

COMMON MARKET LAW REVIEW

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CASE LAW

A. Court of Justice

Case C-272/09 P, *KME Germany and others v. Commission*, Judgment of the Court of Justice (Second Chamber) of 8 December 2011, nyr.

1. Introduction

The *KME* judgment is a significant but somewhat disappointing contribution to the discussion regarding the compatibility of the EU regime for the public enforcement of competition law with the fundamental right to a fair trial.¹ This right is guaranteed by Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms as well as Article 47 of the EU Charter of fundamental rights (“the Charter”), which has acquired binding force since the Lisbon Treaty.² In the two *KME* rulings,³ as well as the *Chalkor* ruling of the same day,⁴ the Court refers exclusively to Article 47 of the Charter and sets aside part of the discussion conducted by practitioners and scholars in recent years over the characterization of competition law sanctions as criminal within

1. Specifically on *KME*, see annotations by Sarrazin, (2012) *Concurrences*, 89–91; Lacresse, (2012) *Concurrences*, 181–182; Idot, (2012) *Europe*, 30. The literature on this topic in general has been prolific: citing only some significant contributions, Andreangeli, *EU Competition Enforcement and Human Rights* (Edward Elgar, 2008); Forrester, “Due process in EC competition cases: A distinguished institution with flawed procedures”, 34 *EL Rev.* (2009), 817–843; Castillo de la Torre, “Evidence Proof and Judicial Review in Cartel Cases”, 32 *World Comp.* (2009), 505–578; Wils, “The increased level of EU antitrust fines, judicial review, and the ECHR”, 33 *World Comp.* (2010), 5–29; Merola and Waelbroeck (Eds), *Towards an optimal enforcement of competition rules in Europe* (Bruylant, 2010); Ehlermann and Marquis (Eds), *European Competition Law Annual 2009: The Evaluation of Evidence and its Judicial Review in Competition Cases* (Hart publishing, 2011); Nazzini, “Administrative enforcement, judicial review and fundamental rights in EU Competition Law: A comparative contextual-functionalist perspective”, 49 *CML Rev.* (2012), 1–36; Bombois, *La protection des droits fondamentaux des entreprises en droit européen répressif de la concurrence* (Larcier, 2012).

2. Art. 6 TEU.

3. See also Case C389/10 P, *KME v. Commission*, judgment of 8 Dec. 2011, nyr, hereafter “*KME II*”.

4. Case C-386/10 P, *Chalkor v. Commission*, judgment of 8 Dec. 2011, nyr. All three cases raised very similar issues. This explains why in *KME II* and *Chalkor* the Court decided not to request an Opinion. The Opinion of A.G. Sharpston in *KME I* serves as a reference point.

the meaning of Article 6(1) ECHR. It does, however, consider another much debated issue, namely the intensity of judicial control.

2. Background

2.1. Facts of the case and procedure

KM Europa Metal (KME) is a corporate group manufacturing metal products. Between May 1988 and March 2001, together with other undertakings, the German, Italian and French branches of KME implemented a complex set of agreements and concerted practices resulting in the sharing of markets and fixing prices for copper plumbing tubes. In September 2004, the Commission adopted a decision finding violation of Article 101 TFEU.⁵ The fines imposed on the relevant undertakings forming the KME group totalled EUR 39 million.

KME appealed the Commission decision before the General Court solely on the calculation of the fine. KME's application was dismissed by the General Court in its entirety. Before the Court of Justice, KME relied on five grounds. It argued that the general Court had violated EU law by giving illogical and/or inadequate reasons to reject its various pleas regarding i) the effect of the cartel on the relevant market, ii) the determination of the size of the market, iii) the infringement of the proportionality principle by the Commission in its calculation of the fine and iv) the misapplication by the Commission of the Leniency notice. KME also raised a point of principle, therein lying the significance of the case. It submitted that (v) the General Court had violated its fundamental right to full and effective judicial review by failing to examine its argument thoroughly, thus showing biased deference to the Commission.⁶ According to KME, the General Court "deferred to an excessive and unreasonable extent to the Commission's discretion".⁷ In other words, KME claimed that the review provided by the General Court fell short of the standard of "full jurisdiction" required by Article 6(1) ECHR.

2.2. General legal background

The general legal background of this case comprises the provisions regarding the right to a fair trial under EU law and in the ECHR (2.2.1), EU provisions on sanctions applicable to violations of competition law (2.2.2) and, most

5. Commission Decision C(2004) 2826 of 3 Sept. 2004, Case COMP/E- 1/38.069 – Copper plumbing tubes.

6. Opinion, para. 39.

7. Opinion, paras. 40 and 41. The quotation is from KME's written pleadings.

importantly, EU case law on the standard(s) of control applicable before the EU Courts in proceedings against Commission decisions imposing fines (2.2.3).

2.2.1. *Right to a Fair Trial*

Article 6(1) ECHR provides *inter alia* 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 corresponding provision in Article 47 of the Charter (“Right to an effective remedy and to a fair trial”) differs slightly in wording. Paragraph 1 reads “Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal”, while paragraph 2 reproduces Article 6(1) ECHR.

Article 52(3) of the Charter specifies 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” and adds that “This provision shall not prevent Union law providing more extensive protection”.

2.2.2. *Fines*

Rules governing the imposition of fines by the Commission in competition law proceedings were initially laid down in Article 15(2) of Regulation 17,⁸ which applied in this case. It provided – as does now Article 23(3) of Regulation 1/2003⁹ – that fines cannot exceed 10 percent of an undertaking’s worldwide turnover. Article 23(5) now expressly states that these fines are not criminal in nature. Both Regulation 17 and Regulation 1/2003 indicate that, in setting the level of fines, the Commission must have regard to two factors: the gravity and the duration of the infringement. These rules are complemented by guidelines, in which the Commission further explains the method for setting fines. The 1998 guidelines,¹⁰ applicable in *KME*, outline a three-step methodology (which is no longer good practice under the 2006 guidelines).¹¹ First, the Commission sets a basic amount, taking into account the gravity of

8. Regulation No 17 of 6 Feb. 1962, First Regulation implementing Articles [81] and [82] of the Treaty, O.J. English Spec. Ed. 1959–1962/87.

9. Council Regulation (EC) No 1/2003 of 16 Dec. 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, O.J. 2003, L 1/1.

10. 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, O.J. 1998, C 9/3.

11. Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003, O.J. 2006, C 210/2. Para 20 of the 2006 guidelines provides that “The

the infringement and its duration. Gravity is assessed on a three-point scale: an infringement can be classified as “minor”, “serious”, or “very serious”. Horizontal restrictions such as price cartels and market-sharing quotas are given as examples of “very serious” infringements. For such infringements, the guidelines indicate that the likely fines will be in excess of EUR 20 million. Regarding duration, the guidelines also draw a distinction between three categories: infringements of “short duration”, “medium duration” and “long duration”. Second, the basic amount may be increased to take duration into account. For infringement of long duration, the category to which the copper plumbing tubes cartel clearly belonged (lasting nearly thirteen years), the guidelines provide for an increase of the basic amount of up to 10% per year of an undertaking’s participation in the cartel. Third, the fine may be reduced in order to take extenuating circumstances into account. The framework for setting fines is completed by the Leniency notice,¹² which provides for reduction in fines for undertakings that cooperate with the Commission and provide valuable evidence for its investigations.

2.2.3. Judicial review: review of legality and unlimited jurisdiction

The jurisdiction and framework for the review by the EU Courts of the acts of the institutions, including those of the Commission, is in Article 263 TFEU (ex 230 EC). The Treaty provides for a limited number of grounds for review, namely “lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers”. Article 261 TFEU (ex 229 EC) empowers the EU legislator to give the Court of Justice unlimited jurisdiction “with regard to the penalties provided for in regulations”. This power has been exercised; Article 17 of Regulation 17 (and now Art. 31 of Regulation 1/2003) provides that “[t]he Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine”.

3. The Advocate General’s Opinion

In her Opinion, Advocate General Sharpston considered, as a preliminary point, the fifth ground of appeal, analysing whether the type of review conducted by the General Court is, in principle, adequate in light of Article 6 ECHR (3.1). In view of these general considerations, she then analysed the

assessment of gravity will be made on a case-by-case basis for all types of infringement, taking account of all the relevant circumstances of the case”.

12. Commission notice on the non-imposition or reduction of fines in cartel cases (O.J. 1996 C 207/4) now replaced by the 2006 Guidelines, *ibid*.

more technical pleas and concluded that the review of the General Court is not only adequate in principle, but had been sufficient in the instant case (3.2). She invited the Court to reject the appeal.

3.1. *Does the General Court's review of fines comply with the right to a fair trial?*

From the Advocate General's account of the pleadings, it appears that KME formulated a general and principled critique of the competition law enforcement system in the EU, echoing arguments found in the literature about its evolution.¹³ KME argued that, in the early years of the Treaty, when competition law needed to gain acceptance, when the Commission was chiefly in charge of its application and when the amount of fines was fairly low, it was appropriate for the Court to rule, as it did in *Consten and Grundig*,¹⁴ that it would only perform limited review on complex economic evaluations.¹⁵ However, under the current system, characterized by high fines and decentralized application of EU competition law, it is "dangerous and unfair", argued KME, to apply the same judicial deference as in the past.¹⁶

Advocate General Sharpston concentrated her analysis on what she identified as the core issue, namely, "whether the General Court exercised 'full jurisdiction' within the meaning of the case law of the European Court of Human Rights".¹⁷ In order to do so, she first asked what scrutiny is required under Article 6 ECHR. At this stage, Sharpston also mentioned the Charter, but then essentially looked at European Court of Human Rights case law for guidance.¹⁸ As the requirement for judicial review under Article 6 ECHR differs in civil and in criminal matters,¹⁹ the Advocate General first examined whether EU competition law fines can be considered as criminal within the meaning of Article 6 and then she applied the three criteria laid down in

13. See references cited *supra* note 1.

14. Joined cases 56 & 58/64, *Consten and Grundig v. Commission*, [1966] ECR (English special edition) 299.

15. Opinion, para 45.

16. *Ibid.* On the argument derived from decentralization, see Opinion, para 47 and e.g. Bailey, "Standard of judicial Review under Articles 101 and 102 TFEU" in Merola and Waelbroeck, *op. cit. supra* note 1, pp. 101–125 at 118. Bailey agrees that direct applicability of Arts 101 and 102 TFEU and the role entrusted to national Courts under Regulation 1/2003 fuels an evolution of the extent of judicial review, also (indirectly) because of the level of complexity the Court has to adjust to when giving a preliminary ruling in competition matters.

17. *Ibid.*

18. Opinion, paras. 60, 61.

19. See e.g. Sudre, *Droit européen et international des droits de l'homme*, 10th ed. (Presses Universitaires de France, 2011), at 403. The main difference is that, in civil matters, there seems to be no obligation that the "Tribunal" can substitute its decision for the decision under appeal. Sudre cites to this effect *Chaudet v. France* (App. 49037/06), 29 Oct. 2009.

*Engel*²⁰ and looked at i) how the matter is classified in the legal system concerned, ii) the nature of the offence and iii) the degree of severity of the penalty that the person concerned risks incurring.

Under EU law, as noted above, competition law sanctions are explicitly classified as not criminal in nature by Article 23(5) of Regulation 1/2003, but it is established in the ECtHR case law that the internal classification is “no more than a starting point”.²¹ When applying the “autonomous” notion of criminal matters, noted Sharpston, the ECtHR often disregards the first criterion and accords “significantly more importance . . . to its second and third criteria”.²² Reviewing those criteria, she had “little difficulty” in concluding that sanctions against cartels are criminal within the meaning of Article 6 ECHR.²³ Referring to ECtHR case law on indicators of criminal nature of an offence, she found that competition law is of general application and that anticompetitive conduct is “generally regarded as underhand, to the detriment of the public at large, a feature which it shares with criminal offences in general and which entails a clear stigma”.²⁴ Regarding the severity of fines, she stressed that the ceiling of 10% of worldwide turnover is “undoubtedly severe, and may even put an undertaking out of business”, adding that the “[legislative] intention is explicitly to punish and deter”.²⁵ She therefore concluded that competition law sanctions are criminal in nature within the meaning of the Convention.

The Advocate General also considered the distinction between “hard core” and non hard-core criminal law offences,²⁶ relying on the finding of the ECtHR that, when non hard-core criminal sanctions are applied by an administrative body that does not present all the guarantees of an independent and impartial tribunal, those decisions should be subject to review by a judicial body having “full jurisdiction”.²⁷ She further cited the ECtHR’s characterization of this notion as including “the power to quash in all respects, on questions of fact and law, the decision of the body below”,²⁸ as well as the holding according to which “a judicial body charged with review ‘must in

20. *Engel and Others v. The Netherlands*, 8 June 1976, § 82, Series A no. 22.

21. Opinion para 63.

22. *Ibid.*

23. Opinion para 64.

24. *Ibid.*

25. *Ibid.*

26. Opinion para 67, citing *Jussila v. Finland* [GC], App. No. 73053/01, ECHR 2006-XIII.

27. *Valico S.r.l. v. Italy* (dec.), no. 70074/01, p. 20, ECHR 2006-III, and the case law cited there, cited by A.G. Sharpston in footnote 32 of her Opinion.

28. Opinion, para 69, citing *Valico* (cited previous note), and the case law cited there.

particular have jurisdiction to examine all questions of fact and law relevant to the dispute before it”²⁹

The Advocate General carefully narrowed down the issue, not offering an overly broad opinion on the compatibility of judicial review of EU Courts in competition proceedings in general with Article 6(1) ECHR. She focused on the Courts’ unlimited jurisdiction concerning fines, leaving aside the review of legality, and whether it gives the General Court jurisdiction over *all* questions of fact and law. She also chose not to address the issue of whether the notion of “full jurisdiction” allows for the concession of a margin of appreciation to the Commission.³⁰ Having thus narrowed down the issue, she expressed “little doubt” that EU law complies with the requirement for full jurisdiction. The key consideration, in her analysis, was that the Treaty and secondary legislation explicitly give the EU Courts the power to substitute their decisions for those of the Commission on the level of fines.³¹

Advocate General Sharpston did not, however, stop at the conclusion that, in theory, the EU system of judicial review is Article 6-compliant. She insisted that “what is of greatest importance is the way in which the General Court actually carried out its review”, not the way in which it described that review.³² Therefore, the fact that the General Court referred to the Commission’s discretion was, in her view, inconclusive.³³ To scrutinize the adequacy of review provided by the General Court, she proposed a case-by-case approach. Most of this review was conducted in the analysis of the four other pleas. In the general analysis of the fifth plea, Sharpston simply noted the fact that the General Court requested the Commission to produce documents, and that the Commission produced “well over 500 pages in response”, which indicated that the thoroughness of the review was “sufficient to satisfy the requirements of the ECHR and the Charter”.³⁴

One last general point regarding the approach suggested by Sharpston needs to be mentioned. She remarked that “[n]othing in Article 6 ECHR or the case law of the European Court of Human Rights requires the ‘independent and impartial tribunal’ to investigate, of its own motion, matters which are not

29. Opinion, para 69, citing *Crompton v. United Kingdom*, No. 42509/05, § 71, 27 Oc. 2009, and the case law cited there.

30. Editorial comments, “Towards a more judicial approach? EU antitrust fines under the scrutiny of fundamental rights”, 48 CML Rev. (2011), 1405–1416, at 1411. According to this editorial, the question arises in the context of Art. 6(1) because competition law proceedings do not belong to the sphere of administrative law.

31. A.G. Sharpston thus agrees with Wils, *op. cit. supra* note 1, at 24, cf. Opinion, para 70.

32. Opinion, para 73.

33. *Ibid.*

34. Opinion, para 76.

raised before it”.³⁵ In adversarial proceedings, such as those before the General Court, the control exerted by the “tribunal” is dependent on arguments raised by the parties. “The exercise of its unlimited jurisdiction”, concluded the Advocate General “must be measured against the content of the arguments on which it was asked to adjudicate”.³⁶

3.3. *Other grounds of appeal*

The other grounds of appeal and their analysis may be presented more briefly. In all four of the other grounds, KME argued that the General Court did not perform adequate control because it let the allegedly ill-reasoned Commission decision stand. By its first ground, KME complained that the Commission, in classifying the infringement as “very serious”, had referred to its effect on the market, when it was common ground that it was not obliged to do so. KME contended that if the Commission takes effect into account, then it must appraise that effect scientifically. In KME’s view, the General Court should have ruled that the Commission could not simply rely on some passing observations (such as the fact that price dropped when the cartel wasn’t adhered to), it had to rebut the econometric studies adduced by KME to show the absence of effect. Advocate General Sharpston concluded that the General Court had reviewed the relevant economic reports before determining that the Commission’s inference was admissible.

By its second ground, KME argued that the Commission had used turnover to measure the size of the cartel, when, in its view, this was not appropriate in the instant case due to the high costs of inputs. Rather, KME submitted that value added³⁷ should have been used instead of turnover. The General Court, while recognizing the shortcomings of turnover as an indicator of economic power, had rejected this submission. Though “necessarily vague and imperfect”,³⁸ “turnover”, ruled the General Court, “is currently considered, by the Community legislature, the Commission and the Court, as an adequate criterion . . . for assessing the size and economic power of undertakings”. Sharpston found no shortcomings in this reasoning.³⁹ She reflected that, if it were permissible to take gross turnover (as was done in this case) in some cases but not in others, as KME suggested, it would be necessary to establish some threshold, probably in the form of a ratio between net and gross turnover, which would trigger the difference in treatment. Yet such a threshold would be

35. Opinion, para 74.

36. Ibid.

37. Value added refers to the value of sales minus costs.

38. Para. 93 of the General Court judgment, cited after para 125 of the Opinion.

39. Opinion, para. 141.

very difficult to apply and would give scope for endless and insoluble disputes, including allegations of unequal treatment. She therefore found that it “does not seem unreasonable to accept that the Commission can rely on an ‘approximate’ – but readily usable – yardstick to measure market size, as one of a combination of criteria used to determine the gravity of an infringement”.⁴⁰ Regarding the adequacy of the General Court’s review, Sharpston rejected the idea that the length of the General Court’s findings could be, as such, an indicator of proper review. Although the holding of the General Court on the relevance of turnover is quite brief, the lengthy exposition of KME’s arguments as well as the dismissal of the Commission’s argument were, according to the Advocate General, sufficient indications that the second plea in law had been carefully scrutinized.⁴¹ The General Court’s findings, she concluded, “are fully *consistent with* the conclusion that it reached its own view”.⁴²

The third ground of appeal related to the increase of the basic amount for duration. Sharpston pointed to an elementary arithmetical error committed by the appellants and unnoticed by the Commission or the General Court. The uplift for duration had not been 125% (the figure which would have been reached had the Commission applied the maximum permissible increase of 10% per year) but 62.5%.⁴³ “It might be said”, remarks Sharpston, that failure to notice such a gross error indicates “that the review was inadequate”. “However”, she continues, “[t]he General Court did no more than base its judgment on a premiss which was accepted by both parties”.⁴⁴

Regarding the fourth ground, the Advocate General found that “it is clear that the statements which that Court made as regards the Commission’s discretion when deciding to take account of mitigating factors in no way prevented it from correctly examining and responding to KME’s arguments, and that its conclusion was reached on the basis of a real appraisal of the facts and arguments before it”.⁴⁵

4. The Judgment of the Court

Unlike the Advocate General, the Court did not examine the fifth ground first. Still, it is useful to start with the final and most important part of the judgment, on the compatibility of review of cartel decisions by EU Courts with the right

40. Ibid.

41. Opinion, para. 145.

42. Ibid. Emphasis added.

43. Opinion, para. 161.

44. Opinion, para 168.

45. Opinion, para 187.

to a fair trial. The Court drew a distinction between the challenge to the EU system in principle and the challenge to the review performed by the General Court in the instant case. It considered that, as far as KME's appeal concerned the architecture of the EU system, it was unfounded, and as far as it concerned specifically the General Court's judgment, it was indissociable from the second, third and fourth pleas.⁴⁶

Interestingly, the Court departed from the reasoning of the Advocate General on why the review of the Commission's decision is compatible with fundamental rights. First, the Court relied solely on Article 47 of the Charter – as an expression of a general principle of EU law – and not on Article 6(1) ECHR.⁴⁷ Therefore the judgment did not discuss the criminal nature of fines imposed for violation of EU competition, or the implication of classifying an infringement of EU competition law as a criminal matter within the meaning of Article 6 ECHR. Second, rather than centre its reasoning on the unlimited jurisdiction of the Courts in relation to fines, the Court bases its argument chiefly on the review of legality,⁴⁸ suggesting that this can be deep enough to be adequate.

In this regard, the Court principally relied on paragraph 39 of its *Tetra Laval* judgment.⁴⁹ It recalled that

“Whilst the Court recognizes that the Commission has a margin of discretion with regard to economic matters, that does not mean that the Community Courts must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must the Community Courts, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it.”

In relation to control over fines, the starting point of the Court's reasoning is the large number of factors that are legally relevant to determining the amount of a fine.⁵⁰ The Court recalls in this regard that it was in the interest of transparency that the Commission adopted guidelines and that these “rules of practice” create an obligation for the Commission to state reasons when it

46. Judgment, para 108.

47. See on this point the discussion by Muguët-Poullennec, Domenicucci and Hoseinian, “Sanctions prévues par le règlement n° 1/2003 et droit à une protection juridictionnelle effective: les leçons des arrêts *KME et Chalkor* de la CJUE”, (2012) *Revue Lamy de la Concurrence*, 32, No. 2112.

48. Judgment, paras. 93 and 102.

49. Case C-12/03 P, *Commission v. Tetra Laval*, [2005] ECR I-987 cited at para 94 of the judgment.

50. Judgment, paras. 96–98.

departs from them.⁵¹ The Court also recalled that the duty to state reasons is a matter of public policy: EU Courts must establish of their own motion that there is a statement of reasons.⁵² The single most important paragraph in the Court's judgment follows the rehearsal of these principles. At paragraph 102, the Court held that

“[T]he 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* – either as regards the choice of factors taken into account in the application of the criteria mentioned in the Guidelines or as regards the assessment of those factors – *as a basis for dispensing with the conduct of an in-depth review of the law and of the facts.*” (emphasis added)

Two elements are particularly important in this passage. First, in contrast with the Opinion, the Court emphasized the review of legality. Full jurisdiction, in the words of the Court, “supplements” the review of legality.⁵³ Second, the Court ruled for the first time that the Commission's discretion, which is not called into question, should not, and does not, prevent Courts from conducting in-depth review. The Court concluded this part of its judgment by recalling the *inter partes* nature of proceedings before EU Courts.⁵⁴ It insisted that

“What the applicant is required to do in the context of a legal challenge is to identify the impugned elements of the contested decision, to formulate grounds of challenge in that regard and to adduce evidence – direct or circumstantial – to demonstrate that its objections are well founded.” (para 105)

The Court then concluded that the review conducted by EU Courts complies with the principle of effective judicial protection, without expanding on the intensity of such review:

“The review provided for by the Treaties thus involves review by the Courts of the European Union 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 a fine. The review of legality provided for under Article 263 TFEU, supplemented by the unlimited jurisdiction in respect of the amount of the fine, provided for under Article 31 of Regulation No

51. Judgment, paras. 99–100.

52. Judgment, para 101.

53. Judgment, para 103. See also similar language in para 93 (“was added”) and para 106.

54. Judgment, para 104. This argument is also used at para. 56, albeit less convincingly.

1/2003, is not therefore contrary to the requirements of the principle of effective judicial protection in Article 47 of the Charter.” (para 106)

All the above considerations constituted the appraisal of the Court on the compatibility *in principle* of the EU system with the fundamental right to a fair trial. Returning to the possibility that KME was also challenging the way in which the General Court had performed its review *in practice*, the Court simply stated that this ground is indissociable from the second, third and fourth ground and had therefore been examined (and rejected) separately. Yet, if one turns to the examination of the first four grounds of review, it is striking that, unlike the Opinion, they contain nothing at all on the sufficiency of the General Court’s review.

The first ground, regarding the evidence of effect of the cartel, was rejected as partly ineffective and partly inadmissible. The ineffective part relates to the fact that KME was contesting an appraisal of the General Court which was made only “for the sake of completeness”.⁵⁵ The General Court did review the findings on effect but, because, as a matter of law, actual effect is not a decisive factor in calculating the fine, any error in the initial appraisal or in the review conducted by the General Court would not have led to a revision of the fine. The inadmissible part relates to the treatment of econometric evidence. The Court held that KME’s submission was not precise enough in that it did not specify what exactly the General Court had misconstrued in the reports.⁵⁶

The second ground, on the relevance of turnover, was rejected on the merits. The Court simply confirmed the judgment of the General Court and held that there were no valid reasons to require that the turnover be calculated excluding certain production costs. Unlike the Advocate General, it did not go into why any other solution would be impractical. Given the detailed argument put forward by KME to demonstrate why turnover was inadequate, it may seem curious that the Court recalled, precisely about this plea, that “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”.⁵⁷ It is all the more curious as the second plea did not relate to the weighting of various factors but to the relevance of one particular factor, namely turnover.

The third ground, relating to the uplift of the basic amount on account of duration, was rejected on the basis of several considerations not linked to one another. The Court relied on the arithmetical error, pointed out in the

55. Judgment, para 34.

56. Judgment, para 38.

57. Judgment, para 56.

Opinion,⁵⁸ but not to declare the plea inoperative. It also affirmed that duration justifies an increase in the fine in principle⁵⁹ and as a matter of law.⁶⁰ There was, therefore, no requirement to link duration to effect or to take varying intensity of a cartel over time.⁶¹

The fourth ground, regarding the reduction of fine for cooperation, was quickly dismissed as inadmissible, partly because it related to questions of fact and partly because it was too vague.⁶²

5. Comment

The *KME* judgment is important because it is a first, not because it is remarkable. For the first time, the Court affirms the compatibility of the existing system of review of Commission decision imposing fines with the fundamental right to a fair trial and to an effective remedy. It does so on the basis of Article 47 of the Charter alone, without relying on the ECHR (5.1), thus avoiding some difficult issues. The Court affirms that EU Courts' review is in principle Article 47-compliant because of the scope and possible depth of review of legality. While it seems correct to consider that the process of review (of legality) rather than the powers of the Court (full jurisdiction) should be at the centre of the analysis, the *KME* judgment only offers limited guidance for the assessment of the suitability of judicial review of a Commission decision in a particular case. In other words, what is needed is a framework for the appraisal of review of judicial review (5.2).

5.1. *Charter only: The exclusion of Article 6 ECHR*

As mentioned already, in *KME*, as in *Chalkor*, the Court, unlike the appellant and the Advocate General, relies not on Article 6 ECHR but solely on Article 47 of the Charter.⁶³ This disposes of the need to rule on the classification of fines imposed in competition law cases as “criminal” within the meaning of Article 6 ECHR, and consequently, on whether antitrust sanctions belong to the “hard core” of “criminal matters” within the meaning of the Convention.

58. Judgment, para 63.

59. Judgment, para 64.

60. Judgment, para 69.

61. Judgment, para 66.

62. Judgment, para 81.

63. Judgment, para 106; *KME II*, cited *supra* note 3, para 133; *Chalkor*, cited *supra* note 4, para 67.

On these points, Sharpston's Opinion will remain, for the time being, the most recent authority.⁶⁴

It is not entirely clear why the Court declined to apply Article 6 ECHR.⁶⁵ Was it because "the argument that competition proceedings are criminal in nature (within the meaning of Article 6 of the ECHR) is not relevant to the Court's review, since that review has to satisfy the same criteria whether the proceedings are regarded as forming part of the hard core of criminal law within the meaning of the case law of the European Court of Human Rights or are covered by administrative law", as the appellant in *Chalkor* submitted?⁶⁶ Or did the second chamber want to avoid the issue for other reasons?

It is not difficult to identify such reasons. Indeed, there are uncertainties as to whether the current EU system complies with the requirement that, when non hard-core criminal sanctions are applied by an administrative body rather than an independent tribunal, those decisions should be subject to review by a judicial body having "full jurisdiction".⁶⁷ The characteristics of full jurisdiction, according to the ECtHR, "include the power to *quash* in all respects, on questions of fact and law, the decision of the body below".⁶⁸ The French version seems to contain a somewhat more stringent requirement. It reads that the reviewing court must have "le pouvoir de *réformer* en tous points, en fait comme en droit, la décision entreprise", which means that the judicial body reviewing the administrative decisions, i.e. the General Court in the EU system, must have the power to *substitute its decision* for that of the administration.

While it is clear that the General Court enjoys such a power in relation to fines, it is far less clear that it also has it in relation to other elements in decisions imposing fines.⁶⁹ However, despite the fact that Article 261 TFEU provides "[r]egulations adopted jointly by the European Parliament and the Council, and by the Council, pursuant to the provisions of the Treaties, may give the Court of Justice of the European Union unlimited jurisdiction with regard to the *penalties* provided for in such regulations", and that Article 264 expressly limits the relief that may be granted by the Court to annulment, some authors contend that Article 31 of Regulation 1/2003, which provides that

64. It is not the first. See notably Judge Vesterdorf acting as Advocate General in Cases T-1-4 & 6-15/89, *Rhône-Poulenc v. Commission*, [1991] ECR II-867 at I.A.5 and I.E.5.

65. Arguably, this might have been a reason to reassign the case to the Grand Chamber.

66. *Chalkor*, cited *supra* note 4, para 50.

67. *Valico*, cited *supra* note 27, and the case law cited there, cited in footnote 32 of the Opinion.

68. *Ibid.*, emphasis added.

69. See Slater and Waelbroeck, "'Marginal review' by the European court of justice in competition cases and its compatibility with fundamental rights", in Merola and Waelbroeck, *op. cit. supra* note 1, pp. 275–289.

“[t]he Court of Justice shall have unlimited jurisdiction to review *decisions* whereby the Commission has fixed a fine” should be read literally.⁷⁰ Reasoning on the basis of the French version of the *Valico* judgment, such an extensive interpretation of the EU Courts’ unlimited jurisdiction is necessary to ensure compliance with Article 6. However, taking the English version as a starting point, it seems possible to argue that review of legality on all points of a decision imposing fines is enough to satisfy the “full jurisdiction” requirement.⁷¹ In light of this uncertainty, and in a case where the appeal was restricted to the amount of the fine, it is understandable that the Court may not have wanted to engage in this complex and politically charged discussion.

There is no particular reason to think that the Court disagreed with A.G. Sharpston’s view that fines imposed in competition law should be classified as criminal within the meaning of the Convention. Indeed, after the ECtHR had ruled in *Menarini* that sanctions for violations of Italian competition law are criminal in nature,⁷² it would seem difficult to disagree.⁷³ Sanctions applicable under Italian law share many key features with EU sanctions: they are not criminal within the meaning of national law and they can be as high as 10% of worldwide turnover. The ECtHR applied the *Engel* criteria and held that the last two of those three criteria – i) nature of the offence and ii) nature and severity of the sanctions – were fulfilled. With regard to the nature of the offence, it reasoned that competition law violations affected general societal interests and that the legislation protecting competition had both a preventive and repressive aim.⁷⁴ With regard to the severity of the sanction, which in the instant case was EUR 6 million, the Court commented that this was “high”.⁷⁵

70. Muguet-Poullennec et al., op. cit. *supra* note 47 and Gérard, “Breaking the EU Antitrust Enforcement Deadlock: Re-empowering the Courts?”, 36 EL Rev. (2011), 457–479; both argue in favour of a broad construction of Art. 31 but recognize that the case law offers little support.

71. The language of proceedings in *KME* and *Chalkor* was English.

72. ECtHR, *Menarini Diagnostics v. Italy*, Case 43509/08 (judgment of 27 Sept. 2011, available only in French and Italian versions at the time of writing), §§ 38–44. See case note by Oliver, “‘Diagnostics’—a Judgment Applying the Convention of Human Rights to the Field of Competition”, (2012) *Journal of European Competition Law & Practice*, 10.1093/jeclap/lpr097. The ECtHR had reached a similar finding in relation to French competition law sanctions in *Stenuit v. France* (1992) 14 EHRR 509.

73. The *Menarini* judgment was handed down two months prior to the *KME* judgment, possibly too late for the Court to take it into account, as the *KME* judgment was probably ready and in the process of being translated in all official languages. In any event, if the Court had wanted to expressly rely on *Menarini*, it may have considered re-opening of proceedings.

74. *Menarini*, cited *supra* note 72, para 40 and case law cited.

75. *Menarini*, *ibid.*, paras. 41–42.

If there had been any doubt, and, arguably, there was very little,⁷⁶ it seems that after *Menarini*, both by analogy and *a fortiori*, EU fines can only be criminal within the meaning of Article 6 ECHR.

It could also be that, by referring only to Article 47 of the Charter, the Court is not only buying time but also opening an alternative route. Article 47(1) requires an “effective remedy” for “[e]veryone whose rights and freedoms guaranteed by the law of the Union are violated”. This text does not contain any reference to civil or criminal matters.⁷⁷ Nor does it explain what an “effective remedy” is. By making Article 47 of the Charter rather than Article 6 ECHR its point of reference, the Court may have reserved itself the possibility of not classifying competition law sanctions under any particular heading, as well as the liberty to consider that the annulment of a decision, even without a *de novo* review, qualifies as an effective remedy.⁷⁸ Article 47 case law is in its infancy and the Court may be opting to raise its own child rather than adopt an adolescent from Strasbourg. This is of course a respectable choice and there is in principle no reason to fear that it may result in a lower level of protection than that afforded by Article 6 ECHR. First of all, one should credit the Court with a determination not to settle for “anything less than an enforcement system above all suspicion when it comes to safeguarding fundamental rights”.⁷⁹ In addition, the Court is legally bound by the “equal or superior protection clause” contained in Article 52(3) of the Charter.⁸⁰ Of course, no Court has jurisdiction to ensure compliance of the Court’s case law with this provision, but that is an ordinary feature of constitutional Courts.

76. As Wils, *op. cit. supra* note 1, at 13, wrote in 2010: “That the application of the *Engel* criteria to the European Commission’s antitrust fining procedures leads to the conclusion that these procedures are ‘criminal’ within the autonomous meaning of Article 6 ECHR, is no longer news today”.

77. Note that Art. 6 ECHR uses both phrases to describe its scope but also doesn’t make a distinction as such.

78. The notion of effective remedy under Art. 13 ECHR does not have the same scope as that contained in Art. 47 of the Charter. It would therefore seem that, on this point, there is some room for an autonomous interpretation of Art. 47 by the Court. Art. 13 ECHR provides: “Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

79. The words of Judge Wahl, who gives such credit to the Union legislator. Wahl, “The Role of the Court of Justice in Ensuring Compliance with Fundamental Rights in Competition Cases Since The Lisbon Treaty”, in Merola and Waelbroeck, *op. cit. supra* note 1, pp. 265–274 at 268.

80. “In 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. This provision shall not prevent Union law providing more extensive protection”.

An optimist might say that the EU Courts could develop under Article 47 of the Charter a clear framework and, effectively, a higher protection of the right to a fair trial in competition law proceedings. Following the *Menarini* judgment, there is certainly a need for the case law of the EU Courts to raise the standard of protection. In that judgment, the Strasbourg Court held that the review of decisions of the Italian competition authority by Italian administrative Courts complied with Article 6(1) requirements. This ruling was disappointing, as it seemed to water down the requirements of effective jurisdictional review in competition law cases.⁸¹ This is very apparent from the dissenting opinion of Judge Pinto de Albuquerque. According to the dissenting judge, the review of the competition authority's decision by the administrative tribunal of Latium and the appeal on points of law before the Council of State do not satisfy the requirement of full jurisdiction. According to him, this is because Italian administrative Courts, whose jurisdiction is limited to a review of legality, profess and practice a doctrine of "restricted review". The formulae describing this review are very close to those encountered in the case law of the Court of Justice. Italian administrative Courts "may not substitute their own technical appreciations of facts to that of the administrative authority".⁸² Judge Pinto de Albuquerque argues that, under the Italian system, administrative judges do not in fact review the application of law to facts. The core of the administrative decision, in particular the finding of a violation and the attribution of responsibility, is outside the scope of what he calls a "weak" judicial review.⁸³ This review is described as a review on the basis of common sense and limited to internal consistency of the decision under review.⁸⁴ It is clear that such a review is far weaker than the review of the General Court and the Court over Commission's decision. This is precisely what is worrying: if such a weak review satisfies the requirements of Article 6 ECHR, not only is the EU system immune from any challenge, but, more importantly, it also means that Article 6 cannot be trusted to be the basis of effective protection. The fact that the ECtHR glossed over the issues raised in the dissenting opinion, in particular the fact that the review must go to the core of the decision, is cause for concern. In this context, it may not be such a bad thing that the Court chose to inaugurate its Article 47 case law in *KME*.

In order to develop this case law on solid ground, one elementary question seems to deserve some attention: that of the applicability of Article 47 to

81. Abenhaïm, "Quel droit au juge en matière de cartels ? Commentaire de l'arrêt *Menarini Diagnostics c/Italie*", 48 RTDeur 2012, 117-133.

82. Dissenting opinion in *Menarini*, cited *supra* note 72, para 4, our translation.

83. Dissenting opinion in *Menarini*, *ibid.*, para 5.

84. *Menarini*, *ibid.*, para 15.

competition law proceedings. It is not submitted that Article 47 is inapplicable, but it is striking that neither the parties nor the Court seem to have paid attention to the fact that applying Article 47(1) of the Charter in the context of competition law proceedings supposes that undertakings who are accused of infringing competition law provisions are persons “whose rights and freedoms are guaranteed by the law of the Union”. The first of these two elements, namely that undertakings qualify as “persons” under Article 47 of the Charter is not really problematic. While in some cases, identifying the legal person to whom a Commission decision should be addressed may be difficult, there is always at least one legal person which can claim procedural rights. Moreover, legal persons are beneficiaries of the rights protected by Article 47, as the judgment in *DEB* illustrates.⁸⁵ In that case, the Court was asked whether companies could rely on the principle of effective judicial protection expressed in Article 47 to claim legal aid (when this possibility was effectively denied under German law). In its answer, the Court made clear that legal persons are not excluded from the beneficiaries of Article 47. This is not to say, however, that companies should, as a matter of principle, enjoy the same rights as natural persons or that all legal persons must enjoy the same degree of protection⁸⁶. Indeed, in *DEB*, the Court ruled that Member States may differentiate between natural and legal persons, between profit-making and non-profit making legal persons as long as the conditions for legal aid pursue a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the legitimate aim which it is sought to achieve.⁸⁷ While legitimate aims would be different for restricting access to legal aid and for restricting access to judicial review, the notion that differentiated regimes may coexist under Article 47 could conceivably be transposed to the right to an effective remedy. If the Court were to rely on such reasoning in the future, it would also have to take other factors into considerations, including the substantive right at stake.⁸⁸

This leads to the second element that needs to be examined if one follows the wording of Article 47(1), namely identifying the right and/or freedom whose protection is at stake in the context of competition law proceedings. The

85. Case C-279/09, *DEB* [2010] ECR I-13849.

86. See *DEB*, cited previous note, para. 62.

87. *DEB*, cited *supra* note 85, para. 60.

88. In *DEB*, cited *supra* note 85, para 61, the Court ruled, in relation to legal aid, that “the national court must take into consideration the subject-matter of the litigation; whether the applicant has a reasonable prospect of success; the importance of what is at stake for the applicant in the proceedings; the complexity of the applicable law and procedure; and the applicant’s capacity to represent himself effectively. In order to assess the proportionality, the national court may also take account of the amount of the costs of the proceedings in respect of which advance payment must be made and whether or not those costs might represent an insurmountable obstacle to access to the courts”.

wording of Article 47(1) fits perfectly a situation in which, for example, a citizen has been deprived of a right protected by EU law, say because she has been deported from a Member State other than that of which she is a national. In this example, the right that has been violated is the right to reside freely within the territory of the Member States, provided for by Article 20 TFEU and by the citizens directive.⁸⁹ By contrast, the fit between Article 47(1) and competition law proceedings seems less than perfect. If the right to a due process and to an effective remedy are only protected when a right guaranteed by EU law has been violated, it will be necessary for parties invoking the protection of Article 47(1) to identify a right and a violation.

Yet, it is not clear which right of an undertaking fined for a competition law infringement is violated. One could think of the presumption of innocence, but this is – fortunately – not relevant to every case. If Article 47(1) was to be applied in connection with this procedural right only, its scope would be far too narrow. If one looks to substantive rights, one could think of the freedom to conduct a business in accordance with Union law, guaranteed by Article 16 of the Charter. An undertaking could argue that its right to conduct business freely subject to Articles 101 and 102 TFEU is violated by a decision which finds an infringement where there is none. This line of argument sits more easily with Article 102 and 101(3) cases, but is more strained in the context of hardcore infringement of Article 101 such as cartels, because, evidently, Article 16 does not cover the freedom to cartelize. What remains, therefore, is to identify a right of cartelists, which can be invoked to trigger the protection of Article 47(1). A better solution may be to invoke right to property, guaranteed by Article 17 of the Charter. After all fines imposed in competition law proceedings are high enough to be construed as violations of that right. Another solution is to avoid any reference to a specific paragraph of Article 47, as the Court does in *KME*.

5.2. *In search of a framework for appraising judicial review*

KME complained about the *excessive deference* of the Courts towards the Commission, echoing concerns expressed in the literature.⁹⁰ Advocate General Sharpston relied on the *unlimited jurisdiction* regarding fines to dismiss this claim. The Court, for its part, bases its reasoning on an analysis of the characteristics of the *review of legality*. Apart from substantive disagreement, this diversity in emphasis prompts the question as to what is the

89. Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, O.J. 2004, L 158/77.

90. See in particular Forrester, op. cit. *supra* note 1; id., “A bush in need of pruning: The luxuriant growth of ‘Light Judicial Review’”, in Ehlermann and Marquis, op. cit. *supra* note 1.

proper basis for reasoning about judicial review of Commission's decisions (5.2.1). If review of legality is – in our view rightly – chosen, the next question is whether “limited review” is in principle or may be in practice contrary to the right to a fair trial (5.2.2).

5.2.1. *Starting point: the review of legality*

Focusing on unlimited jurisdiction, as the Advocate General did, may be entirely understandable on the basis of the French version of the ECtHR case law as regards the review of imposition of criminal sanctions by an administration, but it is not fully convincing.⁹¹ This is because unlimited jurisdiction relates to the *powers* of the Court, not to a *duty* to apply any particular standard of review. Unlimited jurisdiction only means that the Court is not restricted to the alternative between letting the decision stand or annulling it, in part or in totality, but can also modify it. This power concerns the possible content of the operative part, and not grounds, of the judgments. Indeed, the EU Courts can make use of their unlimited jurisdiction on fines irrespective of any finding of illegality.⁹² This is not necessarily a bad thing. Former President Vesterdorf has precisely urged the EU Courts to “step back a little and take an overall look at all the particular circumstances of the case and on that basis ask . . . ‘[d]oes the fine really fit the crime?’”.⁹³ Seen from this angle, unlimited jurisdiction over fines constitutes an element of justice in the EU system of review of Commission decisions by adding an element of judicial discretion rather than by providing a guarantee for any particular standard of review. It is thus not sufficient to consider unlimited jurisdiction when assessing the sufficiency of the EU system of review with the right to a fair trial.

For this reason, the choice of the Court to justify its finding of Article 47-compliance mainly on an analysis of review of legality should be approved. The review of legality provided for by Article 263 TFEU defines the toolkit of judicial control. It is therefore the proper starting point. What the Court is saying in the key paragraph 102 of its judgment is that this toolkit provides the EU Courts with the means to perform adequate control. The Court thus upholds KME's submission that the review of legality has the potential to be

91. See *supra*, text at footnotes 30–31.

92. See cases analysed by Barbier de La Serre and Winckler, “A Landmark Year for the Law on Fines Imposed in EU Competition Law Proceedings”, (2012) JECLaP, 351–370 at 369. See also Barbier de La Serre and Winckler, (2011) JECLaP, 356–370 at 369.

93. Vesterdorf, “The General Court's unlimited jurisdiction over fines”, in Merola and Waelbroeck, *op. cit. supra* note 1, pp. 137–143 at 140. See also Forrester, “A challenge for Europe's Judges: The review of fines in competition cases”, in Merola and Walbroeck, *op. cit. supra* note 1, pp. 145–190.

very deep. As mentioned, it does so by relying on *Tetra Laval*.⁹⁴ This is not the first time that the Court has applied the *Tetra Laval* formula outside merger control,⁹⁵ and there is no reason to restrict it to that field. The formula can be viewed as an interpretation of Article 263 TFEU:⁹⁶ the Court explains what the review of legality entails, namely verifying: i) whether the evidence relied on is factually accurate, reliable and consistent; ii) that evidence contains all the information which must be taken into account in order to assess a complex situation; and iii) that it is capable of substantiating the conclusions drawn from it.

5.2.2. *The unanswered question: is limited review enough?*

The *KME* judgment may be read as an expression of the intention of the Court to “marginalize marginal review”.⁹⁷ The significant findings at paragraphs 94, 102 and 105, taken together, emphasize the capacity of review of legality to be thorough to the requisite (unformulated) standard. One commentator finds it “confusing” that the Court, on the one hand, refers to a form of limited review,⁹⁸ and, on the other, affirms that discretion is not a restriction of judicial control.⁹⁹ Certainly, a clarification would be welcome and the wish expressed in this *Review* that “the Court should search for a more adequate description of what it does”¹⁰⁰ can only be reiterated. In the meantime, if one tries to map out the current state of play, the following observations can be made.

First of all, though the *Tetra Laval* formula may be viewed as expressing a form of limited review when compared to a correctness standard,¹⁰¹ nonetheless it expresses a much less deferential standard than the former *Remia* formula.¹⁰² In the evolution of the case law of the Court, *Tetra Laval*

94. Judgment para 94 quoted *supra* at note 49.

95. See cases analysed by Bailey, *op. cit. supra* note 16. See also Gérard, *op. cit. supra* note 70, footnote 47.

96. Leaving aside the final sentence of para 39 of *Tetra Laval*, which is specific to merger control.

97. Jaeger, “The standard of review in competition cases involving complex economic assessment: Towards the marginalisation of marginal review?”, (2011) JECLaP, 295–314.

98. Para 94 quoted *supra* (*Tetra Laval* formula).

99. Para 102 quoted *supra*. Nazzini, *op. cit. supra* note 1, at 25.

100. Editorial comments, *supra* note 30, at 1411.

101. This is the comparison Nazzini draws in the passage referred to above.

102. In *Remia* and in a number of subsequent cases, the Court held “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) 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,

represents progress. Viewed from this angle, the contrast between paragraph 94 (which recalls the *Tetra Laval* formula), and paragraph 102 (where it is said that discretion is not a reason for Courts not to conduct in-depth review) of the *KME* judgment is less striking. In addition, the *Tetra Laval* formula does not express a uniform standard: while the third element expresses, in relation to control over inferences, a standard of review which falls short of the correctness standard,¹⁰³ the second element, regarding control over the appraisal of relevance, affords the Court the possibility of a very far-reaching review. Furthermore, these two statements must be read together with the passage where the Court insists on the role of the parties.¹⁰⁴ It is possible to connect all three statements into a coherent account of review of legality. In essence, the Court is saying that: i) review focuses on certain aspects of the decision (and is therefore limited in some sense); but ii) discretion is not what limits the depth of review; rather iii) it is the parties' submissions and the evidence they adduce which define the boundaries and the requirement of judicial review.

Each of these statements deserves to be considered, as do their connections. The first statement – court review applies to certain aspects of the decision – seems acceptable and can be compatible in principle with the right to a fair trial. The fact that Courts exert control over rather than duplicate the work of the Commission makes sense both in terms of specialized expertise and separation of powers.¹⁰⁵ As convincingly argued by Nazzini, it would however be necessary, in order to assess properly the compatibility of limited court review with a fair trial, to take into account the level of protection of parties' right during the administrative procedure and not only the characteristics of court review.¹⁰⁶

The second statement, according to which discretion is not what should lead the Courts to refrain from thoroughly reviewing Commission's decisions, may at first glance seem naive. This is because discretion does limit the effectiveness of control. Private practitioners feel strongly about this and it is

whether the facts have been accurately stated and whether there has been any manifest error of appraisal or a misuse of powers". Case 42/84, *Remia v. Commission*, [1985] ECR 2545, para 34.

103. Nazzini, op. cit. *supra* note 1, at 15 (text at footnote 144).

104. Judgment, para 102.

105. These classic justifications do not convincingly account for case-by-case variation of the intensity of control but they nevertheless remain principled reasons for the current institutional design. Neither should be confused with the "complexity justification". See Sibony, *Le juge et le raisonnement économique en droit de la concurrence* (LGDJ, 2008) at p. 722 et seq; Castillo del la Torre, op. cit. *supra* note 1; Bailey, op. cit. *supra* note 16 at 119 et seq.

106. Nazzini, op. cit. *supra* note 1, 17 et seq. argues that, in the current system, guarantees during the administrative procedure are not sufficient for limited review to be compatible with Art. 6 ECHR, but if functional separation of prosecution and decision was introduced at the administrative level, limited court review could stand.

also apparent in the *KME* judgment, as is evident from the way the second plea is handled. *KME* had argued that value added was more relevant than turnover to assess the size of the market. Both the General Court and the Court dismissed the claim, not because they disagreed but because the possibly superior relevance of value added is dissolved in the multiplicity of factors that are relevant for assessing gravity of an infringement.¹⁰⁷ Similarly, in relation to the fourth plea, about the uplift for duration, the Court accepts a loose attribution of relevance by holding that “it is not necessary to establish in practical terms a direct relation between that duration and increased damage to the Community objectives pursued by the competition rules”.¹⁰⁸ In the same vein, the argument that the strict consideration of duration should be mitigated by having regard for intensity of the cartel over time is rejected on the (partly implicit) grounds that variation of intensity may be relevant to an ideal appraisal of gravity, but in practice this would be too complex a refinement and that, moreover, the legislature has accepted such a simplification.¹⁰⁹ In all three examples, although relevance is a matter of law, the Courts refrain from imposing their own views on what should be relevant to appraise the amount of the fine and how relevant each factor should be. Rather, they recognize that the Commission has a margin of discretion both in relation of the determination of relevant factors (within the legal framework) and in relation to their weighting. It is this discretion that allows the Court to handle arguments about relevance in a way that may make parties feel they cannot win.¹¹⁰ This self-limitation on the part of Courts¹¹¹ leads to the fact that the following types of arguments may be dismissed without the Court reaching a genuine opinion on their substance: i) the relevance of a fact has been wrongly affirmed; ii) the relevance of a fact has been wrongly ignored; iii) the relevance of a fact has been wrongly weighted (exaggerated or underestimated). Whether this is compatible with fair trial requirements remains an open question.

Upon closer reading of paragraph 102, it is apparent that the Court probably would not object to the above account of its reasoning. Indeed, the Court does not deny that discretion constitutes a limit to the *effectiveness* of control. It merely says that it is not a valid ground “for dispensing with an in-depth review of the law and of the facts”. In other words, the Courts undertake to review parties’ submission carefully although they reserve their discretion to preserve the Commission’s discretion. Paragraph 102 would then only mean

107. Para 49 and 98 of the ECJ’s judgment and para 92 of the General Court’s judgment.

108. Para 64.

109. Para 69.

110. See e.g. Gérard, *op. cit. supra* note 70, at 469.

111. On which, see e.g. Vesterdorf, *op. cit. supra* note 93.

that discretion does not limit the *process* of review. The Court guarantees a right to be heard, not a link between the right to be heard and the right to an effective remedy. It should be noted in this regard that full appellate jurisdiction would be unlikely to change anything, as a self-limitation on judicial control is there despite unlimited powers of the Court to change the fine.

From this perspective, the third statement, in which the Court emphasizes the roles of the parties, should not be overlooked. It constitutes an integral part of the framework for assessing the Courts' review, as noted by AG Sharpston in her Opinion when, in relation to the required intensity of review, she recalled that "proceedings before the General Court are adversarial in nature".¹¹² Indeed, parties' submissions and evidence delineate the Court's obligations. Negatively, the Court can rely on parties' failure to put forward specific pleas or arguments in order to dispense with the examination of certain points, as is illustrated in the *KME* judgment.¹¹³ Positively, parties' submissions define the points on which the Court is obliged to reach its own opinion. In this regard, the complexity of economic appraisal does not appear to be a true limitation. As *KME*'s counsel submitted, the Courts have in the past performed in-depth review of economic appraisal which were, by any reasonable standard, complex. Arguably, what made such a review possible was the fact that parties had analysed the issues of appraisal in such a way that they had uncovered conceptual issues underpinning the appraisal process.¹¹⁴ Thus the degree of conceptualization of parties' submissions seems a better predictor of the intensity of judicial control than complexity of issues. Yet, as suggested above, where discretion is used by the Court to dilute a question of relevance – which is always, by nature, a matter of law – the review, however exacting, may not result in a finding in favour of the applicant.

It is apparent from the above remarks that the elements contained in the *KME* judgment fall short of a coherent framework for appraising whether the EU system of review complies with the requirement of a fair trial. In this regard, the indicators for sufficiency of the review, which surface in the Opinion and in the judgment, only constitute a starting point. In order of appearance, these indicators are: i) whether the General Court requested

112. Opinion, para 74. See also Wils, *op. cit. supra* note 1, at 19, pointing out, as does the A.G., that this is fully compatible with the ECtHR case law on Art. 6 ECHR.

113. See e.g. judgment para 38: "the appellants do not indicate precisely which parts of those reports the General Court misconstrued as to their real meaning. Accordingly that argument is inadmissible".

114. Sibony, *op. cit. supra* note 105, at 710; Sibony and Barbier de La Serre, "Charge de la preuve et théorie du contrôle en droit communautaire de la concurrence: pour un changement de perspective", (2007) RTDeur, 205–252, spec. at 247.

documents; ii) the fact that parties' arguments are exposed in detail; and iii) the fact that an issue was debated at length in written and oral proceedings.

Whether the General Court requested documents and how many pages the Commission handed over in response do not, as such, appear very convincing. While it is certainly true that a Court not conducting a thorough review would not need to ask for documents, this indicator seems quite formal. It is not suggested that this applies to the General Court, but it is entirely conceivable that a court could conduct a sham review after asking for large quantities of documents. Detailed exposition of parties' arguments certainly indicates that the Court has taken cognizance of these arguments and is therefore an indicator that the right to be heard has been complied with. In connection with this indicator, Advocate General Sharpston notes, significantly, that because the General Court has exposed parties' points of view in detail, "[its] findings are *fully consistent* with the conclusion that it reached its own view".¹¹⁵ Fully consistent is a way to say it is an indicator, but not proof that the proceedings complied with the right to a fair trial. The fact that an issue has been debated at length during the hearing is an indicator put forward by the Commission in its pleadings.¹¹⁶ It is similar to the previous one, proposed by the Advocate General, and could reinforce it. Besides these three indicators, a fourth element may be inferred from Sharpston's Opinion. When reviewing the third ground, the key element in deciding that the absence of notice of a gross miscalculation is not an indicator of inadequate review by the General Court is, again, the adversarial nature of proceedings. The role of parties in the proceedings therefore has an impact on the indicators that should be used to assess the quality of judicial review.

These indicators may not be sufficient to paint a complete picture and account for the perception of quality of review. As President Jaeger said, an element of quality is the capacity of Courts to listen not only to parties but also, more broadly, to legal debates.¹¹⁷ Courts, one might add, must not only listen, they must also be seen to listen. In *KME*, the Court checked that the General Court had listened to parties but didn't itself show that it was listening to the wider legal debates.

115. Opinion para 145, emphasis added.

116. Opinion para 96.

117. Citing Pittie "Quelques vues et souhaits du praticien", remarks presented at the celebration of the 20 years of the Court of First Instance of the European Communities, on 25 Sept 2009, available at <curia.europa.eu/jcms/jcms/P_52284> (accessed 11 Aug. 2012).

6. Conclusion

In *KME*, the Court missed an opportunity to take a stance in a lively debate among practitioners and scholars. It concluded that the current system of review was compatible with the fundamental right to a fair trial, without making explicit what this right entails under Article 47 of the Charter, on which it relied. This feature deprives the judgment of the qualities of a convincing syllogism. This is not, however, a criticism. As was convincingly argued by Nazzini, fundamental rights do not lend themselves well to be applied by way of orderly syllogisms.¹¹⁸ The true disappointment with the *KME* judgment is that the Court also does not engage in any sort of balancing exercise, weighing, as a supreme court should, the many legal and political considerations which underpin the debate over judicial review. In *KME*, the guardian of the guardian of the guardian of the Treaty, i.e. the Court itself, does not expose a theory of guardianship. It merely provides two elements which can serve as starting points for a more comprehensive analytical framework. These are that: i) the adequacy of judicial control should be appraised in relation to the *process* of review of legality, not only of possible *remedies*, such as a reduction of a fine and ii) parties' submissions are an essential element in that process and court review should be appraised in relation to them. The missing elements are: i) the consideration of guarantees during the administrative phase of the procedure and ii) a clarification of the link between the quality of review and the nature of remedies available. This seems all the more necessary as Article 47 of the Charter, on which the Court relied, guarantees not only the right to a fair trial but also the right to an effective remedy.

The Court will certainly very soon have an opportunity to complete its framework of analysis, as new cases will again raise the issue of compatibility of EU Courts' review with fundamental rights, not only in relation to the level of fines, but also to findings of infringements.

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118. Nazzini, op. cit. *supra* note 1.

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