theoretical) expectation of a corporation to have a given competition enforcement decision against it reviewed on potentially more detail on factual grounds by the GC falls short from constituting a practical and effective (‘core’, but possibly even ‘non-core’) due process right and in (almost) all instances will merely be a theoretical or illusory construct aimed at deferring (or, ideally, striking out) the effects of the adverse enforcement decision (already subjected to generally robust administrative and judicial review procedures). Therefore, there seems to be no good justification for the extension of this possibility of challenge before the ECtHR of a decision enforcing EU competition law rules solely on the basis that the judicial scrutiny conducted by the GC and the CJEU may have been excessively limited.

V. ANY NEED FOR CHANGE IN EU COMPETITION LAW ENFORCEMENT AS PER ARTICLE 6(1) ECHR?

As just discussed—given the potential risk of the ECtHR becoming a sort of third appellate instance, and the feebleness of the expectations of corporations to achieve an even higher degree of (factual) scrutiny of the adverse decision at stake—in the absence of other (material) breaches of due process rights, it is hard to see an advantage derived from opening or extending the possibilities to challenge competition enforcement decisions before the ECtHR on the sole basis that the judicial scrutiny conducted by the GC and the CJEU could have been more intense. Therefore, I consider it both legally consistent and normatively desirable to adopt a restrictive approach towards the assessment of any need for the introduction of changes in the system for the enforcement of EU competition rules and the revision


56 Artico v Italy Series A no 37 (1980); 3 EHRR 1 para 33; Harris, O’Boyle and Warbrick (n 11) 15.
of such enforcement decisions on the basis of Article 6(1) ECHR (if it ain’t broke, don’t fix it). This is so for many reasons.

A. Sufficiency of the actual scope and intensity of judicial review

First and foremost because—regardless of the literal drafting of Articles 263 TFEU and 31 of Regulation 1/2003\(^{57}\), and the eventual mentions of the European Courts to the ‘discretion’, the ‘substantial margin of discretion’ or the ‘wide discretion’ of the Commission in their Judgments—it has been made abundantly clear that the European Courts do in fact subject the European Commission’s decisions in competition law cases to very high standards of review both in law and in the factual situation concerned\(^{58}\). And, in my view, this is perfectly in line with the requirements of the ECtHR in Menarini\(^{59}\).

Only adopting the very demanding test advanced in the Menarini dissenting opinion that ‘the core of the reasoning of the administrative decision of conviction, namely the technical evaluation of the charges against the applicant’ are subjected to ‘an autonomous, specific and detailed evaluation’ by the review body, the current EU review system would show a deficiency\(^{60}\)—since the EU Courts do not engage of their own in a full (re)assessment of the evidence available to the European Commission throughout the competition investigation\(^{61}\). Indeed, the CJEU has been clear in determining that it is ‘required not to carry out of its own motion a full review of the judgment under appeal, but to respond to the grounds of appeal raised by the appellant’\(^{62}\).

However, in my view, requiring the European Courts (i.e. the CJEU and the GC) to conduct full reviews of their own motion would be excessive and disproportionate to the (marginal if not negligible) possibility that the standard of review applied (upon proper and sufficient allegations by the appellant) is insufficient to detect an instance of insufficient or defective assessment of the evidence available to the European Commission in the conduct of the competition investigations. On the other hand, if the potential discrepancy between the Courts and the competition authorities was on the ‘policy’ elements embedded in EU competition rules (above §III), then deference to proper ‘classical exercises of

\(^{57}\) This approach is supported by the concurring opinion of Judge Saio in A. Menarini Diagnostics S.r.l. c. Italie App no 43509/08 (ECtHR, 27 September 2011). See also Bellamy (n 3) 5, who stresses that the same antiformalistic approach was favoured by Advocate General Sharpston in her Opinion in case C-386/10 P KME v Commission [2011] nyr, para 73 and 83.


\(^{59}\) A. Menarini Diagnostics S.r.l. c. Italie App no 43509/08 (ECtHR, 27 September 2011), para 63-4.

\(^{60}\) Bellamy (n 3) 9.


\(^{62}\) C-386/10 P Chalkor v Commission [2011] nyr, para 49. See also C-386/10 P KME v Commission [2011] nyr, para 131. For discussion on whether this meets the requirements of Article 6(1) ECHR, see Beumer (n 5) 21-2.
administrative discretion’ should be found to fully meet the requirements of Article 6(1) ECHR, as per the standard doctrine of the ECtHR (above §IV.A)63.

Notwithstanding the above, and as already mentioned, my personal position goes one step further, and I submit that even a judicial review standard that fell short from the requirements indicated by the majority in Menarini should suffice64, given that we are in the area of decisions that involve a certain degree of ‘classic exercise of administrative discretion’65.

B. Avoidance of strategic abuse of due process guarantees by applicants

Secondly, there seems to be no good reason to alter the current rules and promote a permissive rule on access to the ECtHR solely on the basis of the standard of review used in competition law cases because undertakings having been fined for breaches of competition law will always have a very strong (financial) incentive to challenge them before the ECtHR or, at least, to win some time by resorting to this additional review procedure. Therefore, there are high incentives for an excessive recourse to (if not an abuse of) the procedure for human rights protection on the basis of spurious claims of insufficient review of Commission competition Decisions before the European Courts. As a matter of system design, then, such a restriction on the chance to bring an action before the ECtHR (i.e. denying challenges solely or primarily based on the standard of review applied by the GC and the CJEU) seems a proportionate and desirable counterbalance to such perverse incentives66.

C. Case load management and protection of the effective functioning of the ECtHR

Third, in that regard, the ECtHR should be aware of the potentially significant impact of those cases in its workload and the significant amount of resources needed to deal with such complex cases. Furthermore, the ECtHR would need to significantly expand its expertise in the area of competition law (and, more generally, of economic regulation) in order to properly appraise the applications submitted for its protection under the ECHR—and this could be disproportionate to protect ‘theoretical’ due process rights of corporate defendants67 (above §IV.B).

And finally, there seems to be no need to set a very stringent standard of judicial review of competition law cases because changes at EU level would be extremely difficult to implement (a renegotiation of the EU Treaties is certainly not

63 Discussing this possibility, and mostly in favour, Beumer (n 5) 23-4 and 27. Contra, see Forrester (n 3) 819.
64 This is in line with the position of the European Commission; see C-386/10 P Chalkor v Commission [2011] nyr, para 43.
67 Most of the claims for a stricter standard of judicial review seem to a large extent purely theoretical or, sometimes, even grammatical. See, for instance, Forrester, ‘Judicial review and competition law’ (2011) 3-4. This is indicated by Bellamy (n 3) 3. In similar terms, see Beumer (n 5) 16-7; Schweitzer, ‘The European Competition Law Enforcement System and the Evolution of Judicial Review’ (2011) 100; and D Geradin and N Petit, ‘Judicial Review in European Union Competition Law: A Quantitative and Qualitative Assessment’ (2010) Tilburg Law School Legal Studies Research Paper 01/2011, 23 ssrn.com/abstract=1698342.
an easy endeavour) and some basic functional considerations require to restrict the scope of the ECtHR activities and to keep them focused in their core functions [in this case, enforcement of Article 6(1) in hard core criminal cases against individuals], if it is to remain effective and do its job\textsuperscript{68}. Otherwise, the ECtHR could end up trapped in a situation governed by an hypertrophy of Article 6(1) ECHR in connection with EU competition law cases and find itself flooded with a significant number of difficult to manage cases that would drain its resources and diminish the overall effectiveness of its policing of the respect of effective and practical human rights in Europe.

VI. CONCLUSION

Throughout this paper, it has been emphasised that there is a significant risk of hypertrophy of Article 6(1) ECHR if an excessively demanding standard for judicial review is imposed. Firstly, because the discussion on the actual standard of review applied by the European Courts in the review of the European Commission’s decision in competition law cases is to a large extent excessively formal and theoretical—which renders the discussion, to a certain extent, moot and devoid of practical effects. Both the ECtHR and the CJEU have already found that de facto there is full review of EU competition law enforcement decisions and, consequently, it can hardly be sustained that there is an actual (material) lack of due process guarantees in the enforcement of EU competition law by the European Commission and the NCAs. This, probably, should suffice to put an end to the discussion.

However, from a less pragmatic approach, and considering that the delineation of the scope and intensity of judicial review requirements in the field of EU competition law can have an intrinsic value (at least in terms of legal certainty), the discussion developed in this paper has in my view shown that there is no need for any significant change in the EU competition law enforcement system to make it comply with Article 6(1) ECHR as such, given that: i) competition law does not belong to the ‘core’ of criminal offences foreseen in Article 6(1) ECHR (§II); ii) at least arguably, the standard (i.e. scope and intensity) for judicial review is a non-core due process guarantee (§IV.B) that has already been limited by the ECtHR in cases where an administrative body, following robust (sanctioning) administrative procedures, adopts a decision that represents a ‘classic exercise of administrative discretion’ (§IV.A); iii) there are significant peculiarities in the enforcement of EU competition law that tend to diminish the effective/actual need for ‘non-core’ due process guarantees (§III) particularly in the case of corporate defendants (§IV.B); and last, but not least, iv) there is a significant risk of transforming the ECtHR in a third appellate instance in EU competition law cases (§IV.B and §V), without it being justified or proportional in light of the actual need of protection and that, on the contrary, would generate a risk of strategic abuse and, ultimately, of diminishing the effectiveness of the protection of human rights in Europe more generally (given the significant resources required for such a task).

All in all, I think that there are more than good arguments in favour of not introducing any changes to the current EU competition law enforcement system as the scope and intensity of the judicial review available for challengers of Decisions of the European Commission enforcing Articles 101 and 102 TFEU is concerned, since it is not required by Article 6(1) ECHR and, more generally and from a normative perspective, is a less than desirable legal reform. In my opinion, the future accession of the EU to the ECHR does not alter this conclusion.

\textsuperscript{68} For an interesting warning on rights inflation, see G Letsas, A Theory of Interpretation of the European Convention on Human Rights (OUP, 2007) 126-130.