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# Judicial Review of Administrative Discretion in Competition Law: Comparative Analysis of the EU and the Hungarian Approach

## ABSTRACT

In my paper I aim to observe how the margin of appreciation enjoyed by competition authorities in complex economic matters is treated by EU and Hungarian judicial review. Judicial control in this aspect is ambivalent because, while a certain degree of understanding economic principles, as well as the observation of procedural rights are required, courts carry out a legality review which is by definition deferential to administrative discretion. Therefore, I examine the extent of this marginal review in EU case law, with special regard to the so-called manifest error test, its elements and its limits. In addition, I also assess how the Hungarian approach is different concerning recent competition cases.

**KEYWORDS:** competition, administrative discretion, judicial review, antitrust, merger control, complex economic matters, manifest error of assessment

## I. INTRODUCTION

It certainly is a compelling task for administrative authorities to bring legal proceedings in complex matters that call for a detailed investigation as well as an expertise of a scientific or technical nature. In these instances, public enforcement has to comply with a set of rules that, while granting a certain discretion to the administrative authorities, also demands that their decisions remain well-founded and well-reasoned within the meaning of economic terminology; a scientific background that only a handful of authorities will be expected to possess. As regards EU competition policy, an area which is strongly based upon enforcement by the European Commission (the ‘Commission’) and national competition authorities (‘NCAs’) alike, these requirements are well known. Parts of competition law cases are considered to heavily rely on economic appraisals,<sup>1</sup> which serve as a background to competition rules.

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<sup>1</sup> V. Tiili and J. Vanhamme, The Power of Appraisal (Pouvoir d’Appréciation) of the Commission of the European Communities Vis-a-vis the Powers of Judicial Review of the Communities’ Court of Justice and Court of First Instance, (1998) 22 (3) *Fordham International Law Journal*, 887.

It is far from being obvious, however, how an assessment of these matters made by competition authorities should be subject to judicial review of the merits. This is essentially a question of judicial interference in administrative procedure, which can be approached from two sides: one of institutional independence and one of fundamental rights, especially procedural fairness. It appears that EU courts, in deference to the Commission's margin of appreciation, outlined a standard of *marginal* review in the event of complex economic evaluations. However, in EU member states that are also bound by the rules of the European Convention of Human Rights ('ECHR'), *comprehensive* judicial review is a key requirement, derived from the right to a fair trial. Cases before the European Court of Human Rights ('ECtHR'), like *Menarini Diagnostics srl v Italy*,<sup>2</sup> state that the concept of 'full jurisdiction' must prevail in competition law procedures during the judicial phase.

As the approach of member states is a crucial element in competition law enforcement, it is an important task to examine how they can find a proper balance between the separation of powers reflected by the CJEU case-law and the theory of unlimited review arising from ECtHR judgments. In Hungary, a member state since May 1 2004, recent case law has referred to the extent of full judicial review and human rights requirements in competition cases. The aim of this article is to present the differences between the EU and the Hungarian perspective in light of the case law.

## II. REVIEW OF COMPETITION LAW DECISIONS BEFORE THE EU COURTS

According to paragraph 1 of Article 263 the Treaty on the Functioning of the European Union ('TFEU'), the Court of Justice of the European Union ('CJEU') shall review the legality of acts of the Commission, among other EU institutions. From a legal point of view, this Article can be regarded as the fundamental legal basis for the establishment of judicial review in respect of the Commission's decisions rendered in competition cases as well. It should also be emphasised that, since 1989, the General Court ('GCEU') has been established to be the court of first instance in reviewing the Commission's decisions. This renders the CJEU a second instance forum that can only carry out an assessment on points of law and not the factual assessment.<sup>3</sup>

<sup>2</sup> Application no. 43509/08, *A. Menarini Diagnostics srl v Italy*, Judgment of 27 September 2011.

<sup>3</sup> See Article 256(1) TFEU: 'The General Court shall have jurisdiction to hear and determine at first instance actions or proceedings referred to in Articles 263, 265, 268, 270 and 272, with the exception of those assigned to a specialised court set up under Article 257 and those reserved in the Statute for the Court of Justice. The Statute may provide for the General Court to have jurisdiction for other classes of action or proceeding. Decisions given by the General Court under this paragraph may be subject to a right of appeal to the Court of Justice on points of law only, under the conditions and within the limits laid down by the Statute.'

Regarding the object of the review, a distinction must be made between the review of the substantive legality of the case (in other words, the constituent elements of the alleged infringement) and the review of the fines imposed by the Commission, as different judicial standards are applicable to these. This distinction and the limits of judicial review are considered to originate from a separation of powers between EU institutions that serves as a guarantee of ‘the administrative body’s ability to act within the territory assigned to it by the Treaty and the legal framework’.<sup>4</sup>

### 1. Review of substantive legality

Judicial review of substantive legality entails a comprehensive<sup>5</sup> examination of administrative decisions issued by the Commission. The courts’ review should be sufficiently deep and may not be prevented by the Commission’s discretion: the CJEU stated in its case law that ‘the General Court cannot use the Commission’s margin of discretion, by virtue of the role assigned to it in competition policy by the EU and FEU Treaties, as a basis for dispensing with the conduct of an in-depth review of the law and of the facts’.<sup>6</sup> Comprehensive review therefore means that EU courts do not refrain from scrutinising the factual circumstances of the case. The GCEU applies a full review of the facts and their interpretation, examines whether the Commission’s assessment of the evidence is convincing, and, if the court’s assessment of the evidence does not support the Commission’s conclusion, the decision may be annulled.<sup>7</sup> However, EU courts are not allowed to carry out a *de novo* review and substitute their own assessment of the facts for the Commission’s.<sup>8</sup> This restriction is important because EU Courts cannot place themselves in the authority’s shoes and exercise its discretionary powers by carrying out the competition investigation in its stead.<sup>9</sup>

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<sup>4</sup> H. C. Laguna de Paz, Understanding the Limits of Judicial Review in European Competition Law, (2014) 2 (1) *Journal of Antitrust Enforcement*, 210. <https://doi.org/10.1093/jaenfo/jnt014>

<sup>5</sup> See, for example., Case 42/84, *Remia BV and others v Commission*, [1985] ECR 02545, para 34: ‘[...] 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 [...]’.

<sup>6</sup> See, for example, Case C-382/12 P, *MasterCard v Commission*, ECLI:EU:C:2014:2201, para 156.

<sup>7</sup> F. Castillo de la Torre and E. Fournier, *Evidence, Proof and Judicial Review in EU Competition Law*, (Elgar Publishing, 2017) 268. <https://doi.org/10.4337/9781782548904>

<sup>8</sup> M. Bernatt, Transatlantic Perspective on Judicial Deference in Administrative Law, (2015) 22 (2) *Columbia Journal of European Law*, 323. <https://doi.org/10.2139/ssrn.2648232>

<sup>9</sup> Laguna de Paz, Understanding the Limits of Judicial Review in European Competition Law, 210.

## 2. Review of fines

In light of the above and as a general rule, the review of legality can only be aimed at the potential annulment of the Commission's decision but not its reformation.<sup>10</sup> It must be noted, however, that Article 261 TFEU allows regulations to grant unlimited jurisdiction for EU Courts with regard to the penalties provided for in such regulations: '[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'.

In line with the permission granted by Article 261 TFEU, Article 31 of Council Regulation No. 1/2003 declares that

[t]he Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed.' The CJEU confirmed this in *KME v Commission*, where it held that 'in addition to the review of legality, now provided for under Article 263 TFEU, a review with unlimited jurisdiction was envisaged in regard to the penalties laid down by regulations.'<sup>11</sup>

This so-called 'unlimited review' serves as a transfer of power from the Commission to EU courts regarding the determination of the abovementioned sanctions, in the course of which the GCEU may have a wider freedom to decide, even considering new evidence.<sup>12</sup> This makes an unlimited review of the fines 'more than a simple review of legality'.<sup>13</sup> Consequently, EU courts are entitled to carry out a *de novo* review in respect of the fining policy of the Commission.<sup>14</sup>

<sup>10</sup> See Article 264 TFEU: 'If the action is well founded, the Court of Justice of the European Union shall declare the act concerned to be void. However, the Court shall, if it considers this necessary, state which of the effects of the act which it has declared void shall be considered as definitive.'

<sup>11</sup> Case C-389/10 P, *KME Germany and others v Commission*, ECLI:EU:C:2011:816, para 120. See also Case C-603/13 P, *Galp Energia Espana and others v Commission*, ECLI:EU:C:2016:38, para 76.

<sup>12</sup> Castillo de la Torre and Fournier, *Evidence, Proof and Judicial Review in EU Competition Law*, 268–269.

<sup>13</sup> See joined cases C-238-99 P, C-245/99 P, C-247/99 P; C250/99 P to C-252/99 P and C-254/99 P, *Limburgse Vinyl Maatschappij and Others v. Commission*, ECLI:EU:C:2002:582, para 692: '[...] More than a simple review of legality, which merely permits dismissal of the action for annulment or annulment of the contested measure, the unlimited jurisdiction conferred on the Community judicature authorises it to vary the contested measure, even without annulling it, by taking into account all of the factual circumstances, so as to amend, for example, the amount of the fine.'

<sup>14</sup> Bernatt, *Transatlantic Perspective on Judicial Deference in Administrative Law*, 324.

### 3. Marginal review and its limits

Aside from comprehensive and unlimited review, there is a so-called limited or marginal review, which is applied by EU courts in the case of ‘complex economic matters’:

The Court observes that it follows from consistent case-law that, although as a general rule the Community Courts undertake a comprehensive review of the question as to whether or not the conditions for the application of the competition rules are met, their review of complex economic appraisals made by the Commission is necessarily limited to checking whether the relevant rules on procedure and on stating reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers.<sup>15</sup>

The need for such a special type of review was recognized early in the case law. Article 33(1) of the European Coal and Steel Community (‘ECSC’) Treaty of 1951 provided that the courts are allowed to carry out only a limited examination when it comes to the assessment made by the Commission of economic facts:

The Court of Justice shall have jurisdiction in actions brought by a Member State or by the Council to have decisions or recommendations of the High Authority declared void on grounds of 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. The Court of Justice may not, however, examine the evaluation of the situation resulting from economic facts or circumstances in the light of which the High Authority took its decisions or made its recommendations, save where the High Authority is alleged to have misused its powers or to have manifestly failed to observe the provisions of this Treaty or any rule of law relating to its application.

Later, the second half of the text that dealt with the evaluation of economic facts was left out of the Treaty of Rome of 1957 and of subsequent Treaties.<sup>16</sup>

Marginal review gained reception in competition cases when the CJEU held in *Consten and Grundig* that

the exercise of the Commission’s powers necessarily implies complex evaluations on economic matters. A judicial review of these evaluations must take account of their nature by confining itself to an examination of the relevance of the facts and of the legal

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<sup>15</sup> Case T-201/04, *Microsoft v Commission*, ECLI:EU:T:2007:289, para 87.

<sup>16</sup> A. Kalintiri, What’s in a name? The marginal standard of review of “complex economic evaluations” in EU competition enforcement, (September 2016) *LSE Research Online*, [http://eprints.lse.ac.uk/67727/1/KALINTIRI\\_The%20marginal%20standard%20.pdf](http://eprints.lse.ac.uk/67727/1/KALINTIRI_The%20marginal%20standard%20.pdf) (Last accessed: 31 July 2019) 5.

consequences which the Commission deduces therefrom. This review must in the first place be carried out in respect of the reasons given for the decisions which must set out the facts and considerations on which the said evaluations are based.<sup>17</sup>

The CJEU's above declaration was elaborated in connection with the question whether the exclusive agreement between undertakings Consten and Grundig can be individually exempted under Article 101(3) TFEU. Later, in *Remia*, the CJEU extended the principle of marginal review to Article 101(1) in a general manner when it had to decide whether the Commission's appraisal was lawful in determining that the duration of a non-compete clause was excessive. The Court emphasised that

[a]lthough 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, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or a misuse of powers.<sup>18</sup>

The term 'manifest error of assessment' or 'manifest error of appraisal', which is the part of the review that refers to the errors made in the intellectual process of the Commission's evaluation,<sup>19</sup> appears to be an 'all-encompassing term' in EU competition law.<sup>20</sup> EU courts have considered the application of the manifest error test in various instances.<sup>21</sup> Therefore, EU judicature has been criticised for applying marginal review, as a 'lighter' type of review, to cases where in fact a more investigative approach would have been required, such as in Article 102 TFEU (abuse of dominance) cases,<sup>22</sup> or more

<sup>17</sup> Joined cases C-56/64 and C-58/64, *Consten and Grundig v Commission*, ECLI:EU:C:1966:41, 347.

<sup>18</sup> Case C-42/84, *Remia BV and others v Commission*, [1985] ECR 02545, para 34.

<sup>19</sup> Kalintiri, *What's in a name?*, 11.

<sup>20</sup> A. Kalintiri, *Evidence Standards in EU Competition Enforcement: The EU Approach*, (Hart Publishing, 2019) 185. <https://doi.org/10.5040/9781509919697>

<sup>21</sup> See, for example, D. M. B. Gerard, *Breaking the EU Antitrust Enforcement Deadlock: Re-Empowering the Courts?*, (2011) 35 (4) 472.: 'As noted, some have taken issue with the proliferation of references to the deferential review standard of the "manifest error of assessment". Originally introduced in relation to the review of complex economic reasonings, it can now be encountered, in various situations ranging from the definition of markets to the setting of fines, the assessment of companies' cooperation under the leniency notice, etc.' See also Kalintiri, *What's in a name?*, 6–7., for further examples from the case law.

<sup>22</sup> Bernatt, *Transatlantic Perspective on Judicial Deference in Administrative Law*, 307.

generally, where the Commission's market definition has been disputed.<sup>23</sup> The concern in the abstract can be summed up as such 'that the General Court would be unwilling to scrutinise the Commission's assessments and, hence, that it would be too deferential toward the Commission'.<sup>24</sup>

However, the notion of marginal review does not necessarily mean that EU courts (and especially, the GCEU) would shy away from an intensive review of complex economic assessments. In the *Tetra Laval/Sidel* merger, the GC had annulled the Commission's decision prohibiting the merger between Tetra Laval and Sidel. The Commission appealed against the judgment, contesting the GC's appraisal of the case on the grounds that the GC had applied a stricter review than a marginal review and went beyond its jurisdiction. Disagreeing with the Commission's arguments, the CJEU held that

[w]hilst the Court recognises 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.<sup>25</sup>

The above paragraph in *Tetra Laval* is often evoked by commentators as evidence that EU courts indeed perform a marginal assessment that is deep enough to satisfy effective judicial review.<sup>26</sup>

Nevertheless, it must be noted that the limit of the manifest error test (and thus, the scope of judicial scrutiny) is where the Commission's discretion begins. The Commission's determination of complex economic facts may not be reassessed by the GCEU, as it is not the GCEU but the Commission that is 'institutionally responsible for making those assessments'.<sup>27</sup> For example, the CJEU set aside the GCEU's judgment in the *Alrosa* case where it found that, by annulling the Commission's decision on commitments because less onerous alternatives were available, 'the General Court put forward its own assessment of complex economic circumstances and thus substituted

<sup>23</sup> M. Sousa Ferro, Judicial Review: Do European Courts Care about Market Definition?, (2015) 6 (6) *Journal of European Competition Law & Practice*, 400–410. <https://doi.org/10.1093/jeclap/lpu113>

<sup>24</sup> M. Van der Woude, Judicial Control in Complex Economic Matters, (2019) 10 (7) *Journal of European Competition Law & Practice*, 416. <https://doi.org/10.1093/jeclap/lpz037>

<sup>25</sup> Case C-12/03 P, *Commission v Tetra Laval*, ECLI:EU:C:2005:87, para 39.

<sup>26</sup> See, for example, M. Jaeger, The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of the Marginal Review?, (2011) 2 (4) *Journal of Competition Law & Practice*, 300–301. <https://doi.org/10.1093/jeclap/lpr049>

<sup>27</sup> Case C-67/13, *Groupement des Cartes Bancaires v Commission*, EU:C:2014:2204, para 46.

its own assessment for that of the Commission, thereby encroaching on the discretion enjoyed by the Commission instead of reviewing the lawfulness of its assessment'.<sup>28</sup> As far as the review of commitments is concerned, this approach was later mirrored by the GCEU in the *Morningstar* case, where it held that while

taking into account the discretion enjoyed by the Commission when assessing the appropriateness of the proposed commitments, the role of the Court is limited to establishing that the Commission has not committed a manifest error of assessment. More precisely, its role, in the context of that judicial review, is to determine whether a balance has been struck between the concerns raised by the Commission in its preliminary assessment and the commitments proposed by [Thomson Reuters], which must, once again, address those concerns in an adequate manner. Additionally, the review of the lawfulness of the decision making those commitments binding must be assessed in the light of the Commission's concerns and not of the demands put forward by competitors in relation to the content of those commitments. Consequently, the appropriate test to be applied in relation to the Commission's concerns, as expressed in its preliminary assessment, is to determine whether the commitments are sufficient to address adequately those concerns, which seek, in the present case, to make it easier for customers to switch provider.<sup>29</sup>

#### 4. The extent of judicial review and human rights

Against the backdrop offered by EU case law, there remains the question whether judicial deference in the case of limited review could be contrary to Article 6(1)<sup>30</sup> of the ECHR or Article 47(2)<sup>31</sup> of the Charter of Fundamental Rights of the European Union ('Charter'). It goes without saying that there is a significant connection between the two provisions. Indeed, Article 52(3)<sup>32</sup> of the Charter sets the ECHR's case law as

<sup>28</sup> Case C-441/07 P, *Commission v Alrosa*, ECLI:EU:C:2010:377, para 67.

<sup>29</sup> Case T-76/14, *Morningstar v Commission*, ECLI:EU:T:2016:481, paras 56–58.

<sup>30</sup> 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.'

<sup>31</sup> 'Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.'

<sup>32</sup> '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



a minimum requirement for the interpretation of the Charter in terms of corresponding rights. However, as the EU itself is not a contracting party of the ECHR, there has been a longstanding question as to whether the review applied by EU courts corresponds to the lawful interpretation of Article 6(1) by the ECtHR.

Since *Menarini Diagnostics srl v Italy*,<sup>33</sup> competition law proceedings are regarded as falling under the criminal limb of Article 6(1) ECHR. However, in *Jussila v Finland*, the ECtHR made a distinction between hardcore and non-hardcore criminal proceedings, and it remains obvious that competition proceedings may fall into the latter group.<sup>34</sup> Consequentially, the case law places competition enforcement (along with other administrative procedures such as tax proceedings) between civil and hard-core criminal matters. Therefore, one may argue for the special treatment due for competition decisions during administrative review. In *Menarini*, the ECtHR ruled that the Italian judicial review system of administrative decisions was lawful because it guaranteed 'full jurisdiction' in facts and law.<sup>35</sup> It also stated that the Italian administrative courts' judicial review was not only a control of legality, since they were also entitled to verify if the competition authority had lawfully exercised its powers and if its decisions were proportionate, and they could also examine the authority's technical evaluations.<sup>36</sup>

However, as Nazzini points out, the requirement of full jurisdiction refers entirely to the scope of judicial review, and it does not provide any information on the actual standard of review.<sup>37</sup> In other words, it is a completely different thing to examine the scope of the court's examination and the intensity or depth of it. The CJEU has made the same conflation of the two concepts in *KME Germany*, where it held that judicial deference towards the Commission's margin of appreciation was in compliance with the effective judicial protection requirement of Article 47(2) Charter of Fundamental Rights.<sup>38</sup>

The ECtHR's case law has nevertheless permitted in numerous cases a wide degree of latitude towards administrative authorities in specialised areas of law,<sup>39</sup> such as

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shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.'

<sup>33</sup> Application no. 43509/08, *A. Menarini Diagnostics srl v Italy*, Judgment of 27 September 2011, para 44.

<sup>34</sup> Application no. 73053/01, *Jussila v Finland*, Judgment of 23 November 2006, para 43.

<sup>35</sup> Application no. 43509/08, *A. Menarini Diagnostics srl v Italy*, Judgment of 27 September 2011, para 59.

<sup>36</sup> *Ibid.* para 64.

<sup>37</sup> R. Nazzini, *Judicial Review after KME: An Even Stronger Case for the Reform that Will Never Be*, (2015) 40 *European Law Review*, 498. Castillo de la Torre and Fournier, *supra* note 7, 295, also acknowledge that '[t]he exact extent of the review carried out by the competent court in *Menarini* is not very clear from the judgment', but they are of the view that 'it is similar to, if not more limited than, the review exercised by EU Courts.'

<sup>38</sup> Case C-389/10 P, *KME Germany and others v Commission*, ECLI:EU:C:2011:816, paras 118–138.

<sup>39</sup> Castillo de la Torre and Fournier, *Evidence, Proof and Judicial Review in EU Competition Law*, 292.

television broadcasting regulations,<sup>40</sup> environmental protection<sup>41</sup> and town planning.<sup>42</sup> Although these were essentially civil and not criminal cases (within the meaning of the ECtHR's case law), Nazzini suggests that the ECtHR's jurisprudence allows judicial deference when the following conditions are present:

- the subject-matter is such that it is appropriate to be decided by an administrative authority subject to deferential judicial review; and
- the administrative authority complies with the requirements of independence and impartiality despite its administrative nature.<sup>43</sup>

Transposing these requirements into EU administration, the Commission cannot be regarded as an independent and impartial tribunal,<sup>44</sup> which means that judicial deference cannot be permitted. This raises concerns in ensuring effective judicial protection in both antitrust and merger control cases.<sup>45</sup> Without any clear solution in this aspect, some commentators advocate for the allocation of further guarantees in the procedure of the Commission.<sup>46</sup>

### III. THE STANDARD OF REVIEW IN HUNGARY

In Hungary, public competition enforcement is an interplay between the Hungarian Competition Authority ('GVH'), the parties, the lower courts and the Curia, which is the Hungarian Supreme Court, while carrying out an extraordinary revision.<sup>47</sup>

<sup>40</sup> Applications nos. 32181/04 and 35122/05, *Sigma Radio Television Ltd. v Cyprus*, Judgment of 21 July 2011.

<sup>41</sup> Application no. 33538/96, *Alatukkilä and others v Finland*, Judgment of 28 July 2005.

<sup>42</sup> Application no. 19178/91, *Bryan v United Kingdom*, Judgment of 22 November 1995.

<sup>43</sup> Nazzini, Renato: Administrative Enforcement, Judicial Review and Effective Judicial Protection in EU Competition Law: A Comparative Contextual-Functionalist Perspective, (2016) (31) *King's College Dickson Poon School of Law, Legal Studies Research Paper Series*, 36.

<sup>44</sup> Kalintiri, *Evidence Standards in EU Competition Enforcement...*, 176.

<sup>45</sup> While merger control cases cannot be considered as criminal proceedings under the ECHR or the Charter of Fundamental Rights, judicial deference is still an important issue in them because of the multitude of complex economic evaluations in concentrations. (See Kalintiri, *Evidence Standards in EU Competition Enforcement...*, 180.)

<sup>46</sup> Cf. Castillo de la Torre and Fournier, *Evidence, Proof and Judicial Review in EU Competition Law*, 295.: 'After years of insistence that the case law of EU Courts should be put in line with what was perceived to be the line in Strasbourg, the wider impression now is that no relief will come from Strasbourg and the tendency is nowadays to invite the Court of Justice to 'raise' the standard of review beyond what the ECtHR requires. However, there are still authors not convinced that the standards applied by the EU Courts respect the case law of the ECtHR and the Menarini judgment, and some submit that the fairness of the system still depends on whether certain rights are in turn guaranteed at the administrative stage, since a more limited review by the General Court may be acceptable only to the extent that more guarantees are applied in that first stage.'

<sup>47</sup> See Section 7(2) of Act I of 2017 on the Code of Administrative Court Procedures ('Kp.').

Recently, there has been a minor change in the Hungarian legislation regarding administrative litigation. Until 1 January 2018, judicial review of administrative decisions was regulated by Chapter XX of the Old Code of Civil Procedure ('Ket.').<sup>48</sup> Since 1 January 2018, the Kp.<sup>49</sup> has been effective. According to it, the administrative courts at first instance shall examine the lawfulness of the administrative decisions within the limits of the claim,<sup>50</sup> and they 'shall evaluate the evidence separately and all of them together, comparing them to the facts established in the prior administrative procedure'.<sup>51</sup> This was formerly regulated under Section 206(1) of the Ket.

However, there is a rule that curtails the discretion of Hungarian courts to adjudicate the cases in relation to the margin of discretion enjoyed by the authorities. According to Section 85(5) Kp.,

[i]n the scope of the lawfulness of administrative acts realised within discretionary powers the court shall also examine whether the administrative body exercised its competence within the frameworks of its authorisation for deliberation, whether the criteria of deliberation and their causal relation as to weighing the evidence can be ascertained from the document containing the administrative act.<sup>7</sup>

This was formerly regulated under Section 339/B of the Ket.

It can be seen from the above that Hungarian courts also carry out a review of legality in relation to administrative acts. However, this review is bound by a clause that seems similar to the marginal review performed by EU courts, which is essentially a test that examines on the merits whether the reasons behind the authority's discretionary act are clear and logical enough (i.e., causality can be established). It can also be noted as a similarity that, according to the current Hungarian rules, a decision by the GVH can only be annulled but not amended by the courts.<sup>52</sup>

Nevertheless, in light of the below, Hungarian and EU competition law differ on what can be the object of a discretionary act or assessment. In Hungarian law, the 2/2015 (XI. 23.) KMK Opinion<sup>53</sup> on the judicial review of discretionary administrative decisions ('Opinion') was issued in 2015 in order to make a clear definition of what qualifies as a discretionary act. In this aspect, the Opinion distinguishes the assessment of the evidence from the assessment that is permitted by law for administrative bodies:

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<sup>48</sup> Act no. III of 1952 on the Code of Civil Procedure.

<sup>49</sup> Ibid.

<sup>50</sup> See Section 85(1) Kp.

<sup>51</sup> See Section 78(2) Kp.

<sup>52</sup> See Section 90(1)b) Kp.

<sup>53</sup> 2/2015. (XI. 23.) KMK vélemény a mérlegelési jogkörben hozott közigazgatási határozatok felülvizsgálatáról. The text in Hungarian is available here: <https://kuria-birosag.hu/hu/kollvel/22015-xi23-kmk-velemenymerlegelési-jogkorben-hozott-kozigazgatasi-hatarozatok> (Last accessed: 31 July 2019).

‘[a] decision is considered to be realised within discretionary powers if the authority’s decision is based on a legal provision that only designates the limits of the decision. A decision is also realised within discretionary powers if the legal provision allowing for alternative decisions does not designate the conditions or aspects of the making of said decision.’<sup>54</sup> The Opinion specifically mentions the power of the GVH to impose fines on undertakings for competition infringements based on the assessment of certain aspects as an example of a discretionary power.<sup>55</sup>

The above definition of discretionary act does not permit the inclusion of the assessment of the evidence or the facts. According to the Opinion,

[t]here have been judgments that considered the collection of evidence and their assessment a discretionary activity of the authority and carried out its review accordingly. Without a doubt, the assessment of evidence by the authority is a kind of ‘discretionary activity’, but this does not indicate a discretionary power from the point of view of the judicial review, unless the legal basis permits alternative decisions or designates the limits of the decision.<sup>56</sup>

In light of the above, Hungarian law does not acknowledge the GVH’s discretion in relation to any kind of factual assessment, including any complex economic evaluation as well. The courts have the power to carry out a full legality review of the evidence, and have the freedom to establish the relevant facts of the case. This was further confirmed by the Hungarian Constitutional Court’s resolution no. 30/2014 (IX. 30.) AB, emphasising that even the authority’s circumstantial economic evidence may be reassessed by the court:

In the course of evidentiary assessment, the authority may also provide circumstantial evidence and use data, calculations, economic models, etc., even if these latter documents

<sup>54</sup> See the Opinion in Hungarian: „Mérlegelési jogkörben hozott közigazgatási határozatnak minősül az a határozat, amelyben a hatóság döntését olyan jogszabályra alapozza, mely kizárólag a döntés kereteit jelöli ki. Mérlegelési jogkörben hozott határozat az is, ahol a döntési lehetőségeket meghatározó jogszabályi rendelkezés a döntés meghozatalának feltételeit és szempontjait nem jelöli meg.”

<sup>55</sup> See the Opinion in Hungarian: „A jogszabályi rendelkezések sok esetben magához a mérlegelési tevékenységhez fűznek kötelezően figyelembe venni rendelt szempontokat. Ezek tekinthetők a klasszikus mérlegelési szempontoknak, illet tartalmaz például a tisztességtelen piaci magatartás és a versenykorlátozás tilalmáról szóló 1996. évi LVII. törvény 78. § (3) bekezdése, amikor többek között a jogsértő piaci helyzetének vagy magatartásának értékelését írja elő.”

<sup>56</sup> See the Opinion in Hungarian: „A bírói gyakorlatban többször volt látható olyan döntés, amely a hatósági eljárásban felvett bizonyítást és az annak alapján történő értékelést is mérlegelésnek tekintette és a határozat felülvizsgálatát ilyen megközelítés alapján végezte el. Kétségtelenül a bizonyítás értékelése a hatóság részéről egyfajta mérlegelés, azonban ez a típusú „mérlegelés” a bírósági felülvizsgálat szempontjából nem jelent mérlegelési jogkört, ha a jogszabály az adott ügyben döntési lehetőségeket vagy kereteket nem tartalmaz.”

– similarly to expert opinions – sometimes contain uncertain elements or contain a certain degree of probabilistic proof according to the current standing of science. However, the facts established by the GVH cannot be based on mere speculations or assumptions but on incontrovertible evidence. [...] Based on this, the task of the reviewing court is to decide whether the authority complied with its obligation to clarify the facts [...], and whether the individual facts disputed by the persons subject to the proceedings were duly substantiated by the GVH. To that end, it is possible to take evidence in the court phase as well. At the same time, the determination of the probative value of the evidence is left to the internal conviction of the judge [...]<sup>57</sup>

Although currently there are no examples in the Hungarian case law that are about the adjudication of complex calculations or economic models, a few examples among recent judgments dealt with the scope of judicial review and in one example, even the compliance of the standard of review with human rights.

In a case<sup>58</sup> that involved a foreign currency loan cartel among banks, the Curia was called to adjudicate whether the first instance and second instance courts correctly assessed the facts and evidence established by the GVH. The Curia affirmed the findings of the Opinion that there was a difference between the judicial assessment of the facts under Section 206(1) of the Ket. [today Section 78(2) Kp.] and the judicial assessment of the authority's discretionary decision under Section 339/B Ket. [today Section 85(5) Kp.], with the former category being a subject to reassessment under a review of legality.<sup>59</sup>

Regarding the scope of the review, the Curia also examined the obligations originating from the 'full jurisdiction' as required by the ECtHR. It found that the GVH's procedure does not provide all the relevant guarantees to the undertakings that would be sufficient for a contradictory procedure of a tribunal, and thus the requirements of Article 6(1) ECHR should be complied with in the course of judicial review.<sup>60</sup> However, according to the Curia, full jurisdiction does not require that the court should decide the case in the authority's place, because it must respect the authority's powers and discretion.<sup>61</sup> Therefore, even during the reassessment of the evidence, it cannot disregard the reasoning in the authority's decision. The court can only accept an alternative interpretation of the evidence if it is presented by the claimants and if it is more reasonable than that of the authority.<sup>62</sup>

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<sup>57</sup> See resolution no. 30/2014. (IX. 30.) AB, [71].

<sup>58</sup> Judgment no. EBH2017.K.20. of the Curia.

<sup>59</sup> Ibid. [69].

<sup>60</sup> Ibid. [88].

<sup>61</sup> Ibid. [91].

<sup>62</sup> Ibid. [92].

Despite the fact that reassessment in competition law is possible under Hungarian law, so far there have been only a handful of cases that mentioned it, let alone applied a reassessment of the evidence. In the foreign currency loan cartel case mentioned above, the Curia upheld the GVH's decision regarding the existence of a cartel, but annulled the fine and ordered a repeated procedure due to errors of market definition and the incorrect calculation of the relevant turnover by the GVH.<sup>63</sup> In the judgment no. EBH 2017, K.16. relating to vertical agreements in the book retail sector, the Curia refused to adjudicate whether the interpretation of the facts as presented by the claimants was more reasonable than that of the GVH, but it still conflated discretionary assessment with the assessment of the facts.<sup>64</sup>

Other than cartel cases, an abuse of dominance case is notable because there the first instance court held that the GVH selectively assessed the evidence, omitting pieces of statements and other documents without any reason, and established the infringement on that selective assessment. Upon appeal, the Curia upheld the first instance judgment, agreeing with these findings.<sup>65</sup>

## IV. CONCLUSIONS

As a conclusion, some aspects of comparison can be pointed out between the two competition law regimes, along the lines of the margin of discretion enjoyed by competition authorities and human rights concerns.

One striking difference is that EU courts apply marginal review to complex economic assessments, while Hungarian courts do not distinguish them from other evaluations made by administrative authorities, and the GVH does not enjoy a margin of appreciation regarding these. Under Hungarian law, economic evidence falls into the category of the facts, which can be subject to reassessment.

However, both judicatures apply a certain kind of deference towards the respective competition authorities as a sign of the separation of powers. Neither regime's judicial review can amount to a *de novo* review, as they cannot substitute their own assessment for that of the authority, and they cannot carry out the competition investigation themselves. Naturally, the authority's decision serves as a 'starting and reference point' for both EU and Hungarian courts, as they must examine its content, including its evidence and reasoning.

Moreover, the intensity of the competition authority's assessment of the facts (or economic facts) can be a subject of debate or ambivalence under both regimes.

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<sup>63</sup> Ibid. [109]–[122], [196].

<sup>64</sup> Judgment no. EBH 2017, K.16. of the Curia, [19].

<sup>65</sup> Judgment no. Kf.IV.38.050/2018/8. of the Curia, [40].

It appears that EU or Hungarian courts do not necessarily refrain from a deeper review, but only rarely decide to intervene in the authority's discretion, upon the occurrence of an error regarding the reasonability of the decision. The matter of intensity is ever more important from a human rights perspective. Neither the Commission nor the GVH can be considered as an impartial, independent tribunal, and in such circumstances, both Hungarian and EU judicial review are highly dependent on the guarantees of 'full jurisdiction' or 'comprehensive review'.