

The fiftieth shade of grey Competition law, ‘criministrative law’ and ‘fairly fair trials’

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1. Introduction

The evolution of EU competition law is a perfect illustration of the progressive blurring of the boundaries between criminal and administrative law. EU competition law has long been regarded as pertaining to the domain of administrative law. Enforced by an administrative body which imposed relatively low levels of fines on companies, this field of law did not seem to have much in common with the criminal prosecutions and trials taking place at Member State level. In addition, the European Community’s lack of criminal competence made it logically impossible for an EC policy to fall within the field of criminal law. That conclusion was confirmed by Article 15(2) of Regulation No. 17¹, which provided that decisions imposing fines on account of a breach of competition law are not of a criminal law nature.

However, it seems that two factors have progressively undermined this widespread consensus on the non-criminal law nature of competition law.

First, penalties for breaches of competition law have been increasingly toughened up. At EU level, the amounts of fines imposed on undertakings have increased dramatically over the last fifty years with the stated aim of inflicting real harm on the companies concerned so as to dissuade them from re-offending. At national level, the toughening up of competition law penalties went even further, leading a number of legislatures to provide for sanctions such as imprisonment or other freedom-restricting measures applicable to the individuals responsible for infringements of competition law.

Second, the ‘criminal law’ category has been given an autonomous and extensive meaning in the case-law of the European Court of Human Rights (hereinafter, Eur. Court HR). In its seminal judgment *Engel v. The Netherlands*², the Strasbourg Court has considered that, for the purposes of application of Article 6 of the European Convention on Human Rights (hereinafter, ECHR), even State measures which are not expressly characterised as “criminal” can nonetheless fall into that category depending on the nature of the offence concerned and the degree of severity of the penalty that they provide for.

These two developments paved the way for a timid recognition of the criminal or at least ‘quasi-criminal’ character of penalties imposed in the framework of EU competition (more specifically, anti-trust) law³. This evolution, however, has not simply resulted in the transfer

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¹ *OJ*, no. 13, 21 February 1962, p. 204-211.

² Eur. Court HR, 8 June 1976, *Engel v. The Netherlands*, series A, no. 22, para. 82.

³ For a discussion of the criminal character of competition law, see e.g. D. SLATER, S. THOMAS, D. WAELBROECK, “Competition law proceedings before the European Commission and the right to a fair trial: no

of competition law from the familiar sphere of administrative law to the equally well defined field of criminal law. Quite to the contrary, competition law today seems to be stranded somewhere in the middle of these two spheres, in a grey zone which, for want of a better word, could be called ‘criministrative law’.

It is submitted that this awkward position is not a temporary stage that competition law will progressively leave as it continues its journey toward the core of criminal law. Neither is it an unfortunate accident in the legal universe, as if competition law was an isolated meteorite straying amidst the orbits of the administrative and criminal law planets.

It is suggested that this shift of competition law toward the intermediary sphere of ‘criministrative law’ is not only long-lasting, but that it signals a change in the perception of the criminal law – administrative law divide. Looking at it in that perspective, the ‘criminalisation’ of competition law questions the very existence of a clear-cut divide between the supposedly watertight precincts of administrative and criminal law. More specifically, this phenomenon draws attention to the growing spectrum of grey areas in between the white zone of purely administrative law measures and the black core of indisputably criminal measures.

Once identified (part 2 of this paper), this drift of competition law into the ‘criministrative’ area raises a number of questions. Most crucially, it calls for the establishment of a new legal regime made up of standards which reflect the medium position of ‘criministrative’ law on the punitive scale – standards which would be both stricter than those prevailing in administrative law and lower than those curtailing the enforcement of ‘traditional’ criminal law. We will see that such a grey legal regime is currently emerging in the case-law of both the European Court of Justice (ECJ) and the Eur. Court HR, taking the form of what one might call ‘fairly fair’ trial standards (part 3 of this paper).

Finally, a few concluding remarks will challenge the desirability of such a trend. It will be argued that grey zones are replete with danger and that the rule of law can easily get lost in these foggy grey zones. It will be further submitted that, at any rate, should the invasion of grey prove unavoidable, competition law should at least be classified in the darkest shade of grey, namely as close as possible to the black zone of pure criminal law.

2. A new label – ‘criministrative’ law

A. Competition law as criminal law

There has long been a broad consensus that fines imposed under EU competition law do not amount to criminal sanctions. After all, the EU authorities had raised and settled the question

need for reform?”, GCLC Working Paper 04/08, available at : <http://www.coleurope.eu/content/gclc/documents/GCLC%20WP%2004-08.pdf>; C. SMITS, D. WAELBROECK, “Le droit de la concurrence et les droits fondamentaux”, in M. CANDELA SORIANO (dir.), *Les droits de l’homme dans les politiques de l’Union européenne*, Brussels, Larcier, 2006, p. 135-162 ; A. BAILLEUX, “Le salut dans l’adhésion ? Entre Luxembourg et Strasbourg, actualités du respect des droits fondamentaux dans la mise en œuvre du droit de la concurrence”, *R.T.D.E.*, 2010, p. 31-54 ; W. WILS, “Is Criminalisation of EU Competition Law the Answer ?”, available at [http://www.eui.eu/RSCAS/Research/Competition/2006\(pdf\)/200610-COMPed-Wils.pdf](http://www.eui.eu/RSCAS/Research/Competition/2006(pdf)/200610-COMPed-Wils.pdf).

themselves in Article 23(5) of Regulation 1/2003⁴, which provides that : “*Decisions [imposing fines for competition law breaches] shall not be of a criminal law nature.*”

However, this reference started to lose ground as soon as EU competition lawyers became aware of the landmark *Engel* judgment of the Eur. Court HR⁵. In that case, the Strasbourg court famously held that the concept of criminal law is vested with an autonomous meaning for the purpose of Article 6 (right to a fair trial) and 7 (*nullum crimen sine lege*) of the ECHR. In that respect the Court ruled that, in order to determine whether a given “charge” must be regarded as criminal, “*it is first necessary to know whether the provision(s) defining the offence charged belong, according to the legal system of the respondent State, to criminal law, disciplinary law or both concurrently. This however provides no more than a starting point. The indications so afforded have only a formal and relative value and must be examined in the light of the common denominator of the respective legislation of the various Contracting States. The very nature of the offence is a factor of greater import. (...) However, supervision by the Court does not stop there. Such supervision would generally prove to be illusory if it did not also take into consideration the degree of severity of the penalty that the person concerned risks incurring*” (para. 82).

In other words, the Court considered that, even where a specific sanction or procedure was not explicitly labelled as “criminal” under the relevant legal system, it could still be regarded as criminal for the purpose of the guarantees afforded by the ECHR.

It took about nine years for the Strasbourg human rights bodies to apply the *Engel* criteria to competition law enforcement. In *Société Stenuit v. France*, the European Commission on Human Rights considered that the enforcement of French competition law in the case at issue unambiguously fell under the criminal heading of Article 6 ECHR. In that respect, the Commission noted that, insofar as it sought to preserve free competition, the measure at stake aimed to safeguard the general interest of society, which is usually protected through criminal law. The Commission also took into account the fact that the financial sanction imposed on the company by the French Minister for Economy was an alternative to the transmission of the file to the criminal prosecutor. Finally, the Commission considered that the sanctions provided for “*obviously*” had a dissuasive character insofar as they could amount to a maximum of 5% of the company’s turnover⁶.

The criminal character of French competition law enforcement was confirmed by the Eur. Court HR in its decision *Lilly v. France*⁷. It is remarkable that the French government itself reached the same conclusion as the Court in spite of the fact that competition law was not classified as criminal law under French law.

French competition law is not the only one that has been characterised as criminal for the purposes of the ECHR⁸. In *Menarini v. Italy*⁹, the Court held that a fine of EUR 6 million

⁴ Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, *OJ*, no. L1, 4 January 2003, p. 1.

⁵ See fn. 2.

⁶ Eur. Comm. HR, Report (31), 30 May 1991, *Société Stenuit v. France*, paras 62-65.

⁷ Eur. Court HR, 3 December 2002 (decision), *Lilly France SA v. France*.

⁸ See however Eur. Court HR, 3 June 2004 (decision), *OO Neste v. Russia*, in which the Court considered that, based on the *Engel* criteria, a decision ordering the confiscation of the profit gained through anticompetitive practices did not fall under the criminal head of Article 6.

⁹ Eur. Court HR, 27 September 2011, *A. Menarini Diagnostics S.R.L. v. Italy*, paras 40-42.

imposed pursuant to Italian competition law fell under the criminal head of Article 6 ECHR. The Court took into account the goal of the legislation that gave rise to the imposition of the sanction (i.e. maintenance of free competition) as well as the nature (dissuasive and repressive) of the sanction. The Court also emphasised the severity of the sanction.

The Strasbourg Court has not yet ruled on the criminal law nature of EU competition law. The few cases that were brought against fines imposed by the Commission on account of breaches of EU competition law failed at the admissibility stage¹⁰. Since then, the *Connolly* decision¹¹ – a staff case – has made it clear that the Court has no jurisdiction to rule on decisions adopted by the Commission. This situation is not likely to change until the formal accession of the EU to the ECHR.

This lack of an explicit ruling of the Eur. Court HR regarding EU competition law has enabled the EU courts to turn a (half-)blind eye to the *Engel – Stenuit – Lilly – Menarini* string of cases.

To be fair, it is worth noting that the EU courts are being put in an awkward position. On the one hand, the case-law of the Eur. Court HR clearly points towards the recognition of the criminal character of the fines imposed pursuant to EU competition law. On the other hand, Regulation 1/2003¹² – as well as its predecessor, Regulation no. 17 –, which organises the enforcement of EU competition law, explicitly provides that “[d]ecisions [imposing fines for competition law breaches] shall not be of a criminal nature” (Art. 23(5)).

In that context, it is not very surprising that, after having briefly been receptive to the Eur. Court HR’s position¹³, the Court of Justice and the General Court (then Court of First Instance) – unlike some Advocate Generals¹⁴ – bluntly rejected the criminal law nature of EU competition sanctions based on a reference to a legal text. In the *Volkswagen* case, for example, the Court of Justice simply referred to the fact that “Article 15(4) of Regulation No 17, moreover, provides that decisions imposing such a fine are not of a criminal law nature”¹⁵ in order to reject the claim that the intentional nature of the breach cannot be established without identifying the (natural) persons responsible for it.

Similarly, in *Compagnie Maritime Belge*, the General Court found that the principle of retroactivity *in mitius* did not apply to competition law infringements. In support of that

¹⁰ Eur. Comm. HR, 9 February 1990, *Melchers & Co. v. Germany*, D.R. no. 64, p. 146, in which the Commission nonetheless seems to consider that the principles that govern national competition rules could in theory also apply to EC competition law (p. 152) ; Eur. Court HR, 6 March 2004, *Senator Lines. v. [15 Member States of the European Union]*.

¹¹ Eur. Court HR, 9 December 2008, *Connolly. v. [15 Member States of the European Union]*.

¹² Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, *OJ*, no. L1, 4 January 2003, p. 1.

¹³ ECJ, 8 July 1999, judgment C-199/92 P, *Hüls v. Commission*, ECR, p. I-4336, para. 150 : “It must also be accepted that, given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, the principle of the presumption of innocence applies to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments (see, to that effect, in particular the judgments of the European Court of Human Rights of 21 February 1984, *Öztürk*, Series A No 73, and of 25 August 1987 *Lutz*, Series A No 123-A)”

¹⁴ See e.g. the Opinion of Judge Vesterdorf acting as Advocate General in T-1/89, *Rhône-Poulenc v. Commission*, ECR, p. II-867, at p. 885 ; Opinion of AG Léger in C-185/95 P, *Baustahlgewebe v. Commission*, ECR, p. I-8422, para. 31.

¹⁵ ECJ, 18 September 2003, judgment C-338/00 P, *Volkswagen v. Commission*, ECR, p. I-9219, para. 96.

conclusion, it held that “[t]he applicant’s argument that substantive Community competition law is criminal in nature and that the Commission was therefore required to take into account in the contested decision the evolution in such law which is alleged to be favourable to the applicant must also be rejected. In effect, the premiss of that argument is incorrect. It follows from the wording of Article 19(4) of Regulation No 4056/86 that even the fines imposed under that provision are not of a criminal law nature”¹⁶.

However, it appears from the reasoning of the EU courts that the wording of the relevant regulations is not the only reason why they refuse to recognise the criminal-law nature of competition law sanctions. Indeed, as both courts put it in the abovementioned judgments, “[t]he effectiveness of Community competition law would be seriously affected if the argument that competition law formed part of criminal law were accepted”¹⁷.

This statement is undoubtedly surprising. It cannot be disputed that one of the main effects – if not one of the main goals – of due process rights is to curtail the exercise of the State’s punitive power. The presumption of innocence, the equality of arms principle, the non-retroactivity principle and the like can all be regarded as obstacles to the effective enforcement of criminal law. To be sure, this is not a good reason to jettison these principles – quite to the contrary.

It is submitted that the EU courts’ blunt statement can only be understood by some sort of defiance toward the companies targeted by competition law. This defiance is best illustrated by the following statement of Advocate General Jarabo-Colomer in *Volkswagen*: “[t]he body of safeguards developed in the field of criminal law, which has as its protagonists the penalising State, on the one hand, and the individual charged with the offence on the other, is not transferred en bloc to the field of competition law. Those safeguards are designed specifically to compensate for that imbalance of power. In the case of free competition, those parameters are altered, since it is sought to protect the community of individuals which constitutes society and is composed of groups of consumers against powerful corporations with significant resources. To accord such offenders the same procedural safeguards as those accorded to the most needy individuals, apart from being a mockery, would entail, essentially, a lower degree of protection, in this case economic protection, for the individual as the main victim of anti-competitive conduct”¹⁸.

It is an understatement to say that this cut-and-dried opinion is questionable, as a matter of both principle and facts. As a matter of principle, making the array of procedural safeguards depend on the presumed size and power of the entity being the subject of repression would take the EU down a very slippery road. In terms of the facts, it is doubtful whether the undertakings that are the subject of antitrust proceedings are necessarily wealthy and powerful. The Commission regularly imposes fines on ailing companies which are on the verge of bankruptcy. In any event, it is simply misleading to portray competition law proceedings as trials pitching powerful corporations and needy individuals against each other. One cannot lose sight of the fact that the enforcement of competition law lies with the

¹⁶ GC, 1 July 2008, judgment T-276/04, *Compagnie maritime belge v. Commission*, ECR, p. II-1277, para. 66.

¹⁷ See *Volkswagen*, fn. 15, para. 97; *Compagnie maritime belge*, fn. 16, para. 66.

¹⁸ Opinion delivered on 17 October 2002 in *Volkswagen*, fn. 15, para. 66.

Commission and the national competition authorities¹⁹, which are backed by the *imperium* of the Member States.

B. Competition law as criministrative law

Thirty years after its *Engels* judgment, the Eur. Court HR found it necessary to refine its extensive reading of the ‘criminal law’ category. In *Jussila v. Finland*, regarding the imposition of tax surcharges, the Court suggested that a distinction should be made, within the criminal law category, between a ‘core’ and a ‘periphery’: “*It is self-evident that there are criminal cases which do not carry any significant degree of stigma. There are clearly “criminal charges” of differing weight. (...) Tax surcharges differ from the hard core of criminal law*”²⁰.

This introduction of shades of grey within the black zone of criminal law seems at first sight sensible. It is pretty clear that the imposition of a fine for a breach of economic laws cannot be compared with the conviction to a lifelong prison sentence for an assault committed on a person.

In that respect, it should be noted that, well before *Jussila*, the Court had already considered that minor offences could call for a more relaxed application of the fair trial standards²¹.

However, the problem starts when one tries to draw a general line between the so-called core and periphery of criminal law. The Eur. Court of HR’s case law does not provide clear guidance as to the criteria governing the demarcation between criminal and ‘criministrative’ law. It appears from this piecemeal case-law that the type of sentence at stake²² (imprisonment v. fine), the severity of the sanction²³ (the amount of the fine) and the type of court having jurisdiction over it²⁴ (criminal v. administrative court) can be taken into account by the Strasbourg Court in order to determine the existence of a “significant degree of stigma” leading to the hard core of criminal law.

The Eur. Court of HR has never ruled on the question as to whether competition law fines pertained to the core or to the periphery of criminal law. In its abovementioned (post-*Jussila*) *Menarini* judgment, the Court simply held that the sanction imposed by the Italian authorities was of a criminal nature without going into further details on this general finding.

In spite of this cautious silence, the emergence of a ‘criministrative law’ category was enthusiastically embraced by a number of Advocate Generals at the EU Court of Justice in order to characterise the fines imposed within the framework of EU competition law. In its Opinion in *Schenker*, Advocate General Kokott stated, for example, that “[a]lthough antitrust law is not part of the core area of criminal law, it is recognised as having a character similar to criminal law”²⁵. In the same vein, Advocate General Sharpston considered that “I have

¹⁹ I leave aside the private actions for damages brought by (or on behalf of) consumers before domestic courts against companies that are claimed to have breached competition law, as nobody would argue that such “civil” actions fall within the scope of criminal law.

²⁰ Eur. Court HR, 23 November 2006, *Jussila v. Finland*, paras 43.

²¹ See for example Eur. Court HR, 29 October 1991, *Fejde v. Sweden*, para. 33.

²² Eur. Court HR, 29 September 2009, *Talabér v. Hungary*, para. 27.

²³ Eur. Court HR, 12 May 2010, *Kammerer v. Austria*, para. 29.

²⁴ *Id.*, para. 28.

²⁵ Opinion delivered on 28 February 2013, in C-681/11, *Schenker*, not yet reported, para. 40.

*little difficulty in concluding that the procedure whereby a fine is imposed for breach of the prohibition on price-fixing and market-sharing agreements in Article 81(1) EC falls under the ‘criminal head’ of Article 6 ECHR as progressively defined by the European Court of Human Rights. [...] If the fining procedure in the present case thus falls within the criminal sphere for the purposes of the ECHR (and the Charter), I would none the less agree that, in the words of the judgment in Jussila, it ‘differ[s] from the hard core of criminal law; consequently, the criminal-head guarantees will not necessarily apply with their full stringency’*²⁶.

Not all Advocate Generals share this view, however. In *AstraZeneca*, AG Mazak considered that the applicant’s line of reasoning “*constitutes an attempt to apply criminal evidential standards to a procedure which the Court of Justice has stated is administrative rather than criminal in nature and is somewhat incoherent with Article 23(5) of Council Regulation (EC) No 1/2003, which provides that fines imposed pursuant to that provision shall not be of a criminal law nature*”²⁷.

The Court of Justice itself has not yet referred to competition law as belonging to so-called ‘quasi-penal’ or ‘criministrative’ law. However, the *Jussila* case-law of the Eur. Court HR may have reconciled the Court with the idea that EU competition law could be regarded as falling within the periphery of criminal law for the purposes of due process rights. Evidence of this can be found in *Weichert v. Commission* where, instead of bluntly stating that competition has nothing to do with criminal law, the Court considered that it was not “*necessary to examine whether a fine such as that imposed on the appellant by the contested decision is of a criminal law nature for the purposes of Article 6(2) of the ECHR*”²⁸. Even more tellingly in *Schindler v. Commission*²⁹, the Court referred to the *Menarini* judgment, implicitly endorsing the view that high fines for breach of competition law could fall within the criminal sphere.

In view of the above, it seems that the brand new ‘criministrative law’ category could help the Luxembourg and the Strasbourg courts to achieve a compromise for the purposes of characterising competition law enforcement. On the one hand, it signals the Eur. Court H.R.’s will to somewhat mitigate the *en bloc* extension of the criminal law sphere initiated in *Engels*. On the other hand, it makes the ‘criminalisation’ of competition law more palatable for the Court of Justice.

It nonetheless remains to be seen whether both courts will ever come to an agreement on this topic. One should not forget that, in *Menarini*, the Strasbourg Court refrained from deciding whether high fines designed to punish cartel offenders fell within the core or the periphery of criminal law. Conversely, the EU courts are obviously afraid of openly using the term “criminal” to designate competition law lest this would open the door to a flood of claims for new rights and guarantees which would further impair the effectiveness of anti-trust enforcement.

3. A new standard – ‘fairly fair trial’

²⁶ Opinion delivered on 10 February 2011, in C-272/09 P, *KME Germany e.a. v. Commission*, not yet reported, paras 64 and 67. See also, albeit more ambiguously, the opinion delivered by AG Bot on 26 October 2010 in C-201/09 P and C-216/09 P, *ArcelorMittal Luxembourg SA v. Commission*, ECR, p. I-2239, para. 41 : “*While that procedure is not strictly speaking a criminal matter, it is none the less quasi-penal in nature*”.

²⁷ Opinion delivered on 25 May 2012 in C-457/10 P, *AstraZeneca v. Commission*, not yet reported, para. 50.

²⁸ ECJ, 16 November 2010, Judgment C-73/10 P, *Weichert v. Commission*, ECR, p. I-11535, para. 53.

²⁹ ECJ, 18 July 2013, Judgment C-501/11 P, *Schindler v. Commission*, ECR, not yet reported, para. 33.

At this stage, many a reader will probably consider this dispute over labels as much ado about nothing. After all, don't the EU courts already grant to undertakings most guarantees applicable to criminal proceedings? And doesn't the Strasbourg Court already agree that some of these guarantees do not fully apply to cases which do not belong to the core of criminal law? Therefore, can't we already consider that, in spite of their disagreement on *words*, both courts are already in agreement over the *substance* of the law governing competition law proceedings? Or to put it in the words of this conference's title: do labels still matter?

It is submitted that they do and for two reasons. First, we will see that the way the European courts conceive of competition law ('peripheral criminal law' (Strasbourg) as opposed to 'hard administrative law' (Luxembourg) does indeed have a bearing on the rights and guarantees that they are willing to give to the undertakings concerned. Second, it is argued that the emergence of a legally recognised grey zone, i.e. 'criministrative law', is a risky process which in itself may represent a threat to the rule of law.

A. 'Fairly fair trial' standards in Strasbourg

In its *Jussila* judgment, the Eur. Court H.R. held that "*tax surcharges differ from the hard core of criminal law; consequently, the criminal-head guarantees will not necessarily apply with their full stringency*". As this quote illustrates, the 'invention' of 'criministrative law' was directly connected to a relaxation of the standards provided for by the ECHR.

It should, however, be recalled that the application of lower requirements can already be found in cases pre-dating the formal recognition of a 'peripheral' criminal law. For example, the Court has long considered that "*[c]onferring the prosecution and punishment of minor offences on administrative authorities is not inconsistent with the Convention provided that the person concerned is enabled to take any decision thus made against him before a tribunal that does offer the guarantees of Article 6*"³⁰. In the same vein, the Court considered in two judgments delivered on 29 October 1991 that the "*special features of the domestic proceedings*"³¹ or "*the minor character of the offence*"³² justified the lack of an oral hearing before an appellate court.

It nevertheless seems that the creation of a 'quasi penal' category has paved the way for an extension and a systematisation of this flexible approach. Looking at it in that perspective, one could fear that the recognition of a grey legal category, i.e. 'criministrative law' leads to the creation of a similarly grey legal standard, i.e. 'fairly fair trial'.

It appears from the current case-law that this relaxed standard entails a number of deviations from the classic Article 6 ECHR fair trial guarantees.

First, this 'fairly fair trial' standard is less strict than the wording of Article 6(1), which provides that "*[i]n the determination 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*".

³⁰ Eur. Court HR, 21 February 1984, *Öztürk v. Germany*, series A, no. 73, para. 56 (and references cited therein).

³¹ Eur. Court HR, 29 October 1991, *Helmers v. Sweden*, para. 36.

³² Eur. Court HR, 29 October 1991, *Fejde v. Sweden*, para. 33.

As explained above, the Court accepts that peripheral criminal cases can be dealt with in the first instance by an administrative authority, which is directly at odds with the wording of Article 6. Admittedly, the Court makes this derogation conditional upon the possibility of appealing the administrative authority's decision before a genuine appellate court which must have full judicial review³³, i.e. *"the power to quash in all respects, on questions of fact and law, the decision of the body below. It must in particular have jurisdiction to examine all questions of fact and law relevant to the dispute before it"*³⁴. The problem is that the Court does not seek to ascertain whether the appellate court *actually* exercises its power of judicial review or whether it blindly relies on the factual and economic findings made by the administrative authority, thereby granting it a wide measure of discretion. The 'fairly fair trial' requirement seems to be met as soon as an independent court has, *in theory*, a power of full judicial review.

In the same vein, the 'fairly fair trial' doctrine admits of restrictions to the right to an oral hearing. In cases like *Jussila v. Finland*³⁵ and *Suhadolc v. Slovenia*³⁶, the Court found that *"the obligation to hold a hearing is not absolute (...) the character of the circumstances which may justify dispensing with an oral hearing essentially comes down to the nature of the issues to be dealt with by the competent court – in particular, whether these raise any question of fact or law which could not be adequately resolved on the basis of the case file. An oral hearing may not be required where there are no issues of credibility or contested facts which necessitate an oral presentation of evidence or cross-examination of witnesses and where the accused was given an adequate opportunity to put forward his case in writing and to challenge the evidence against him (...). In this connection, it is legitimate for the national authorities to have regard to the demands of efficiency and economy."* In order to gauge the acceptability of dispensing with an oral hearing, the Court *"has also had regard to the minor sum at stake or the minor character of the offence"*, stressing the fact that the above considerations *"do not mean that a refusal to hold an oral hearing might be justified only in rare cases"*.

The guarantees of Article 6(1) are further undermined by the 'fairly fair trial' case-law when the Court considers that an accused may not necessarily have the right to be present at the hearing. In *Kammerer v. Austria*, the Court found that a EUR 72 fine order for non-compliance with the obligations of registered owners to have their cars duly inspected *"did not carry any significant degree of stigma"*, as a result of which the Court could not conclude that *"the administrative criminal proceedings against the applicant had been unfair on account of his absence from the hearing before the [Independent Administrative Panel]"*³⁷.

To date, the 'fairly fair trial' case-law has not had a direct impact on the presumption of innocence enshrined in Article 6(2) ECHR. One may however wonder whether such presumption is not indirectly affected by the relaxation of the Article 6(1) standards and more specifically by the possibility to have one's case dealt with at first instance by an administrative body. It should indeed be noted that this case-law leads to a reversal of the burden of proof: a person sanctioned by an administrative body becomes the appellant once it seeks judicial review of such a sanction. Accordingly, following the formula *actori incumbit*

³³ For a case where this requirement was not met, see Eur. Court HR, 2 September 1998, *Lauko v. Slovakia*.

³⁴ Eur. Court HR, 21 March 2006, *Valico v. Italy*.

³⁵ See fn. 20 above.

³⁶ Eur. Court HR, 17 May 2011, *Sudaholc v. Finland*.

³⁷ Eur. Court HR, 12 May 2010, *Kammerer v. Austria*, paras 28-30.

probatio, it is for the accused to demonstrate the flaws of the accusations made against him. Everyone will agree that this task is considerably more onerous than merely having to sit and wait until the prosecuting authority has adduced evidence of guilt “beyond reasonable doubt”.

At first sight, the ‘fairly fair trial’ case-law has not yet undermined the guarantees offered by Article 6(3) either. This finding calls, however, for a number of qualifications. First, in *Kammerer*³⁸, the Court left the door open to a lowering of such guarantees in ‘criministrative’ cases by holding that “[t]he approach adopted in the *Jussila v. Finland* case, namely to apply the criminal head guarantees of Article 6 in a differentiated manner depending on the nature of the issue and the degree of stigma certain criminal cases carried, is, in the Court’s view, not limited to the issue of the lack of an oral hearing but may be extended to other procedural issues covered by Article 6 (...)”. Second, it appears from the recent case-law that the Article 6(3) guarantees already seem to have lost their absoluteness even in “classical” criminal matters, with the Court substituting an “overall fairness assessment” to the application of a “blunt and indiscriminate”³⁹ guarantee. Third, it goes without saying that this trend is also discernible in ‘criministrative’ cases⁴⁰.

B. ‘Fairly fair’ competition proceedings in Luxembourg

It appears from the above that the Eur. Court HR has progressively developed a ‘fairly fair trial’ doctrine which admits of restrictions to the guarantees afforded by Article 6 ECHR. It should, however, be added that this flexibility is not without limits. On various occasions, the Court has emphasised that deviations from the Article 6 guarantees were only acceptable under “exceptional circumstances”⁴¹. It therefore seems that the full fair trial guarantees remain the general rule, the ‘fairly fair trial’ case-law being doomed to remain the exception.

It is questionable whether the EU courts share this state of mind when dealing with competition law proceedings. It is true that the Court of Justice and the General Courts have recognised that the right to a fair trial applies to the enforcement of competition law. However, beyond this general statement, the courts have not only embraced but also expanded on the ‘fairly fair’ trial doctrine of the Eur. Court H.R.

Let us start with two exceptions to the fair trial guarantees explicitly acknowledged by the EU courts.

The first exception is related to the combination, by the Commission, of the functions of prosecutor and judge. The Court has consistently held that the right to be heard by an impartial tribunal could not be invoked against the Commission on the ground that the latter is

³⁸ See fn. 37.

³⁹ See Eur. Court HR, 15 December 2011, *Al-Khawaja and Tahery v. United Kingdom*, para. 146.

⁴⁰ Eur. Court HR, 31 July 2007, *Zaicevs v. Lettonia*, paras 46-49. See, however, Eur. Court HR, 20 September 2011, *Yukos v. Russia*.

⁴¹ See Eur. Court HR, 29 September 2011, *Flisar v. Slovenia*, para. 33. See also, e.g., Eur. Court HR, 29 September 2009, *Talaber v. Hungary*, para. 25, and *Sandor Lajos Kiss v. Hungary*, para. 22: “in the determination of criminal charges, the hearing of the defendant in person should nevertheless be the general rule. Any derogation from this principle should be exceptional and subjected to restrictive interpretation. The absence of an oral hearing at second instance has led to violations in several criminal cases”. See also Eur. Court H.R., 10 April 2012, *Popa and Tanasescu v. Romania*, para. 46.

not a tribunal⁴². This rather circular argument was later reinforced through references to the abovementioned Eur. Court HR's case-law according to which "*provided that the right to an impartial tribunal is guaranteed, Article 6(1) of the Convention does not prohibit the prior intervention of administrative bodies that do not satisfy all the requirements that apply to procedure before the courts*"⁴³. According to the EU Courts' line of reasoning, the imposition of fines for a breach of competition rules does not amount to a violation of the right to a fair trial given that the decision of the Commission can be appealed before the General Court, which enjoys full jurisdiction in that respect.

The position of the EU courts is apparently in line with the case-law of the Strasbourg Court. It could even be argued that it is more restrictive than the latter since it seems to require the General Court to effectively exercise its review rather than simply relying on the assessments made by the Commission⁴⁴. However, one cannot overlook the fact that, far from being an exception related to minor infringements, the 'fairly fair trial standard' is applied as the rule by the EU courts. In other words, the EU courts rely on what seems to be an irrebuttable presumption that competition law sanctions necessarily call for the application of less harsh procedural requirements than what is mandated under Article 6 ECHR. Yet this automaticity runs counter to the spirit of the 'fairly fair trial' doctrine.

The second exception does not directly rest on any explicit precedent in Strasbourg. Both the Court of Justice and the General Court consider that "*the right to examine or have examined witnesses against him*" contained in Article 6(3)d) does not apply to competition law proceedings before the Commission⁴⁵. Neither of the EU courts have explained the reason why this fundamental guarantee of criminal trials did not apply to competition law proceedings. Once again, this lack of a proper justification sits uneasily with the idea that 'fairly fair trial standards' only apply in exceptional circumstances.

It is submitted that the above two exceptions are only the tip of the iceberg. It appears from a number of cases that the EU courts are reluctant to treat undertakings being the subject of competition law enforcement in the same way a criminal court would treat an indicted person. Illustrative of that approach is the General Court's statement that it "*must reject the applicant's assertion that the Commission must adduce proof 'beyond reasonable doubt' of the existence of the infringement in cases where it imposes heavy fines*"⁴⁶. Once again, one is left to wonder what justifies such a terse statement, which is clearly at variance with the Eur. Court HR's finding that it is "*a basic requirement of criminal justice that the prosecution has to prove its case beyond reasonable doubt*"⁴⁷.

⁴² See already ECJ, 29 October 1980, judgment C-209/15 *e.a.*, *van Landewyck v. Commission*, para. 81 ; ECJ, 7 June 1983, judgment C-100-108/80, *Musique diffusion française v. Commission*, ECR, p. 1825, paras 7-11.

⁴³ GC, 11 July 2007, judgment T-351/03, *Schneider Electric v. Commission*, ECR, p. II-2237, para. 183. In the same vein, see ECJ, 18 July 2013, judgment C-501/11 P, *Schindler v. Commission*, not yet reported, paras 34-37.

⁴⁴ In that respect, see, ECJ, 8 December 2011, judgment C-386/10, *Chalkor v. Commission*, not yet reported, para. 47 ECJ, 8 December 2011, judgment C-389/10, *KME v. Commission*, not yet reported, para. 129. On the other hand, see GC, 2 February 2012, *Dow Chemical v. Commission*, judgment T-77/08, not yet reported, para. 148. On that issue, see the very interesting opinion of AG Wathelet in the case *Telefonica SA v. Commission*, C-295/12 P, paras 107-173, not yet decided.

⁴⁵ ECJ, 7 January 2004, judgment C-204/00 P *e.a.*, *Alborg Portland e.a. v. Commission*, ECR, p. I-123, para. 200 ; GC, 27 June 2012, judgment T-439/07, *Coats Holding v. Commission*, not yet reported, para. 174.

⁴⁶ GC, 8 July 2008, judgment T-53/03, *BPB v. Commission*, ECR, p. II-1333, para. 64.

⁴⁷ Eur. Court HR, 13 December 2011, *Ajdarić v. Croatia*, para. 51. See also the dissenting opinion of Judge Zupancić in *Sievert v. Germany*, 19 July 2012 : "*The presumption [of innocence] authorises final decisions in cases where there is otherwise insufficient evidence as to what the plaintiff or the prosecution is actually*

The judgments of the Court of Justice in *Otis* and *Ziegler* are likewise questionable. In *Otis*⁴⁸, the Commission, acting on behalf of the European Community, claimed damages before a domestic court for the losses suffered by the EC as a result of Otis's participation in a price-fixing agreement. The Commission argued that, pursuant to the principle of the primacy of EU law, the domestic court was bound by the legal findings made by the Commission in the decision whereby it imposed a fine on Otis for participating in that same cartel. Otis replied that such a conclusion breached the right to a fair hearing and the equality of arms principle. The Court of Justice disagreed, noting that the Commission decision had been open for review before the EU courts. This reasoning is not acceptable. It means that undertakings must anticipate that the Commission will use its legal findings in subsequent civil proceedings and must challenge such findings in advance in the framework of an action for annulment before the EU courts.

Similarly, in *Ziegler*⁴⁹, the claimants challenged a fine imposed by the Commission on the ground that it lacked "objective impartiality". In support of this claim, Ziegler argued that the Commission had openly expressed the view that it had been one of the main victims of the anti-competitive conduct that it now sought to sanction. The Court dismissed that argument. It first noted that such a line of reasoning would amount to depriving the Commission of the power to investigate any anticompetitive conduct that might have affected the European Union. Interestingly, such a line of reasoning demonstrates that, according to the Court, the fight against cartels at EU level⁵⁰ may justify certain limitations on the undertakings' due process rights. The Court considered further that the Commission departments responsible for the enforcement of competition law were different from those affected by the cartel at issue. This argument seems hard to reconcile with the Court's position that fines for a breach of competition rules can only be adopted by the Commission as a whole, and cannot be attributed to one particular Commissioner or department⁵¹. Finally, the Court reasoned that "*Commission decisions may be subject to review by the European Union judicature*". This last argument is no more convincing than the others since it amounts to considering that any procedural flaw at Commission level can be redressed before the EU courts – which is irreconcilable with the Eur. Court HR's case-law⁵².

The question is not whether the cases discussed above are right or wrong. The point is simply that the EU courts have a somewhat ambiguous position towards the enforcement of EU competition law. Several of their judgments seem to be underpinned by the (correct) view that any additional right granted to the undertakings will necessarily come at the expense of the effectiveness of EU (competition) law.

Against that background, it is to be feared that the fast developing 'fairly fair trial' doctrine of the Eur. Court HR will be seized by the EU courts as an opportunity to freeze or even

asserting. In civil procedure preponderance of evidence will suffice, whereas in criminal procedure, we require proof beyond reasonable doubt."

⁴⁸ ECJ, 6 November 2012, judgment C-199/11, *Europese Gemeenschap v. Otis e.a.*, not yet reported.

⁴⁹ ECJ, 11 July 2013, judgment C-439/11 P, *Ziegler v. Commission*, not yet reported. Honesty requires to say that the author of the present article acted as counsel for Ziegler in this case.

⁵⁰ The case could have been dealt with at national level.

⁵¹ ECJ, 23 September 1986, judgment C-5/85, *Akzo Chemie v. Commission*, ECR, p. 2585, para. 30 ; ECJ, 15 June 1994, *Commission v. BASF*, judgment C-137/92 P, ECR, p. I-2555, paras 67-70.

⁵² See in that respect Eur. Court HR, 6 January 2010, *Vera Fernández-Huidobro v. Spain*, para. 109 and the references cited therein.

diminish the protection afforded to the companies facing competition law fines. This concern is fuelled by a statement of Advocate General Kokott in *Schenker*⁵³, which seems to turn the *Jussila* case-law on its head. After recalling that antitrust law “*is recognised as having a character similar to criminal law*”, Ms. Kokott concludes that “*regard must be had in antitrust law to certain principles stemming from criminal law which can ultimately be traced back to the rule of law and the principle of fault*” (emphasis added). It is perhaps reading too much into it but this statement seems to suggest that, as a matter of principle, criminal law guarantees do not apply to ‘criministrative’ law such as competition proceedings, subject only to “*certain*” limited exceptions, thereby reversing the principle/exception relationship established by the Eur. Court HR.

4. A critical conclusion – lost in a foggy grey

The above developments make it clear that grey has invaded the administrative - criminal law divide. This evolution is probably inevitable to some extent. It is also hard to dispute that an overly generous approach to fair trial requirements in the case of truly minor infringements (say, a EUR 25 fine for not having one’s car duly inspected) may not strike the right balance between the interests of the individual and those of society.

The problem, however, is to find a working criterion. As judge Loucaides wrote in his dissenting opinion in *Jussila*, “*I find it difficult, in the context of a fair trial, to distinguish, as the majority do in this case, between criminal offences belonging to the ‘hard core of criminal law’ and others which fall outside that category. Where does one draw the line? (...) To accept such distinctions would open the way to abuse and arbitrariness.*”

But the problems do not end in the determination of what exactly falls within the sphere of ‘criministrative’ law. Even assuming that one could draw a safe line between the core and periphery of criminal law, one would then be confronted with the daunting task of distinguishing between the essential and the disposable guarantees of Article 6 ECHR. This conundrum could be even more intricate than the first one, not least because the need to preserve the individuals from an omnipotent administration has probably never been so pressing.

In that respect, it is difficult not to concur with Judge Pino de Albuquerque when, dissenting in *Menarini*, he writes : “*L’acceptation d’un ‘pseudo-droit pénal’ ou d’un ‘droit pénal à deux vitesses’, où l’administration exerce sur les administrés un pouvoir de punition, imposant parfois des sanctions pécuniaires extrêmement sévères, sans que s’appliquent les garanties classiques du droit et de la procédure pénale, aurait deux conséquences inévitables : l’usurpation par les autorités administratives de la prérogative juridictionnelle du pouvoir de punir et la capitulation des libertés individuelles devant une administration publique toute-puissante*”.

Be that as it may, the ‘criministrative law’ sphere seems to have a bright future ahead of it. Therefore, if we cannot get rid of ‘legal grey’, we should at least try to organise it. In that respect, it is submitted that, at any rate, competition law proceedings belong to the darkest, ‘fiftieth shade of grey’ insofar as they share more similarities with the prosecution of robbery than with the enforcement of administrative obligations.

⁵³ Opinion delivered on in C-681/11, *Schenker*, not yet reported, para. 59.

Various elements can be adduced in support of that contention. First, competition law rules consist of general prohibitions that apply to all undertakings, regardless of their wealth, field of activity or legal status.

Second, the Commission and the national competition authorities enjoy extensive investigative powers, including the right to search companies' premises and the homes of people suspected of hiding evidence.

Third, there is no doubt that the sanctions imposed on competition offenders are aimed at deterrence. The fines imposed on competition offenders can be huge, rising up to 10% of an undertaking's turnover and the offence's lack of effective impact on the market does not affect the level of the fines. In addition, the findings made by the Commission in a decision adopted against an undertaking can be used by national competition authorities in other jurisdictions where competition law provides for imprisonment and other personal sanctions.

Finally, it cannot be disputed that competition fines are vested with a certain degree of stigma. As Advocate General Kokott acknowledged, there is a "*condemnation ('stigma') associated with the imposition of cartel (...) penalties against the undertaking*"⁵⁴. Former Commissioner Monti called cartels the "*cancer of market economies*"⁵⁵ while U.S. Supreme Court Justice Scalia characterised them as the "*supreme evil of antitrust*"⁵⁶. It is hard not to see in such statements a moral condemnation which brings competition offences to the verge of the 'dark core' of criminal law.

This attempt to show the peculiarity of competition law is revealing of the dangers lying behind the blur between criminal and administrative law. The creation of a so-called 'criministrative law' category will probably create more problems than it will solve. Law relies on fictions. One of these fictions is the clear-cut divide between 'white' administrative and 'black' criminal law, to which are associated different legal regimes and procedural guarantees. It is the task of lawyers to organise and 'process' the 'real world' – which is and has always been made of grey – by translating it into stable and simplifying categories.

It is certainly legitimate and indeed necessary to try and adapt the law to the complexity of our times. But it would be foolish to entertain the idea that law is able – or indeed is intended – to reflect all the intricacies and peculiarities of the world 'out there'. Devising new categories designed to reflect the endless shades of grey that make up the criminal-administrative law divide would not only be an enterprise doomed to failure. By generating expectations that law cannot live up to, such a project would undermine the credibility and authority of the law itself.

⁵⁴ Opinion of AG Kokott cited in fn. 53, para. 59.

⁵⁵ "Monti committed to taking on cartels", *European Voice*, 7 February 2002.

⁵⁶ *Verizon Communications, Inc. v. Trinko, LLP*, 13 January 2004, 540 U.S., p. 8.